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CASES REPORTED IN VOLUME I

PAGE

African Woods, Ltd., Ramia (Edward), Ltd. v. [P.C.] 627
Akerib v. Booth & Others, Ltd. [Manchester Assizes] 481
Alfred Herbert, Ltd. Pension and Life Assurance Scheme Trusts, Re [Ch.D.] 618
Ansbacher (Henry) & Co. v. Inland Revenue Comrs. [Ch.D.] 686
Anson (Third Party) White (Fourth Party). Baker v. Merckel [C.A.] 668
Apex Film Distributors, Ltd., Re [C.A.] 152
Arbuckle Smith & Co., Ltd. v. Greenock Corpn. [H.L.] 568
Argenti, Phrantzes v. [Q.B.D.] 778
Associated Newspapers, Ltd., Dingle v. [Q.B.D.] 294
Attorney-General for the State of South Australia v. Brown [P.C.] 734
Attorney-General of Northern Rhodesia, Mungoni v. [P.C.] 446
Auten v. Rayner [Q.B.D.] 692
Baker v. Merckel (Anson Third Party, White Fourth Party) [C.A.] 668
Bakers' (Federation of Wholesale and Multiple) Agreement, Re [R.P.C.] 227
Bashir v. Commissioner of Lands [P.C.] 117
Beetham v. Trinidad Cement, Ltd. [P.C.] 274
Belfast Corpn. v. O.D. Cars, Ltd. [H.L.] 65
Bellshill & Mossend Co-operative Society, Ltd. v. Dalziel Co-operative Society, Ltd. [H.L.] 673
Bennett, R. v., *Ex parte* R. [Q.B.D. Divl. Ct.] 335
Bernstein, Inland Revenue Comrs. v. [Ch.D.] 697
Black v. Black (May intervening) [Div.] 251
Booth & Others, Ltd., Akerib v. [Manchester Assizes] 481
Bosworth, The [Adm.] 146
Bosworth (No. 2), The [C.A.] 729
Boulton's Will Trusts, Re [C.A.] 553
Bowes-Lyon, Green v. [Q.B.D.] 301
Boxall, Carr v. [Ch.D.] 495
Briggs (Henry), Son & Co., Ltd. v. Inland Revenue Comrs. [C.A.] 800
Bright, Pemberton v. [C.A.] 792
Brown, Attorney-General for the State of South Australia v. [P.C.] 734
Brown v. National Coal Board [Newcastle upon-Tyne Assizes] 108
Brown v. Rolls Royce, Ltd. [H.L.] 577
Bugle Press, Ltd. Re [Ch.D.] 768
Burt, R. v., *Ex parte* Presburg [Q.B.D. Divl. Ct.] 424
Burton & Sons (Bermondsey), Ltd. (Third Party), Graham (Fourth Party), Godley v. Perry [Q.B.D.] 36
Busby R. v. [C.C.A.] 326
C., Re [Ct. of Protection] 393
C.S.C. (an infant), Re [Ch.D.] 711
Calvert, Fallon v. [C.A.] 281
Campbell-Jones, Diamond v. [Ch.D.] 583
Cane (Valuation Officer), Institution of Mechanical Engineers v. [C.A.] 129
Carpet (British) Manufacturers' Agreement, Re Federation of [R.P.C.] 356
Carr v. Boxall [Ch.D.] 495
Ceylon University v. Fernando [P.C.] 631
Challenger, Jones v. [C.A.] 785
Chapman, R. v. [Q.B.D. Divl. Ct.] 452
Clark, Parker v. [Exeter Assizes] 93
Commissioner of Lands, Bashir v. [P.C.] 117
Compania de Vapores San Elefterio Limitada, Cuban Atlantic Sugar Sales Corpn. v. [C.A.] 141
Compania Naviera Aeolus S.A., Union of India v. [Q.B.D.] 753
Cook (*decd.*), In the Estate of [Prob.] 689
Cook, Re [Q.B.D. Divl. Ct.] 536
Corfe v. Corfe [C.A.] 593
Crowe (Valuation Officer) v. Lloyds British Testing Co., Ltd. [C.A.] 411
Cuban Atlantic Sugar Sales Corpn. v. Compania de Vapores San Elefterio Limitada [C.A.] 141
Daily Sketch & Sunday Graphic, Ltd., Darke v. [C.A.] 397
Daily Sketch & Sunday Graphic, Ltd., Daws v. [C.A.] 397
Dalziel Co-operative Society, Ltd., Bellshill & Mossend Co-operative Society, Ltd. v. [H.L.] 673
Darke v. Daily Sketch & Sunday Graphic, Ltd. [C.A.] 397
Daws v. Daily Sketch & Sunday Graphic, Ltd. [C.A.] 397
Dawson, R. v. [C.C.A.] 558
Delamont, Stroud Building Society v. [Ch.D.] 749
Dewani, Kiriri Cotton Co., Ltd. v. [P.C.] 177
Diamond v. Campbell-Jones [Ch.D.] 583
Dingle v. Associated Newspapers, Ltd. [Q.B.D.] 294
Director of Public Prosecutions, Welham v. [C.C.A.] 260
——, [H.L.] 805
Dreyfus (Louis) et Cie. v. Parnaso Cia. Naviera S.A. [C.A.] 759
Eisovitch, Schneider v. [Q.B.D.] 169
Ek Liong Hin, Ltd., Official Assignee of the Property of Koh Hor Khoon, Bankrupt v. [P.C.] 440
Ellis, Taylor v. [Ch.D.] 549
Elmdene Estates, Ltd. v. White [H.L.] 306
Fallon v. Calvert [C.A.] 281
Federation of British Carpet Manufacturers' Agreement, Re [R.P.C.] 356
Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland). Re the Agreement between the members of the [R.P.C.] 227
Fernando, Ceylon University v. [P.C.] 631
George, Pease v. [C.A.] 709
Godley v. Perry (Burton & Sons (Bermondsey), Ltd., Third Party, Graham Fourth Party) [Q.B.D.] 36
Gould v. National Provincial Bank, Ltd. [Ch.D.] 544
Graham (Fourth Party), Burton & Sons (Bermondsey), Ltd. (Third Party), Godley v. Perry [Q.B.D.] 36
Great Universal Stores, Ltd., Re [Ch.D.] 252
Green v. Bowes-Lyon [Q.B.D.] 301
Greenock Corpn., Arbuckle Smith & Co., Ltd. v. [H.L.] 568
Grosvenor Place Estates, Ltd. v. Roberts (Inspector of Taxes) [Ch.D.] 643
Guildford Godalming & District Water Board, Longhurst v. [Q.B.D.] 54
Hall v. Hall [Leeds Assizes] 91
Hambleden's (Viscount) Will Trusts, Re [Ch.D.] 353
Hamilton v. National Coal Board [H.L.] 76
Hammersmith, West London and St. Mark's Hospitals, (Board of Governors of), Judd v. [Q.B.D.] 607
Herbert (Alfred), Ltd. Pension and Life Assurance Scheme Trusts, Re [Ch.D.] 618
Hinchy, Inland Revenue Comrs. v. [H.L.] 505
Holland, Jaquin v. [C.A.] 402
Hope (Valuation Officer), Society of Medical Officers of Health v. [H.L.] 317
Horton v. Horton [Div.] 503
Hotel de Paris, Ltd., Isaac v. [P.C.] 348
Houses and Estates, Ltd, Re [Ch.D.] 768
Hull v. Hull [Div.] 378
India (Union of) v. Compania Naviera Aeolus S.A. [Q.B.D.] 753
Inland Revenue Comrs., Ansbacher (Henry) & Co. v. [Ch.D.] 686
Inland Revenue Comrs. v. Bernstein [Ch.D.] 697
Inland Revenue Comrs., Briggs (Henry), Son & Co., Ltd. v. [C.A.] 800

PAGE
Inland Revenue Comrs. v. Hinchy [H.L.] 505
Inland Revenue Comrs., Public Trustee v. [H.L.] 1
Institution of Mechanical Engineers v. Cane (Valuation Officer) [C.A.] 129
Isaac v. Hotel de Paris, Ltd. [P.C.] 348
Isaacs v. Market Bosworth Rural District Council [Q.B.D. Divl. Ct.] 433
J. (an infant), Re [Ch.D.] 603
Jaquin v. Holland [C.A.] 402
Jewish Orphanage Endowments Trusts, Re [Ch.D.] 764
Jodla v. Jodla (otherwise Czarnomska [Div.] 625
Jones v. Challenger [C.A.] 785
Joy Music, Ltd. v. Sunday Pictorial Newspapers (1920), Ltd. [Q.B.D.] 703
Judd v. Hammersmith, West London and St. Mark's Hospitals (Board of Governors of) [Q.B.D.] 607
Kiriri Cotton Co., Ltd. v. Dewani [P.C.] 177
Lancashire Shipping Co., Ltd., Riverstone Meat Co., Pty., Ltd. v. [C.A.] 193
Langton (*decd.*), Re [C.A.] 657
Legge v. Matthews [C.A.] 595
Lenton v. Tregoning [C.A.] 717
Levy (*decd.*), Re [C.A.] 42
Lewis v. Packer [Ch.D.] 720
Little (*decd.*), Re [Prob.] 387
Liverpool (No. 2), The [Adm.] 465
Lloyds British Testing Co., Ltd., Crowe (Valuation Officer) v. [C.A.] 411
Lombank, Ltd., Lowe v. [C.A.] 611
Longhurst v. Guildford Godalming & District Water Board [Q.B.D.] 54
Lord Advocate (on behalf of Inland Revenue Comrs.), Parker v. [H.L.] 20
Lowe v. Lombank, Ltd. [C.A.] 611
McKenna, R. v. [C.C.A.] 326
McKinley v. McKinley [Leeds Assizes] 476
Market Bosworth Rural District Council, Isaacs v. [Q.B.D. Divl. Ct.] 433
Marshall v. Nottingham City Corpn. [Q.B.D.] 659
Matthews, Legge v. [C.A.] 595
Merckel, Baker v. (Anson Third Party, White Fourth Party) [C.A.] 668
Mounsdon v. Weymouth and Melcombe Regis Corpn. [Q.B.D. Divl. Ct.] 538
Mungoni v. Attorney-General of Northern Rhodesia [P.C.] 446
Munrow, Taylor v. [Q.B.D. Div. Ct.] 455
National Assistance Board, Oldfield v. [Q.B.D. Divl. Ct.] 524
National Coal Board, Brown v. [Newcastle-upon-Tyne Assizes] 108
National Coal Board, Hamilton v. [H.L.] 76
National Provincial Bank, Ltd., Gould v. [Ch.D.] 544
National Smelting Co., Ltd., Quintas v. [Bristol Assizes] 104
Niki (Panamanian S.S.) Owners, South African Despatch Line v. [C.A.] 285
Nottingham City Corpn., Marshall v. [Q.B.D.] 659
O.D. Cars, Ltd., Belfast Corpn. v. [H.L.] 65
Official Assignee of the Property of Koh Hor Khoon, Bankrupt v. Ek Liong Hin, Ltd. [P.C.] 440
Ohochuku v. Ohochuku [Div.] 253
Oldfield v. National Assistance Board [Q.B.D. Divl. Ct.] 524
Pachner v. Parker (formerly Pachner) [Div.] 159
Packer, Lewis v. [Ch.D.] 720
Paddington Borough Council, Victory (Ex-Services) Association, Ltd. v. [Q.B.D. Divl. Ct.] 498
Panamanian S.S. Niki (Owners), South African Despatch Line v. [C.A.] 285
Parker v. Clark [Exeter Assizes] 93
Parker v. Lord Advocate (on behalf of Inland Revenue Comrs.) [H.L.] 20
Parker (formerly Pachner), Pachner v. [Div.] 159
Parnaso Cia. Naviera S.A., Louis Dreyfus et Cie. v. [C.A.] 759
Pease v. George [C.A.] 709
Pemberton v. Bright [C.A.] 792
Pepper v. Pepper [Div.] 529
Perry, Godley v. (Burton & Sons (Bermondsey), Ltd., Third Party, Graham Fourth Party) [Q.B.D.] 36
Philpot, Re [Q.B.D. Divl. Ct.] 165
Phrantzes v. Argenti [Q.B.D.] 778
Pidgley, R. v. [Q.B.D. Divl. Ct.] 452

PAGE
Playle (Valuation Officer), Wexler v. [C.A.] 338
Practice Direction (Chancery Division: Costs: Taxation) [Ch.D.] 401
Practice Direction (Costs: Taxation) 401
Practice Direction (Powers of attorney, by trustees) 716
Practice Direction (Probate and Divorce: Costs: Taxation) [P. & D.] 347
Prater, R. v. [C.C.A.] 298
Presburg, *Ex parte*, R. v. Burt [Q.B.D. Divl. Ct.] 424
Public Trustee v. Inland Revenue Comrs. [H.L.] 1
Quintas v. National Smelting Co., Ltd. [Bristol Assizes] 104
R., *Ex parte*. R. v. Bennett [Q.B.D. Divl. Ct.] 335
R. v. Bennett, *Ex parte* R. [Q.B.D. Divl. Ct.] 335
R. v. Burt, *Ex parte* Presburg [Q.B.D. Divl. Ct.] 424
R. v. Busby [C.C.A.] 326
R. v. Chapman [Q.B.D. Divl. Ct.] 452
R. v. Dawson [C.C.A.] 558
R. v. McKenna [C.C.A.] 326
R. v. Pidgley [Q.B.D. Divl. Ct.] 452
R. v. Prater [C.C.A.] 298
R. v. Shacter [C.C.A.] 61
R. v. Smith [C.C.A.] 256
R. v. Welham [C.C.A.] 260
——, [H.L.] 805
R. v. Wenlock [C.C.A.] 558
R. v. Willis [C.C.A] 331
Ramia (Edward), Ltd. v. African Woods, Ltd. [P.C.] 627
Rayner, Auten v. [Q.B.D.] 692
Riverstone Meat Co., Pty., Ltd. v. Lancashire Shipping Co., Ltd. [C.A.] 193
Roberts (Inspector of Taxes), Grosvenor Place Estates, Ltd. v. [Ch.D.] 643
Rogerson, Wilkins (Inspector of Taxes) v. [Ch.D.] 650
Rolls Royce, Ltd., Brown v. [H.L.] 577
Rossage v. Rossage [C.A.] 600
Sajan Singh v. Sardara Ali [P.C.] 269
Samson v. Samson [C.A.] 653
Sardara Ali, Sajan Singh v. [P.C.] 269
Schlesinger v. Schlesinger [Div.] 721
Schneider v. Eisovitch [Q.B.D.] 169
Seistan, The [Adm.] 32
Shacter, R. v. [C.C.A.] 61
Smith, R. v. [C.C.A.] 256
Society of Medical Officers of Health v. Hope (Valuation Officer) [H.L.] 317
South African Despatch Line v. Panamanian S.S. Niki (Owners) [C.A.] 285
Stanton v. Youlden (Ewart F.), Ltd. [Q.B.D.] 429
Steed's Will Trusts, Re [C.A.] 487
Stroud Building Society v. Delamont [Ch.D.] 749
Structural and Marine Engineers, Ltd., Westcott v. [Q.B.D.] 775
Sunday Pictorial Newspapers (1920), Ltd., Joy Music, Ltd. v. [Q.B.D.] 703
Sussex Brick Co., Ltd., Re [Ch.D.] 772
Taylor v. Ellis [Ch.D.] 549
Taylor v. Munrow [Q.B.D. Div. Ct.] 455
Tregoning, Lenton v. [C.A.] 717
Trinidad Cement, Ltd., Beetham v. [P.C.] 274
Union of India v. Compania Naviera Aeolus S.A. [Q.B.D.] 753
University of Ceylon v. Fernando [P.C.] 631
Vernazza, Re [C.A.] 183
Victory (Ex-Services) Association, Ltd. v. Paddington Borough Council [Q.B.D. Divl. Ct.] 498
Welham v. Director of Public Prosecutions [C.C.A.] 260
——, [H.L.] 805
Wenlock, R. v. [C.C.A.] 558
Westcott v. Structural and Marine Engineers, Ltd. [Q.B.D.] 775
Wexler v. Playle (Valuation Officer) [C.A.] 338
Weymouth and Melcombe Regis Corpn., Mounsdon v. [Q.B.D. Divl. Ct.] 538
White, Elmdene Estates, Ltd. v. [H.L.] 306
White (Fourth Party), Anson (Third Party), Baker v. Merckel [C.A.] 668
Wilkins (Inspector of Taxes) v. Rogerson [Ch.D.] 650
Willis, R. v. [C.C.A.] 331
Wright v. Wright [C.A.] 678
Wring, Re [Q.B.D. Divl. Ct.] 536
Youlden (Ewart F.), Ltd., Stanton v. [Q.B.D.] 429

INDEX

PAGE

ACCOUNTANT
  Crime—*Falsifying books—Fraud.* See Company (Officer—*Auditor*).

ACTION
  Consolidation of actions. *See* Practice (Consolidation of actions).
  Vexatious—*Restraining.* *See* Vexatious Proceedings.

ADMIRALTY
  Consolidated actions—*Costs.* *See* Costs (Consolidated actions).
  Limitation of liability. *See* Shipping (Limitation of liability).
  Payment into court—*Salvage.* *See* Practice (Payment into court—*Several causes of action*).

ADOPTION
  Arrangement by adoption society or local authority—*Return of infant.* *See* Care and possession of infant before adoption, *post.*
  Care and possession of infant before adoption—*Infant allowed to spend two consecutive nights and another night with mother during the period of three months preceding date of adoption order—Whether infant continuously in the care and possession of adopters during prescribed period—Arrangement for adoption made by local authority—Return of infant to local authority—No jurisdiction to grant stay pending appeal—Adoption Act,* 1958 (*c.* 5), *s.* 3 (1) *s.* 35 (3) [Re C.S.C. (an infant)] 711
  Legitimation of illegitimate child—*Relevancy of choice between legitimation and adoption to exercise of discretion to make adoption order—Legitimacy Act,* 1959 (*c.* 73), *s.* 1 (1) [Re C.S.C. (an infant)] 711

ADVANCEMENT
  See Trust and Trustee (Powers of trustee).

AFFIDAVIT
  Striking out—*Hearsay—Interlocutory proceedings—Application to suspend access to child—Whether "interlocutory" so as to make statements of information and belief admissible—Affidavit containing large proportion of inadmissible material—Whether whole affidavit should be removed from the file—R.S.C., Ord.* 38, *r.* 3 [Rossage *v.* Rossage] 600
    Proceedings not interlocutory—Discretion [Re J. (an infant)] 603
  Inadmissible facts—Divorce—Custody—Estoppel [Hull *v.* Hull] 378

AFFILIATION
  Affiliation order—*Order not an affiliation order unless it contains direction for payment of money—National Assistance Act,* 1948 (*c.* 29), *s.* 44 (2)—*Affiliation Proceedings Act,* 1957 (*c.* 55), *s.* 4 [Oldfield *v.* National Assistance Board] 524

AFFILIATION ORDER
  See Affiliation.

ALIMONY
  See Divorce.

AMENDMENT
  Superannuation scheme. *See* Superannuation (Scheme).
  See also Pleading.

APPEAL
  Alteration of law pending appeal. *See* Statute (Retrospective operation—*Pending proceedings*).
  Contempt of court. *See* Contempt of Court.
  Rating—*To Lands Tribunal.* *See* Rates (Lands Tribunal).

APPEARANCE
  Default. *See* Discovery (Default of appearance).

ARBITRATION
  Award—*Duration.* *See* Industrial and Provident Societies (Rules—*Arbitration rule*).

ASSESSMENT
  Rates, to. *See* Rates (Valuation).

ATTACHMENT OF EARNINGS
  See Magistrates (Husband and wife—*Maintenance order—Enforcement*).

ATTORNEY-GENERAL
  Privilege—*Claim of privilege by.* *See* Discovery (Production of documents—*Privilege—Production contrary to the public interest*).

AUDIT
  Local government. *See* Local Government.

AUDITOR
  Officer of company. *See* Company (Officer).

AUSTRALIA
  See Privy Council.

BAIL
  See Criminal Law.

BASTARDY
  See Affiliation.

BILL OF COSTS
  See Costs (Taxation).

BREACH OF DUTY
  Statutory duty. *See* Coal Mining (Statutory duty).

PAGE

BUILDING

Building regulations—*Guard-rails—Working place more than six feet six inches from ground—"Temporary platform"—Erection of steel chimney on roof of boiler house—Whether roof a "temporary platform"—Building (Safety, Health and Welfare) Regulations*, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 24 (1), (5) (*d*) [WESTCOTT *v.* STRUCTURAL AND MARINE ENGINEERS, LTD.] 775

BUILDING REGULATIONS

See BUILDING.

BUILDING SOCIETY

Mortgage—*Receiver. See* MORTGAGE (Receiver).

BURDEN OF PROOF

Legal burden—*Negligence—Legal burden on plaintiff averring negligence applied ultimately in relation to evidence as a whole—Distinction between legal and provisional onus of proof* [BROWN *v.* ROLLS ROYCE, LTD.] 577

Restrictive trade practices. *See* RESTRICTIVE TRADE PRACTICES (Reference).

CAPITAL

Reduction. *See* COMPANY (Reduction of capital).

CATAPULT

Sale of—*Implied condition of fitness. See* SALE OF GOODS (Implied condition of fitness).

CEYLON

See PRIVY COUNCIL.

CHARITY

Gift for general purposes of charity—*Indefinite gift of income—Implication of trust for general purposes of charity* [Re LEVY (*decd.*)] 42

Income—*Indefinite gift of income in perpetuity—Whether charity entitled to call for corpus—Question of construction* [Re LEVY (*decd.*)] 42

Scheme—*Investment clause—Power for governors to alter scheme by resolution—No alteration to involve deviation from "main principles" of scheme—Alteration of investment clause by resolution, so as to extend range of investments—Whether valid* [Re THE JEWISH ORPHANAGE ENDOWMENTS TRUSTS] 764

CHARTERPARTY

See SHIPPING.

CHILD

Ill treatment—*Ground for divorce. See* DIVORCE (Cruelty).

CLERK

Justices. *See* EVIDENCE (Witness—*Competency*).

COAL MINING

Statutory duty—*Breach—Maintenance of machinery—Winch operated by hand—Absence of stells to steady winch—Whether winch "properly maintained"—Absolute obligation—Mines and Quarries Act*, 1954 (*c.* 70), *s.* 81 (1) [HAMILTON *v.* NATIONAL COAL BOARD] 76

Security of road and working place—Electrician removing electric light fitting from partly fallen girder before receiving actual instructions to do so and without knowledge of overman—Fall of stone from roof—Whether breach of statutory duty—Whether impracticable to avoid or prevent the contravention—Whether electrician summoned to danger zone employed in that part of the mine—Whether light fitting on partly fallen girder constituted "debris"—Mines and Quarries Act, 1954 (*c.* 70), *s.* 48 (1), *s.* 51 (3) (*b*), *s.* 157 *—Coal and Other Mines (Support) Order*, 1956 (*S.I.* 1956 *No.* 1763), *Sch.* 1, *reg.* 12 [BROWN *v.* NATIONAL COAL BOARD] 108

COMMISSION

Commission of inquiry—*Procedure. See* INQUIRY.

COMPANY

Memorandum of association—*Object clauses—Ascertainment of main object—Evidence of activities necessary only where object ambiguous* [VICTORY (EX-SERVICES) ASSN., LTD. *v.* PADDINGTON BOROUGH COUNCIL] 498

Officer—*Auditor—Whether "officer" of company within criminal enactments—Whether "public officer" of company within such enactments—Auditor charged with fraud, fraudulent statements and falsifying books as officer of a company—Larceny Act*, 1861 (*c.* 96), *s.* 83, *s.* 84—*Companies Act*, 1948 (*c.* 38), *s.* 328 (1) (*j*), *s.* 330, *s.* 331, *s.* 455 (1) [R. *v.* SHACTER] .. 61

Reduction of capital—*Petition—Allegation that company was still carrying on business—Whether such an allegation necessary* [Re GREAT UNIVERSAL STORES, LTD.] 252

Scheme of arrangement—*Petition—Allegation that company was still carrying on business—Whether such an allegation necessary* [Re GREAT UNIVERSAL STORES, LTD.] 252

Scheme for transfer of shares to transferee company—Acquisition of shares of dissentients—Fairness of scheme—Burden of proof—Majority shareholders in transferor company holding all shares in transferee company—Companies Act, 1948 (*c.* 38), *s.* 209 (1) [Re BUGLE PRESS, LTD. Re HOUSES AND ESTATES, LTD.] 768

Acquisition of shares of dissentients—Unfairness—Burden of proof—Companies Act, 1948 (*c.* 38), *s.* 209 (1) [Re SUSSEX BRICK CO., LTD.] 772

Winding-up—*Contributory—B contributories—Calls on shares—Call made on A contributory—Notification of B contributories—Whether call made on B contributories—Debts subsequently bought up for B contributories—Reduction of liability—Companies Act*, 1948 (*c.* 38), *s.* 212 (1) (*c*), *s.* 214—*Companies (Winding-up) Rules*, 1949 (*S.I.* 1949 *No.* 330), *r.* 88 [Re APEX FILM DISTRIBUTORS, LTD.] 152

COMPENSATION

Compulsory acquisition—*Intention to acquire compulsorily without compensation not to be imputed to legislature* [BELFAST CORPN. *v.* O.D. CARS, LTD.] 65

COMPULSORY PURCHASE

Compensation—*Injurious affection—Distinction between injurious affection of and acquisition of property* [BELFAST CORPN. *v.* O.D. CARS, LTD.] 65

CONFLICT OF LAWS

Foreign law—*Recognition—Dowry—Discretion of foreign court in fixing dowry—Difference in nature of foreign right and of remedies available in English court—Whether right to dowry recognised by English court—Whether right to dowry enforceable* [PHRANTZES *v.* ARGENTI] 778

CONSOLIDATION OF ACTIONS

Costs. *See* COSTS (Consolidated actions).

See also PRACTICE.

CONSPIRACY

Criminal. *See* CRIMINAL LAW.

CONTEMPT OF COURT

Appeal—*Committal—Refusal of committal order for alleged breach of injunction—Construction of injunction—Appellate jurisdiction* [LENTON *v.* TREGONING] 717

CONTRACT

Agreement—*Printed form of hire-purchase agreement—Form signed by hirer but not read—Whether clause brought to notice of hirer* [LOWE *v.* LOMBANK, LTD.] 611

Breach—*Damages—Measure—Sale of land. See* SALE OF LAND.

Place of commission of breach—Contract to deliver cargo to one port in United Kingdom to be nominated by plaintiffs—Breach when cargo abroad before nomination—Whether breach committed in England—R.S.C., Ord. 11, *r.* 1 *(e)* [CUBAN ATLANTIC SUGAR SALES CORPN. *v.* COMPANIA DE VAPORES SAN ELEFTERIO LIMITADA] 141

Duration. *See* Intention to create legal relationship—*Sharing home, post.*

Enforcement of illegal contract—*Title to goods purchased. See* PRIVY COUNCIL (Malaya—*Motor vehicle—Sale of vehicle by illegal transaction).*

Exception clause—*Shipping. See* SHIPPING (Charterparty—*Exceptions*; Demurrage—*Exception).*

Tenancy agreement including agreement for certain services to be performed exclusively by landlord—Landlord not " in any circumstances " to be responsible for damage caused by water —Tenant's goods damaged by escape of water from cistern in water closet—Water closet in landlord's possession—Whether landlord exempted from liability for negligence [AKERIB *v.* BOOTH & OTHERS, LTD.].. 481

Implied condition—*Fitness of goods. See* SALE OF GOODS (Implied condition of fitness).

Intention to create legal relationship—*Sharing home—Agreement by plaintiffs, a married couple, to give up their own home and share home of defendants, an elderly couple—Agreement by defendants to make will leaving their house to female plaintiff and her relatives—Whether intention to make an agreement binding in law—Duration of contract to share home* [PARKER *v.* CLARK] 93

Promise and representation distinguished—*Acknowledgment made in clause of contract—Whether it had contractual force* [LOWE *v.* LOMBANK, LTD.] 611

Sale of land. *See* SALE OF LAND.

Will—*To leave property. See* Intention to create legal relationship, *ante.*

Writing—*Memorandum—Offer—Letter containing all terms of agreement and offer to contract —Sufficiency—Law of Property Act,* 1925 (*c.* 20), *s.* 40 (1) [PARKER *v.* CLARK] 93

COPYRIGHT

Infringement—*Literary work—Reproduction of substantial part—Parody of words of song—Test to be applied in considering whether parody an infringement—Colourable imitation not a relevant consideration—Disclosure necessary on requesting permission for parody—Copyright Act,* 1956 (*c.* 74), *s.* 18 (3), *s.* 49 (1) [JOY MUSIC, LTD. *v.* SUNDAY PICTORIAL NEWSPAPERS (1920), LTD.] 703

Licence—*Oral permission by telephone alleged—Parody—Purpose of parody not made clear* [JOY MUSIC, LTD. *v.* SUNDAY PICTORIAL NEWSPAPERS (1920), LTD.].. 703

CORROBORATION

See CRIMINAL LAW (Evidence).

CORRUPTION

See CRIMINAL LAW.

COSTS

Bill of costs. *See* Taxation, *post.*

Consolidated actions—*Payment into court—Actions consolidated by defendant—First plaintiff recovering more and the other less than his apportioned part of money paid into court—Whether defendant liable for whole costs of first plaintiff* [THE BOSWORTH (No. 2)].. .. 729

Criminal cases. *See* CRIMINAL LAW.

Divorce. *See* DIVORCE.

Legal aid—*Retention of fund in court pending satisfaction. See* LEGAL AID.

Probate. *See* PROBATE.

Taxation—*Bill of costs—Bills lodged after Jan.* 1, 1960—*Rules of the Supreme Court (No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch* 2, *Appendix* 2 [PRACTICE DIRECTION] 401

Order—Chancery Division—Application for construction of document, or variation of trusts, or similar application—Form of order [PRACTICE DIRECTION].. 401

COUNSEL

Habeas corpus—*Application by counsel. See* HABEAS CORPUS (Practice).

COURT OF APPEAL

Alteration of law pending appeal. *See* STATUTE (Retrospective operation—*Pending proceedings*).

CREDIT

Obtaining by fraud. *See* CRIMINAL LAW (Obtaining credit by fraud).

CRIMINAL LAW

Appeal—*Alternative counts—Conviction on both. See* Practice—*Alternative counts, post.*

Bail. See Bail, *post.*

Bail—*Appeal dismissed by Court of Criminal Appeal—Application for fiat of Attorney-General for appeal to House of Lords—Whether prisoner entitled to bail before certificate granted— " Appellant "—Criminal Appeal Act,* 1907 (*c.* 23), *s.* 14 (2), *s.* 21 [R. *v.* WELHAM] .. 260

Conspiracy—*Indictment—Several conspiracies included in the same count—Whether conspiracy should also be charged where these are substantive charges in relation to the same conduct* [R. *v.* DAWSON, R. *v.* WENLOCK].. 558

Corroboration. *See* Evidence, *post.*

Corruption—*Ingredients of offence—Gift offered to officer of public body in respect of transaction in which the public body was concerned—Whether gift " corruptly " offered if offeror had no intention of carrying out transaction—Public Bodies Corrupt Practices Act,* 1889 (*c.* 69), *s.* 1 (2) [R. *v.* SMITH] 256

PAGE

CRIMINAL LAW—*continued.*

Costs—*Magistrates' court—Police prosecutor—Police not legally represented—Jurisdiction to award costs—Discretion and amount—Costs in Criminal Cases Act*, 1952 (*c.* 48), *s.* 6, *s.* 17 [R. *v.* BURT, *Ex parte* PRESBURG] 424

Credit. *See* Obtaining credit by fraud, *post.*

Evidence—*Admissibility—Hearsay—Evidence of statement made to accused by person not called as a witness—Statement relevant in considering subsequent conduct of accused* [R. *v.* WILLIS] 331

Bankruptcy—Public examination—Part of appellant's public examination in bankruptcy admitted on charge of fraudulent conversion—Evidence inadmissible—Larceny Act, 1916 (*c.* 50), *s.* 43 (3) [R. *v.* DAWSON, R. *v.* WENLOCK] 558

Corroboration—Witness, whether fellow-prisoner or Crown witness, having purpose of his own to serve [R. *v.* PRATER] 298

Forgery—*Uttering a forged document—" Intent to defraud "—Hire-purchase and credit-sale agreements forged and used to obtain loans from hire-purchase finance companies—No intention to defraud finance companies—Intention to evade current credit restrictions by deceit—Forgery Act*, 1913 (*c.* 27), *s.* 4, *s.* 6 (2) [R. *v.* WELHAM] 260

[*Sub nom.* H.L. WELHAM *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 805

Fraud—*Auditor—Fraudulent statements and falsifying books—Whether officer of company. See* COMPANY (Officer—*Auditor*).

Indictment—*Alternative counts. See* Practice—*Alternative counts, post.*

Insanity—*Uncontrollable impulse. See* Murder—*Uncontrollable impulse, post.*

Jury—*Intimidation or threat—Jury recalled by judge and told that they would be kept for the night if they did not reach a verdict in ten minutes—Freedom of jury to take time—Convictions quashed* [R. *v.* MCKENNA, R. *v.* MCKENNA, R. *v.* BUSBY] 326

Murder—*Uncontrollable impulse—Whether uncontrollable impulse presumed in law to afford evidence of insanity* [ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA *v.* BROWN] 734

Obtaining of credit by fraud—*Sale of goods—Goods not delivered—Whether an obtaining of credit—Debtors Act*, 1869 (*c.* 62), *s.* 13 (1) [R. *v.* DAWSON, R. *v.* WENLOCK] 558

Practice—*Alternative counts—Duty of court to look at realities of position and convict on count showing plainest evidence of guilt* [R. *v.* DAWSON, R. *v.* WENLOCK] 558

Indictment—Conspiracy. See Conspiracy—*Indictment, ante.*

Prison Commissioners' report before sentence of preventive detention—Copy to be given to offender—Whether condition precedent to passing of sentence—Criminal Justice Act, 1948 (*c.* 58), *s.* 21 (5) [Re PHILPOT] 165

Probation order—Breach—Matters to be put to prisoner—Case committed by magistrates' court to quarter sessions—Certificate by magistrate of probationer's failure to comply with probation order—Certificate admissible but not conclusive evidence—Criminal Justice Act, 1948 (*c.* 58), *s.* 6 (4) [R. *v.* CHAPMAN AND PIDGLEY] 452

Sentence—*Preventive detention. See* Practice—*Prison Commissioners' report before sentence of preventive detention, ante.*

Verdict—*Time for jury to consider. See* Jury—*Intimidation or threat, ante.*

CROSS-EXAMINATION

Divorce. *See* DIVORCE (Evidence).

CRUELTY

Divorce proceedings, in. *See* DIVORCE.

DAMAGES

Fatal Accidents Acts, under. *See* FATAL ACCIDENT.

Interest, on. *See* INTEREST.

Law Reform (Miscellaneous Provisions) Act, 1934, under. *See* FATAL ACCIDENT.

Legal aid—*Costs—Cross orders as to costs between successful assisted defendant and plaintiffs—Set-off—Money paid into court by plaintiffs partly retained there until costs of assisted defendant satisfied—" Means "—Legal Aid and Advice Act*, 1949 (*c.* 51), *s.* 2 (2) (*e*) *s.* 3 (4)—*Legal Aid (General) Regulations*, 1950 (*S.I.* 1950 *No.* 1359), *reg.* 16, *reg.* 17, *as amended by S.I.* 1954 *No.* 166 [CARR *v.* BOXALL] 495

Measure of damages—*Expenses of services freely given—When recoverable as special damage* [SCHNEIDER *v.* EISOVITCH] 169

Fatal accident. See FATAL ACCIDENT.

Loss of earnings—Pension—Pension payable from superannuation fund to which employee and employer contributed—Whether pension should be excluded when assessing damages [JUDD *v.* BOARD OF GOVERNORS OF THE HAMMERSMITH, WEST LONDON AND ST. MARK'S HOSPITALS] 607

Sale of land. See SALE OF LAND (Contract—*Breach*).

Remoteness of damage—*Mental shock—Husband killed in car accident—Wife in same car but rendered unconscious by accident—Wife later told, in hospital, of husband's death—Whether damages recoverable for shock from hearing of accident* [SCHNEIDER *v.* EISOVITCH] 169

Special damage—*Expenses of services freely given. See* Measure of damages, *ante.*

DANGEROUS MACHINERY

See FACTORY.

DEATH DUTY

See ESTATE DUTY.

DECONTROL

See RENT RESTRICTION (Sub-tenancy).

DECREE NISI

See DIVORCE.

DELEGATION

Trustee, by. *See* TRUST AND TRUSTEE (Delegation of trusts by trustee during absence abroad).

DEMURRAGE

See SHIPPING.

DE-REQUISITION

See REQUISITION.

DESERTION

See DIVORCE.

DETINUE

Illegality—*Title to motor vehicle acquired by illegal transactions—Whether court will grant relief—" Ex turpi causa non oritur actio "* [Sajan Singh *v.* Sardara Ali] 269

DEVELOPMENT

See Town and Country Planning.

DIRECTOR OF PUBLIC PROSECUTIONS

Privilege. *See* Discovery (Production of documents—*Privilege—Legal professional privilege*).

DISCOVERY

Default of appearance—*Defendant in default of appearance—Defendant not a proper party to action—Whether discovery should be ordered against defendant* [Gould *v.* National Provincial Bank, Ltd.] 544

Production of documents—*Privilege—Legal professional privilege—Whether Director of Public Prosecutions entitled to legal professional privilege* [Auten *v.* Rayner] 692

Production contrary to the public interest—Police officer's diaries—Director of Public Prosecution's memoranda—Right of Attorney-General to claim privilege in face of court without swearing an affidavit [Auten *v.* Rayner].. 692

DIVORCE

Adultery—*Cross-examination. See* Evidence, *post.*

Alimony—*Assessment—Factors to be considered—Position of parties if marital obligations fulfilled—Wealthy husband living on capital and business expenses—South African domicil of husband—Wife born in America and now resident in England with children of the marriage—Wife's own adultery—Obligation to make order that should be just—Whether jointure principle applicable—Whether high incidence of United Kingdom income tax should be taken into account—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 20 (2) [Schlesinger *v.* Schlesinger] 721

Costs—*Taxation—Bill of costs—Item numbers to be shown—Rules of the Supreme Court* (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *Appendix* 2 [Practice Direction] 347

Cruelty—*Child—Ill treatment of child—Unjustifiable acts—Beating—Proof of intent to injure health of other spouse—No need to aver or prove express intent* [Wright *v.* Wright].. .. 678

Custody—*Access—Whether application interlocutory for purposes of affidavit evidence of information and belief—R.S.C., Ord.* 38, *r.* 3, *proviso* [Rossage *v.* Rossage] 600

Estoppel—Desertion—Adultery—Wife granted decree in undefended suit on ground of husband's desertion—Discretion statement by her disclosed adultery with two men—Whether husband estopped in subsequent custody proceedings from asserting wife had deserted him and from alleging adultery with men other than those referred to in the discretion statement [Hull *v.* Hull] 378

Decree nisi—*Specifying valid marriage—First marriage of Nigerian Christians in Nigeria according to local custom—Subsequent ceremony at register office in England—Which marriage would be dissolved—Whether religious beliefs of spouses justified first marriage being treated as monogamous* [Ohochuku *v.* Ohochuku] 253

Desertion—*Consensual separation—Period of separation indefinite—Maintenance agreement signed reciting agreement to live separately—Husband's request to wife to return rejected—Whether wife in desertion* [Hall *v.* Hall] 91

Evidence—*Cross-examination—Adultery—Questions tending to show guilt of adultery—Answer denying adultery—Denial sworn to in affidavit verifying answer—No denial in respondent's oral evidence-in-chief—Whether respondent liable to be cross-examined as to adultery—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 32 (3) [Corfe *v.* Corfe].. 593

Petitioner not tendering evidence in person or on commission—Jurisdiction of court to hear and determine petition [Black *v.* Black (May intervening)] 251

Judicial separation—*Alimony. See* Alimony, *ante.*

Maintenance—*Application—Leave of judge—Claim not included in petition but made nine and a half years after decree—Leave requisite under rules current at date of decree if application delayed for two months—Whether procedural rules applicable those at date of petition or of application—No obligation at date of petition to include claim for maintenance in petition—Leave not required merely on ground of lapse of time at date when application made—Matrimonial Causes Act*, 1950 (*c.* 25), *s.* 19 (3), *s.* 29—*Matrimonial Causes* (*Property and Maintenance*) *Act*, 1958 (*c.* 35), *s.* 1—*Matrimonial Causes Rules*, 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3) *proviso* (ii), *r.* 44 (1), *as amended by Matrimonial Causes* (*Amendment*) *Rules*, 1958 (*S.I.* 1958 *No.* 2082) [Pachner *v.* Parker (formerly Pachner)] 159

Nullity. *See* Nullity.

Polygamous marriage. *See* Decree nisi—*Specifying valid marriage, ante.*

Practice—*Ancillary relief. See* Maintenance, *ante.*

Trial—Evidence. See Evidence, *ante.*

DOCUMENT

Production of. *See* Discovery (Production of documents).

DOWRY

Foreign law. *See* Conflict of Laws (Foreign law—*Recognition*).

EASTERN AFRICA

See Privy Council.

EMERGENCY LEGISLATION

Detention order. *See* Privy Council (Rhodesia and Nyasaland—*Northern Rhodesia*).

ENFORCEMENT NOTICE

See Town and Country Planning.

ESTATE DUTY

Exemption—*Interest as holder of an office—Share of income of residuary estate given to trustee for life while a trustee—Death of trustee—Whether capital of share exempted from liability to duty—Finance Act*, 1894 (*c.* 30), *s.* 1, *s.* 2 (1) (*b*) [Public Trustee *v.* Inland Revenue Comrs.] 1

Incidence—*Property not passing to the executor as such—Death of life tenant—Assignment by life tenant and reversionary life tenant of one-third of income to contingent reversioner of one-third of trust fund—Estate duty levied only in respect of other two-thirds of trust fund—Whether duty rateably borne by whole estate—Finance Act*, 1894 (*c.* 30), *s.* 9 (1) [Re Boulton's Will Trusts] 533

ESTATE DUTY—*continued.*

Passing of property—*Property deemed to pass—Beneficial interest—Income of trust fund during life of settlor to be divided equally among her children—Capital of trust fund to be divided among them on her death—All children surviving settlor—Extent of beneficial interest arising or accruing on settlor's death—Finance Act*, 1894 (*c.* 30), *s.* 2 (1) (*d*) [Parker *v.* Lord Advocate (on behalf of Inland Revenue Comrs.)] 20

Inter-relation of s. 1 *and s.* 2 *of Finance Act*, 1894 (*c.* 30) [Public Trustee *v.* Inland Revenue Comrs.] 1

ESTOPPEL

Divorce. *See* Divorce (Custody).

Estoppel in pais—*Hire-purchase—Delivery receipt acknowledging that goods were in good condition—Whether finance company could maintain that hirer was estopped by having given receipt* [Lowe *v.* Lombank, Ltd.] 611

Res judicata. *See* Divorce (Custody).

Tenancy by estoppel. *See* Mortgage (Possession of mortgaged property).

Tribunal—*Whether decision of tribunal can create estoppel per rem judicatam. See* Rates (Local valuation court—*Appeal—Res judicata*).

EVIDENCE

Affidavit, by. *See* Affidavit.

Corroboration. *See* Criminal Law.

Criminal proceedings, in. *See* Criminal Law.

Divorce. *See* Divorce.

Further evidence—*Power of appellate court to receive. See* Rates (Lands Tribunal).

Hearsay—*Striking out of affidavit. See* Affidavit (Striking out).

See also Criminal Law (Evidence—*Admissibility*).

Witness—*Competency—Clerk to justices—Matrimonial proceedings—Subpoena—Production of notes of evidence—Whether privileged* [McKinley *v.* McKinley] 476

Recall of. See Practice (Trial).

EXCEPTION

Charterparty. *See* Shipping (Charterparty).

Clause of exception. *See* Contract (Exception clause); Shipping (Demurrage).

EXECUTION

Will. *See* Will.

FACTORY

Building regulations. *See* Building (Building regulations).

Dangerous machinery—*Duty to fence—Overhead travelling cable-way used for transporting materials from one part of factory to another—Large buckets suspended from cables and constantly in motion—Bottom of buckets passing four feet above flat roof of factory building—Access to part of factory obtained from flat roof—Injury to workman standing on roof—Factories Act*, 1937 (*c.* 67), *s.* 14 (1) [Quintas *v.* National Smelting Co., Ltd.] 104

Definition—*Pumping station occupied by water board—Water from springs filtered and chlorinated in filter house then put under pressure in pump house—Whether water "article"—Whether process of making water wholesome "the altering or cleaning" of water—Whether pump house a factory—Factories Act*, 1937 (*c.* 67), *s.* 151 (1) (*b*), (6) [Longhurst *v.* Guildford Godalming & District Water Board] 54

FAMILY ARRANGEMENT

Contract to share home. *See* Contract (Intention to create legal relationship).

FATAL ACCIDENT

Damages—*Measure of damages—Funeral expenses—Erection of marble memorial over grave—No dependency within Fatal Accidents Acts proved—Law Reform (Miscellaneous Provisions) Act*, 1934 (*c.* 41), *s.* 1 (2) (*c*), *s.* 2 (3)—*Fatal Accidents Act*, 1846 (*c.* 93), *s.* 2 [Stanton *v.* Ewart F. Youlden, Ltd.] 429

FLOOD

Nuisance. *See* Nuisance.

FOREIGN LAW

Recognition by English courts. *See* Conflict of Laws.

FORGERY

See Criminal Law.

FRANKED INVESTMENT INCOME

See Profits Tax (Computation of profits).

FRAUD

Intent to defraud. *See* Criminal Law (Forgery—*Uttering a forged document*).

GIFT

Wedding presents. *See* Husband and Wife (Property—*Wedding presents*).

GOLD COAST

See Privy Council (West Africa).

GOODS

Sale of. *See* Sale of Goods.

GUARANTEE

Stamp duty. *See* Stamp Duty.

GUARD-RAIL

See Building (Building regulations).

HABEAS CORPUS

Practice—*Application for habeas corpus in criminal matter—Application by person in execution—Right of applicant to be heard in person* [Re Wring, Re Cook] 536

HEARSAY

See Affidavit (Striking out); Criminal Law (Evidence—*Admissibility*).

HIRE-PURCHASE

Agreement—*Clause of acknowledgment—Whether clause had contractual effect* [Lowe *v.* Lombank, Ltd.] 611

HIRE-PURCHASE—*continued.*

Condition—*Implied condition—Fitness for purpose for which goods are required—Exclusion of condition by express provision of agreement—Agreement signed but not read by hirer—Whether provision brought to the notice of the hirer—Whether hirer impliedly made known purpose for which goods were required—Estoppel—Hire-Purchase Act*, 1938 (*c.* 53), *s.* 8 (2), (3) [LOWE *v.* LOMBANK, LTD.] 611

Forgery. *See* CRIMINAL LAW (Forgery—*Uttering a forged document*).

HUSBAND AND WIFE

Custody of children. *See* DIVORCE (Custody).

Maintenance—*Enforcement of order. See* MAGISTRATES (Husband and wife—*Maintenance order—Enforcement*).

Variation of order. See MAGISTRATES (Husband and wife—*Maintenance order—Variation*).

Property—*Matrimonial home—Sale under trust for sale. See* TRUST AND TRUSTEE (Trust for sale of land).

Wedding presents—No principle of law that they are joint property—Married Women's Property Act 1882 (*c.* 75), *s.* 17—*Matrimonial Causes (Property and Maintenance) Act*, 1958 (*c.* 35), *s.* 7 [SAMSON *v.* SAMSON] 658

Summary matrimonial jurisdiction. *See* MAGISTRATES.

ILLEGALITY

Money paid on transaction illegal by statute—*Whether recoverable. See* PRIVY COUNCIL (Eastern Africa—*Rent restriction—Premium*).

Title arising from illegal transaction. *See* DETINUE.

IMPULSE

Uncontrollable impulse. *See* CRIMINAL LAW (Murder).

INCOME

Indefinite gift of income. *See* CHARITY (Income—*Indefinite gift of income in perpetuity*).

INCOME TAX

Appeal—*Estoppel—Res judicata—Whether decision of commissioners on one assessment can give rise to estoppel on subsequent assessment. See* RATES (Local valuation court—*Appeal—Res judicata*).

Assessment—*Perquisite. See* Income, *post.*

Deduction of tax—*Failure to deduct tax—Rent on long lease—Liability of recipient to be assessed—Income Tax Act*, 1952 (*c.* 10), *s.* 1, *s.* 122, *s.* 148, *s.* 170 (2), (3), *s.* 177 (2), *Sch. D* [GROSVENOR PLACE ESTATES, LTD. *v.* ROBERTS (INSPECTOR OF TAXES)] 643

Income—*Perquisites or profits of office or employment—Employer's gift of suit of clothes—Computation of value—Cost to employer or second-hand value to taxpayer—Income Tax Act*, 1952 (*c.* 10), *Sch.* 9, *r.* 1 (*Rules applicable to Sch. E*) [WILKINS (INSPECTOR OF TAXES) *v.* ROGERSON] 650

Penalties for inaccurate return. *See* Return—*Incorrect return—Penalty, post.*

Return—*Incorrect return—Penalty—Treble the tax which he ought to be charged—Whether treble the total amount of tax payable for year of assessment or only treble the amount of tax evaded—Income Tax Act*, 1952 (*c.* 10), *s.* 25 (3) (*a*) [INLAND REVENUE COMRS. *v.* HINCHY] .. 505

INDEPENDENT CONTRACTOR

Negligence. *See* SHIPPING (Seaworthiness—*Due diligence to make ship seaworthy*).

INDICTMENT

See CRIMINAL LAW (Conspiracy).

INDUSTRIAL AND PROVIDENT SOCIETIES

Rules—*Arbitration rule—Dispute submitted to arbitration while respondents a member of society—Withdrawal of respondents from membership of society after award—Whether respondents continued to be bound by award* [BELLSHILL & MOSSEND CO-OPERATIVE SOCIETY, LTD. *v.* DALZIEL CO-OPERATIVE SOCIETY, LTD.] 673

INFANT

Adoption. *See* ADOPTION.

Custody—*Divorce proceedings, in. See* DIVORCE (Custody).

Ward of court. *See* WARD OF COURT.

INFRINGEMENT

Copyright. *See* COPYRIGHT.

INJUNCTION

Form of order—*Two defendants—Injunction restraining the defendants from obstructing roadway—Acts of obstruction done by second defendant alone—Whether acts by one defendant alone constituted breach of injunction* [LENTON *v.* TREGONING] 717

Nuisance—*Flooding. See* NUISANCE (Flooding).

INQUIRY

Commission of inquiry—*Procedure—Freedom to obtain information its own way where no procedure prescribed—Requirements of natural justice* [UNIVERSITY OF CEYLON *v.* FERNANDO] 631

INSANITY

As defence to crime. *See* CRIMINAL LAW (Murder—*Uncontrollable impulse*).

INTEREST

Damages—*Unliquidated damages—Interest awarded on damages during period of assessment—Law Reform (Miscellaneous Provisions) Act*, 1934 (*c.* 41) [CARR *v.* BOXALL] 495

INVESTMENT CLAUSE

Charity scheme. *See* CHARITY (Scheme).

JOINT TENANCY

Land held on trust for sale—*Application for sale. See* TRUST AND TRUSTEE (Trust for sale of land).

JUDGE

Jury trial—*Time for jury to consider verdict. See* CRIMINAL LAW (Jury—*Intimidation or threat*).

JURY

Freedom of jury to take time to consider verdict. *See* CRIMINAL LAW.

Trial by—*Action for damages for severe personal injuries—Application for trial by jury refused—Discretion of judge absolute—R.S.C., Ord.* 36, *r.* 1 (3) [PEASE *v.* GEORGE] 709

JUSTICES
  See MAGISTRATES.

LANDLORD AND TENANT
  Condition—*Conditions and covenants distinguished—Stipulations possibly having the characters of both* [BASHIR *v.* COMR. OF LANDS] 117
  Lease—*Mortgagor, by.* *See* MORTGAGE (Possession of mortgaged property).
  Licence to occupy premises. *See* LICENCE (Licence to occupy premises).
  Mortgage. *See* MORTGAGE (Receiver).
  Repair—*Damages for failure to repair—Measure of damages—Determination of tenancy—Premises immediately re-let, owing to housing shortage, after small expenditure on repair—Value of reversion found to have been diminished by more than twice sum expended—Larger sum still would have been required to put premises into good and tenantable repair—Landlord and Tenant Act*, 1927 (*c.* 36), *s.* 18 (1) [JAQUIN *v.* HOLLAND] 402
  " Reversionary tenancy " or agreement for the grant of a " future tenancy "—*Distinction—Landlord and Tenant Act*, 1954 (*c.* 56), *s.* 28, *s.* 65 (3) [GREEN *v.* BOWES-LYON] 301
  Surrender of tenancy—*Surrender by operation of law—Grant of option to extend term—Operation as surrender and grant of new lease—Effective from grant rather than exercise of option—Liability of lessee assigning after grant but before exercise of option—Rent and dilapidations after end of original term* [BAKER *v.* MERCKEL (ANSON THIRD PARTY, WHITE FOURTH PARTY)] 668

LANDS TRIBUNAL
  Evidence. *See* RATES.

LAW
  Ignorance of law no excuse [KIRIRI COTTON CO., LTD. *v.* DEWANI] 177

LEGAL AID
  Costs—*Assisted person successful defendant—Set-off of costs—Retention of fund in court pending satisfaction of costs of defendant* [CARR *v.* BOXALL] 495

LEGITIMACY
  Adoption—*Relevancy of possible legitimation to adoption application.* *See* ADOPTION (Care and possession of infant before adoption).

LIBEL
  Consolidation of actions. *See* PRACTICE (Consolidation of actions).
  Privilege—*Qualified privilege—Parliamentary papers—Report of select committee—Comment on proceedings and report of committee—Parliamentary Papers Act*, 1840 (*c.* 9), *s.* 3 [DINGLE *v.* ASSOCIATED NEWSPAPERS, LTD.] 294

LICENCE
  Copyright. *See* COPYRIGHT.
  Licence to occupy premises—*Exclusive possession—Payment and acceptance of amount of rent due to landlord of licensor—Intention of parties—Whether licence or lease* [ISAAC *v.* HOTEL DE PARIS, LTD.] 348

LIMITATION OF LIABILITY
  Shipping. *See* SHIPPING.

LOCAL GOVERNMENT
  Audit—*Surcharge—Rent on de-requisition—Council undertaking full cost of any increases under Rent Act*, 1957—*Discretion of councillors not properly exercised—Local Government Act*, 1933 (*c.* 51), *s.* 228—*Requisitioned Houses and Housing (Amendment) Act*, 1955 (*c.* 24), *s.* 4 (4) [TAYLOR *v.* MUNROW] 455

LOCAL VALUATION COURT
  See RATES.

MACHINERY
  Dangerous. *See* FACTORY (Dangerous machinery).

MAGISTRATES
  Clerk—*Notes.* *See* EVIDENCE (Witness—*Competency*).
  Costs in criminal cases. *See* CRIMINAL LAW (Costs).
  Husband and wife—*Maintenance order—Enforcement—Attachment of earnings—Whether potential earning power in another occupation may be considered—Maintenance Orders Act*, 1958 (*c.* 39), *s.* 6 (3) [PEPPER *v.* PEPPER] 529
    Variation—Order for maintenance of wife and child—Birth of another child—Attachment of earnings order made against husband—Husband's earnings reduced—Whether magistrates on wife's complaint to increase order can reduce maintenance to husband's " normal deduction rate " under Maintenance Orders Act, 1958 (*c.* 39), *s.* 6 (3)—*Summary Jurisdiction (Married Women) Act*, 1895 (*c.* 39), *s.* 7 [PEPPER *v.* PEPPER] 529
    No case to answer—Appeal—Re-hearing ordered by Divisional Court—Right to call evidence at re-hearing notwithstanding election at former hearing [HORTON *v.* HORTON] 503
  Procedure—*Summary trial for indictable offence—Consent of accused to summary trial—Case adjourned for a week after evidence of first prosecution witness—Whether accused entitled to withdraw consent at adjourned hearing—Whether summary trial begun—Magistrates' Court Act*, 1952 (*c.* 55), *s.* 19 (5), *s.* 24 [R. *v.* BENNETT, *Ex parte* R.] 335
  Witness—*Whether compellable.* *See* EVIDENCE (Witness—*Competency—Clerk to justices*).

MAINTENANCE
  Divorce. *See* DIVORCE.
  Wife. *See* MAGISTRATES (Husband and wife).

MALAYA
  See PRIVY COUNCIL.

MARRIAGE
  Nullity of. *See* NULLITY.
  Polygamous. *See* DIVORCE (Decree nisi—*Specifying valid marriage*).
  Presents. *See* HUSBAND AND WIFE (Property—*Wedding presents*).

MASTER AND SERVANT
  Duty of master—*Protective appliances.* *See* SAFE SYSTEM OF WORKING (Extent of master's duty).
  Liability of master—*Negligence—Burden of proof* [BROWN *v.* ROLLS ROYCE, LTD.] 577

MATRIMONIAL HOME

Trust for sale—*Application by divorced wife, a joint tenant with former husband, for sale. See* TRUST AND TRUSTEE (Trust for sale of land—*Refusal of trustee to concur in sale*).

MEASURE OF DAMAGES

See DAMAGES; FATAL ACCIDENT (Damages); SALE OF LAND (Contract—*Breach*).

MEMORANDUM

Contract for the disposition of land. *See* CONTRACT (Writing).

MISTAKE

Mistake of law—*Money paid under mistake—Recovery—Parties not in pari delicto* [KIRIRI COTTON CO., LTD. *v.* DEWANI] 177

MONEY

Money had and received—*Origin of cause of action—Money paid under mistake of law recoverable when parties not in pari delicto—Money paid for illegal premium* [KIRIRI COTTON CO., LTD. *v.* DEWANI] 177

MONEYLENDER

Definition of moneylender—*Exception—Business, not having primary object of lending money for purposes whereof money is lent—Belief that refraining from making loans to customers would lose custom—Materiality of belief—Immateriality of correctness of belief in fact* [OFFICIAL ASSIGNEE OF THE PROPERTY OF KOH HOR KHOON, BANKRUPT *v.* EK LIONG HIN, LTD.] 440

Mortgage—*Enforcement. See* MORTGAGE (Remedies of mortgagee—*Moneylender's security*).

MORTGAGE

Possession of mortgaged property—*Mortgagor not in occupation—Power of leasing only with consent in writing of mortgagee—Tenancy granted by mortgagor—No evidence of consent in writing—Mortgagee having knowledge of tenancy—Mortgagee going without interest for many years—Whether mortgagee entitled to recover possession against tenant as trespasser—Law of Property Act*, 1925 (*c.* 20), *s.* 99 [TAYLOR *v.* ELLIS] 549

Receiver—*Tenancy—Acceptance of tenant of mortgagor as mortgagee's tenant by receiver—Mortgagor's power of leasing restricted to leasing with consent in writing of mortgagee—Tenancy granted without consent—Receipt of rent by receiver appointed by mortgagee—Notice to quit given by mortgagee and containing statement that tenant held as tenant of mortgagee* [STROUD BUILDING SOCIETY *v.* DELAMONT] 749

Remedies of mortgagee—*Moneylender's security—Originating summons for repayment—Whether particulars required by R.S.C., Ord.* 20, *r.* 10, *and R.S.C., Ord.* 3, *r.* 10, *must be included in summons or affidavit in support—R.S.C.. Ord.* 55, *r.* 5A [LEWIS *v.* PACKER] 720

Tenancy. *See* Receiver—*Tenancy, ante.*

MURDER

See CRIMINAL LAW.

NATIONAL ASSISTANCE

Affiliation order. *See* AFFILIATION.

NATURAL JUSTICE

Domestic tribunal. *See* TRIBUNAL (Decision).

NEGLIGENCE

Burden of proof. *See* BURDEN OF PROOF (Legal burden).

Damages—*Deductions from damages. See* DAMAGES (Measure of damages).

Personal injuries—Expenses of services freely given. See DAMAGES (Measure of damages—*Expenses of services freely given*).

Shock. See DAMAGES (Remoteness of damage).

Exclusion of liability. *See* CONTRACT (Exception clause).

Fatal accident. *See* FATAL ACCIDENT (Damages).

"NO CASE"

Submission of—*Summary matrimonial jurisdiction. See* MAGISTRATES (Husband and wife—*No case to answer*).

NORTHERN IRELAND

Town and country planning—*Compensation—Refusal of permission to develop—Statutory exclusion of right to compensation—Constitutional invalidity of law made to take any property without compensation—Validity of exclusion of right to compensation—Government of Ireland Act*, 1920 (*c.* 67). *s.* 5 (1)—*Planning and Housing Act (Northern Ireland)*, 1931 (*c.* 12), *s.* 10 (2)—*Planning (Interim Development) Act (Northern Ireland)*, 1944 (*c.* 3), *s.* 2, *s.* 6 (4) [BELFAST CORPN. *v.* O.D. CARS, LTD.] 65

Evidence—Evidence of Ministry's view as to reasonableness of restrictive provisions in a planning scheme—Adequacy of oral evidence [BELFAST CORPN. *v.* O.D. CARS, LTD.] .. 65

NORTHERN RHODESIA

See PRIVY COUNCIL (Rhodesia and Nyasaland).

NUISANCE

Flooding—*Interference with course of stream—Culvert constructed in* 1926 *by highway authority to carry stream under highway—Entrance to culvert not protected by grid—Property on lower side of highway flooded owing to entrance to culvert being blocked by debris—Liability of highway authority—Liability of occupiers of fields—Apportionment of liability—Injunction* [PEMBERTON *v.* BRIGHT] 792

NULLITY

Wilful refusal to consummate marriage—*Just excuse—Religious ceremony not arranged—Marriage at register office—Mutual intention to have subsequent church ceremony—Parties being Roman Catholics knew that consummation could only follow after church ceremony* [JODLA *v.* JODLA (OTHERWISE CZARNOMSKA)] 625

OCCUPATION

Rateable. *See* RATES (Rateable occupation).

OFFICER

Company, of. *See* COMPANY.

OFFICIAL REFEREE

Reference to. *See* PRACTICE (Reference to referee).

OPTION
New lease—*Option to extend term—Surrender of old lease by operation of law. See* LANDLORD AND TENANT (Surrender of tenancy).

PARLIAMENT
Privilege—*Report of select committee—Impugning validity of report contrary to Bill of Rights—Whether comment on report permitted—Bill of Rights* (*c.* 2), *s.* 1, *art.* 9 [DINGLE *v.* ASSOCIATED NEWSPAPERS, LTD.] .. 294

PARODY
See COPYRIGHT (Infringement—*Literary work*).

PAYMENT INTO COURT
See PRACTICE.

PENSION
Damages for negligence—*Whether pension should be taken into account. See* DAMAGES (Measure of damages—*Loss of earnings*).
Scheme. *See* SUPERANNUATION (Scheme).

PERPETUITIES
Rule against perpetuities—*Children—Presumption that women past age of child-bearing inapplicable* [INLAND REVENUE COMRS. *v.* BERNSTEIN] .. 697
Income—Indefinite gift of income [Re LEVY (*decd.*)] .. 42

PERSON OF UNSOUND MIND
Settlement of property by direction of the court—*Restraint from squandering property—Form of settlement—Law of Property Act*, 1925 (*c.* 20), *s.* 171 (1), (5), (7) [Re C.] .. 393

PLEADING
Amendment—*Statement of claim—Statement of claim amended by plaintiff but not in red—Order to "deliver amended statement of claim in proper form"—Dismissal of action for want of prosecution by failing to comply with order—Whether jurisdiction to order delivery of amended statement of claim* [Re LANGTON (*decd.*)] .. 657

POLICE
Prosecutor—*Police constable laying information and giving evidence—Police not legally represented—Prosecutor acting on behalf of Metropolitan Police—Costs—Costs in Criminal Cases Act*, 1952 (*c.* 48), *s.* 17 [R. *v.* BURT, *Ex parte* PRESBURG] .. 424

POLYGAMOUS MARRIAGE
Dissolution of subsequent English marriage. *See* DIVORCE (Decree nisi—*Specifying valid marriage*).

POSSESSION
Demised property, of. *See* RENT RESTRICTION.
Mortgaged property, of. *See* MORTGAGE (Possession of mortgaged property; Receiver).

POWER OF ATTORNEY
Trustee's. *See* TRUST AND TRUSTEE (Delegation of trusts by trustee during absence abroad).

PRACTICE
Affidavit. *See* AFFIDAVIT.
Amendment. *See* PLEADING (Amendment).
Consolidation of actions—*Costs. See* COSTS (Consolidated actions).
Libel actions brought by different plaintiffs against same defendants—Plaintiffs in both actions represented by same solicitors—Defences in both actions not identical—Application by defendants on summons for directions in second action for consolidation of both actions—No summons issued in first action—Jurisdiction—Discretion—R.S.C., Ord. 49, *r.* 8 [DAWS *v.* DAILY SKETCH & SUNDAY GRAPHIC, LTD., DARKE *v.* SAME] .. 397
Criminal court. *See* CRIMINAL LAW.
Discovery. *See* DISCOVERY.
Habeas corpus. *See* HABEAS CORPUS.
Magistrates. *See* MAGISTRATES (Procedure).
Payment into court—*Several causes of action—Payment in of lump sum—Apportionment—Salvage—R.S.C., Ord.* 22, *r.* 1 (2) [THE BOSWORTH] .. 146
Reference to referee—*Inquiry and report—Attendance of witness—Jurisdiction of referee to order attendance of defendant—Purpose of attendance being to enable defendant to be cross-examined—R.S.C., Ord.* 36A, *r.* 7 (1) (*a*) [FALLON *v.* CALVERT] .. 281
Restrictive Practices Court. *See* RESTRICTIVE TRADE PRACTICES (Court).
Service—*Service out of jurisdiction—Breach of contract committed within the jurisdiction—Contract to deliver cargo to one port in United Kingdom to be nominated by plaintiffs—Ship lost when outside jurisdiction and before port of delivery nominated—Whether breach committed within the jurisdiction—Whether evidence that plaintiffs would have nominated English port admissible—R.S.C., Ord.* 11, *r.* 1 (*e*) [CUBAN ATLANTIC SUGAR SALES CORPN. *v.* COMPANIA DE VAPORES SAN ELEFTERIO LIMITADA] .. 141
Trial—*Evidence—Recall of witness by judge—Recall for cross-examination—Right not personal to judge—Subsequent interlocutory reference to official referee to report on one matter in issue—Jurisdiction of official referee to order defendant to appear before him for cross-examination—R.S.C., Ord.* 36A, *r.* 7 (1) (*a*) [FALLON *v.* CALVERT] .. 281
Witness—Whether jurisdiction to order party to civil suit to attend to give evidence [FALLON *v.* CALVERT] .. 281
Mode of trial—Jury. See JURY (Trial by).
Vexatious action. *See* VEXATIOUS PROCEEDINGS.

PREMIUM
Recovery at common law where premium illegal by statute. *See* PRIVY COUNCIL (Eastern Africa—*Rent restriction*).
See also RENT RESTRICTION.

PRINTED FORM
Hire-purchase agreement. *See* CONTRACT (Agreement).

PRISON
Report. *See* CRIMINAL LAW (Practice—*Prison Commissioners' report before sentence of preventive detention*).

PRIVILEGE
Document. *See* DISCOVERY (Production of documents).
Libel. *See* LIBEL.

PRIVY COUNCIL
Australia—*Criminal law—Murder—Insanity—Uncontrollable impulse—Whether the law recognises uncontrollable impulse as ground for inferring insanity without evidence leading to that inference* [ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA *v.* BROWN] 734
Ceylon—*Tribunal—Commission of inquiry—Natural justice—Student suspended from university examinations—Witnesses at commission of inquiry not questioned in presence and hearing of student—Two witnesses questioned by one member in absence of other members of commission —Two interviews by commission of inquiry with student alone* [UNIVERSITY OF CEYLON *v.* FERNANDO] 631
Eastern Africa—*Landlord and tenant—Crown lease—Covenant or condition—Breach—Relief against forfeiture according to principles of "English law" and doctrines of equity—Whether English statute law applicable—Crown Lands Ordinance,* 1915 (*Laws of Kenya,* 1948, *c.* 155), *s.* 83—*Registration of Titles Ordinance,* 1919 (*Laws of Kenya,* 1948, *c.* 160), *s.* 21, *Sch.* 1 [BASHIR *v.* COMR. OF LANDS] 117
Rent restriction—Premium—Illegality—Premium paid under mistake of law—No statutory means of recovery—Whether tenant entitled to recover—Uganda Rent Restriction Ordinance (*Laws of Uganda* 1951 *c.* 115), *s.* 3 (2) [KIRIRI COTTON CO., LTD. *v.* DEWANI] 177
Malaya—*Motor vehicle—Sale of vehicle by illegal transaction—Transfer of property—Whether buyer entitled to return of vehicle or its value—Registration of Motor Vehicles Regulations,* 1945 (*of Malaya*), *reg.* 2—*Motor Vehicles Commercial Use Regulations* (*of Malaya*), *reg.* 3 (3), *as amended* [SAJAN SINGH *v.* SARDARA ALI] 269
Rhodesia and Nyasaland—*Northern Rhodesia—Emergency legislation—Detention order—Regulation authorising governor to delegate "powers" under emergency regulations—Whether regulation enabled governor to delegate duty of being satisfied of necessity to exercise power—Northern Rhodesia Emergency Powers Regulations,* 1956, *reg.* 16 (1), *reg.* 47 [MUNGONI *v.* ATTORNEY-GENERAL OF NORTHERN RHODESIA] 446
Singapore—*Moneylender—Loans on security of goods stored by firm whose primary business was that of rubber merchants and shippers—Loans only to selected customers—"Moneylender" —Singapore Moneylenders Ordinance* (*Laws of the Colony of Singapore,* 1955, *c.* 193), *s.* 2 (*d*) [OFFICIAL ASSIGNEE OF THE PROPERTY OF KOH HOR KHOON, BANKRUPT *v.* EK LIONG HIN, LTD.] 440
Trinidad and Tobago—*Master and servant—Trade dispute—Board of inquiry—Jurisdiction— "Trade dispute"—Dismissal of workmen by employers—Non-recognition of union by employers—Power of governor to appoint board of inquiry—Trade Disputes* (*Arbitration and Inquiry*) *Ordinance* (*Laws of Trinidad and Tobago,* 1950 (*c.* 22 *No.* 10)), *s.* 2 (1), *s.* 8 (1) [BEETHAM *v.* TRINIDAD CEMENT, LTD.] 274
West Africa—*Gold Coast—Concession of timber rights—Failure to comply with statutory requirements—Whether concession invalid—Concessions Ordinance* (*Laws of the Gold Coast* (1951) *c.* 136), *as amended, s.* 12 (2), (3), (4), *s.* 13 (11) [EDWARD RAMIA, LTD. *v.* AFRICAN WOODS, LTD.] 627
West Indies—*Trinidad—Licence—Licence to occupy premises—Exclusive possession—Payment and acceptance of amount of rent due to landlord of licensor—Whether intention of parties to create relationship of landlord and tenant or of licensor and licensee* [ISAAC *v.* HOTEL DE PARIS, LTD.] 348

PROBATE
Costs—*Taxation—Bill of costs—Item numbers to be shown—Rules of the Supreme Court* (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *Appendix* 2 [PRACTICE DIRECTION] 347
Signature of will. *See* WILL (Execution).

PROBATION
See CRIMINAL LAW (Practice).

PRODUCTION
Document, of. *See* DISCOVERY (Production of documents).

PROFITS TAX
Computation of profits—*Franked investment income—Dividends from subsidiary company— "Functions" of company alleged to consist wholly of holding property—Colliery company's undertaking nationalised—Subsequent activities devoted to obtaining compensation pending liquidation—Whether company carrying on a trade or business—Finance Act,* 1937 (*c.* 54), *s.* 19 (4) [HENRY BRIGGS, SON & CO., LTD. *v.* INLAND REVENUE COMRS.] 800
Franked investment income. *See* Computation of profits, *ante.*

PROPERTY
Husband and wife—*Dispute between. See* HUSBAND AND WIFE.

QUALIFIED PRIVILEGE
See LIBEL (Privilege).

RATES
Appeal. *See* Local valuation court, *post.*
Assessment. *See* Valuation, *post.*
De-rating—*Industrial hereditament—"Industrial purpose". See* Valuation—*Gross value—Non-industrial building, ante.*
Exemption—*Scientific society—"Purposes of science . . . exclusively"—"Development of mechanical engineering"—"Annual voluntary contributions"—Subscriptions of members —Advantages of membership of organisation of professional men—Whether subscriptions were "voluntary" contributions—Scientific Societies Act,* 1843 (*c.* 36), *s.* 1 [INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE (VALUATION OFFICER)] 129
Lands Tribunal—*Evidence—Evidence after decision reserved—Discretion of tribunal to refuse to hear evidence that might have been adduced at hearing* [WEXLER *v.* PLAYLE (VALUATION OFFICER)] 338
Limitation of rates chargeable—*Ex-services association—Main object to promote comradeship between and improve conditions and welfare of all ranks of H.M. Forces—Organisation for the advancement of social welfare—Ascertainment of main object of organisation having written constitution—Rating and Valuation* (*Miscellaneous Provisions*) *Act,* 1955 (*c.* 9), *s.* 8 (1) (*a*) [VICTORY (EX-SERVICES) ASSN., LTD. *v.* PADDINGTON BOROUGH COUNCIL] 498

RATES—*continued.* PAGE

Limitation of rates chargeable—

" Occupied for the purposes of an organisation "—Trade union war memorial convalescent home vested in trustees under trust deeds—Home conducted for benefit of union members and their wives—Trustees under strict union control—Whether trustees or union the organisation for whose purposes the home was occupied—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (*c.* 9), *s.* 8 (1) (*a*) [ISAACS *v.* MARKET BOSWORTH RURAL DISTRICT COUNCIL] .. 433

Local valuation court—*Appeal—Res judicata—Scientific society's claim for exemption—Claim upheld on appeal for previous valuation list—Decision not appealed—Circumstances admitted to be unchanged—Whether valuation officer estopped from opposing claim* [SOCIETY OF MEDICAL OFFICERS OF HEALTH *v.* HOPE (VALUATION OFFICER)] 317

Rateable occupation—*Alterations preparatory to intended use—Purchase of warehouse premises for use as a bonded store—Alterations to premises—No use of premises as bonded store until after alterations were completed—Whether premises " unoccupied " during period of alteration—Local Government (Scotland) Act*, 1947 (*c.* 43), *s.* 243 (1) (*as amended by Valuation and Rating (Scotland) Act*, 1956 (*c.* 60), *s.* 44, *Sch.* 7, *Part* 3), *s.* 379 (1) [ARBUCKLE SMITH & CO., LTD. *v.* GREENOCK CORPN.] 568

Valuation—*Dwelling-house—Disrepair—Landlord's liability to repair—Dwelling-house in poor state of repair—Disrepair disregarded in arriving at value—Valuation for Rating Act*, 1953 (*c.* 42), *s.* 2 (2), (3) (*a*) [WEXLER *v.* PLAYLE (VALUATION OFFICER)] 338

Gross value—Non-industrial building—Chain and anchor testing house—Hereditament was a factory—Whether used wholly or mainly for " industrial purposes "—Rating and Valuation Act, 1925 (*c.* 90), *s.* 22 (1) (*a*), (*b*), (4)—*Rating and Valuation (Miscellaneous Provisions) Act*, 1955 (*c.* 9), *s.* 5 (1), (2), (3) [CROWE (VALUATION OFFICER) *v.* LLOYDS BRITISH TESTING CO., LTD.] 411

REDUCTION OF CAPITAL

See COMPANY.

REFEREE

Official. *See* PRACTICE (Reference to referee).

REFERENCE

Official referee, to. *See* PRACTICE (Reference to referee).

REMOTENESS OF DAMAGE

See DAMAGES.

RENT

Income tax. *See* INCOME TAX (Deduction of tax).

RENT CONTROL

Premium. *See* RENT RESTRICTION (" Premium ").

RENT RESTRICTION

" Premium "—*Payment—Third party receiving benefit—Tenant required by landlord, as condition of grant of tenancy, to sell house, owned jointly by him and his wife, to third party at undervalue of £500—Whether sale at undervalue constituted payment of premium—" Pecuniary consideration "—Whether landlord liable to repay £500 to tenant—Landlord and Tenant (Rent Control) Act*, 1949 (*c.* 40), *s.* 2 (1), (5), *s.* 18 (2) [ELMDENE ESTATES, LTD. *v.* WHITE] .. 306

Sub-tenancy—*Sub-tenant of part of premises with rateable value below £40—Whole premises decontrolled by Rent Act*, 1957—*Whether landlord entitled to recover possession—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (*c.* 17), *s.* 15 (3)—*Housing Repairs and Rents Act*, 1954 (*c.* 25), *s.* 41—*Rent Act*, 1957 (*c.* 25), *s.* 11 (1), (3), *Sch.* 4—*Landlord and Tenant (Temporary Provisions) Act*, 1958 (*c.* 68), *s.* 3 (1) [LEGGE *v.* MATTHEWS] 595

REPAIR

Liability of tenant. *See* LANDLORD AND TENANT.

REQUISITION

De-requisition—*Duty of local authority to review rent recoverable under Requisitioned Houses and Housing (Amendment) Act*, 1955 (*c.* 24), *s.* 4 (4) [TAYLOR *v.* MUNROW] 455

RES JUDICATA

Divorce. *See* DIVORCE (Custody—*Estoppel*).

Rating—*Local valuation court. See* RATES (Local valuation court—*Appeal*).

Tribunal—*Decision—Whether decision may give rise to estoppel per rem judicatam* [SOCIETY OF MEDICAL OFFICERS OF HEALTH *v.* HOPE (VALUATION OFFICER)] 317

RESTRICTIVE TRADE PRACTICES

Court—*Practice—Declaration—Past restrictions—Whether declaration as to past restrictions would be made—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 20 (5) [Re THE AGREEMENT BETWEEN THE MEMBERS OF THE FEDERATION OF WHOLESALE AND MULTIPLE BAKERS (GREAT BRITAIN AND NORTHERN IRELAND)] 227

Reference—*Alteration after date of reference—Overseas trading restrictions severed from home trading restrictions and embodied in new document—Discretion of court to deal with overseas trading restrictions—Restrictive Trade Practices Act*, 1956 (*c.* 68), *s.* 8 (8), *s.* 20 [Re FEDERATION OF BRITISH CARPET MANUFACTURERS' AGREEMENT, Re FEDERATION OF BRITISH CARPET MANUFACTURERS' COMMON FORM AGREEMENT] 356

Bread price restriction—Wholesale and Multiple Bakers (Great Britain and Northern Ireland) Federation—Agreement not to sell at retail prices higher than those recommended by Federation—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (*c.* 68), *s.* 21 (1) (*b*) [Re THE AGREEMENT BETWEEN THE MEMBERS OF THE FEDERATION OF WHOLESALE AND MULTIPLE BAKERS (GREAT BRITAIN AND NORTHERN IRELAND)] 227

Burden of proof—Recommendation, not clause in agreement, constituting restriction—Restrictive Trade Practices Act, 1956 (*c.* 68), *s.* 6 (7), *s.* 21 (1) [Re THE AGREEMENT BETWEEN THE MEMBERS OF THE FEDERATION OF WHOLESALE AND MULTIPLE BAKERS (GREAT BRITAIN AND NORTHERN IRELAND)] 227

Carpet manufacturers—Price cum quality restriction—Wholesale dealings restrictions—Overseas trading restrictions—No sale to be made direct to consumer buyers other than buying agencies—Whether removal of restrictions would deny public substantial benefit—Whether removal of restrictions would be likely to cause substantial reduction in volume of earnings of carpet trade export business in relation to whole business of carpet trade—Restrictive Trade Practices Act, 1956 (*c.* 68), *s.* 21 (1) (*b*), (*f*) [Re FEDERATION OF BRITISH CARPET MANUFACTURERS' AGREEMENT, Re FEDERATION OF BRITISH CARPET MANUFACTURERS' COMMON FORM AGREEMENT] 356

RESTRICTIVE TRADE PRACTICES—*continued.* PAGE

Reference—

Continuance of terms of trading—Resolution after date of reference for continuance by individual arrangements—Resolution a recommendation within Restrictive Trade Practices Act, 1956 (c. 68), *s.* 6 (7) [Re Federation of British Carpet Manufacturers' Agreement, Re Federation of British Carpet Manufacturers' Common Form Agreement] .. 356

REVERSION

Reversionary tenancy. *See* Landlord and Tenant (" Reversionary tenancy " or agreement for the grant of a " future tenancy ").

RHODESIA AND NYASALAND

See Privy Council.

SAFE SYSTEM OF WORKING

Extent of master's duty—*Protective appliance—Conflicting medical opinions whether appliance would be effective protection—Barrier cream not provided by employer—Burden of proof of failure to take reasonable care* [Brown *v.* Rolls Royce, Ltd.] 577

SALE OF GOODS

Illegality—*Title to motor vehicle acquired by illegal transaction.* *See* Detinue (Illegality).

Implied condition of fitness—*Merchantable quality—Catapult—Purchaser boy aged six—Catapult displayed in shop window where seen by boy who then purchased it in shop—Reliance on seller's skill or judgment—Whether sale by description—Sale of Goods Act*, 1893 (c. 71), *s.* 14 (1), (2) [Godley *v.* Perry (Burton & Sons (Bermondsey), Ltd. third party, Graham fourth party)] 36

Sale by sample—*Reasonable examination of sample—Sale between wholesalers—Sale of Goods Act*, 1893 (c. 71), *s.* 15 (2) (*c*) [Godley *v.* Perry (Burton & Sons (Bermondsey), Ltd. third party, Graham fourth party)] 36

Wholesalers, between. *See* Sale by sample—*Reasonable examination of sample, ante.*

SALE OF LAND

Contract—*Breach—Damages—Measure—Repudiation of contract by vendor—Intention of purchaser to convert property—Purchaser a dealer in real estate—Whether knowledge of these matters to be imputed to vendor* [Diamond *v.* Campbell-Jones] 583

SALVAGE

See Shipping.

SAMPLE

Sale by. *See* Sale of Goods (Sale by sample).

SCHEME

See Charity; Superannuation.

SCHEME OF ARRANGEMENT

See Company.

SCIENTIFIC SOCIETY

Exemption from rating. *See* Rates (Exemption).

SEAWORTHINESS

See Shipping.

SEPARATION AGREEMENT

Desertion—*Request for resumption of cohabitation made by one spouse and refused by the other.* *See* Divorce (Desertion—*Consensual separation*).

SERVICE

Writ. *See* Practice.

SETTLEMENT

Person of unsound mind's property. *See* Person of Unsound Mind (Settlement of property by direction of the court).

Surtax. *See* Surtax.

SHIPPING

Charterparty—*Construction—" Full and complete cargo " within maximum amd minimum limits —Shipowners' option to declare quantity within those limits—" Approximative cargo " declared by master—Cargo loaded* 3.18 *per cent. short of quantity declared—Whether shipowners in breach of contract—Gencon form charterparty* [Louis Dreyfus et Cie. *v.* Parnaso Cia. Naviera S.A.] 759

Exceptions—Strikes—Charterers not responsible for delay if intended cargo cannot be provided —Alternative cargoes—Duty of charterers to provide alternative cargo—Reasonable time allowable for its provision—Whether cargo intended for shipment must be identifiable [South African Despatch Line *v.* Owners of the Panamanian S.S. Niki] 285

Demurrage—*Exception—Strike occurring while vessel on demurrage—Discharge prevented—Centrocon strike clause incorporated in Baltimore Form C charterparty—Whether demurrage payable during strike period* [Union of India *v.* Compania Naviera Aeolus S.A.] .. 753

Investigation of casualty—*Report—Rider by one assessor censuring chief engineer—No charge against chief engineer—Irregularity* [The Seistan] 32

Limitation of liability—*Fund paid into court—Claims—Claim by harbour board for expenses of raising wreck, etc.—Claim by owners of wreck for liability to harbour board for excess of expenses over proceeds of sale of wreck, etc.—Double proof—Duty of harbour board to mitigate loss—Whether owners could claim against fund—Whether harbour board should give credit for amount of owners' claim—Mersey Docks and Harbour Board Act*, 1954 (c. xlv), *s.* 3 (3) [The Liverpool (No. 2)] 465

Salvage—*Payment into court of one sum—Two salvors—Two causes of action consolidated—Whether sum paid need be apportioned between two salvors—R.S.C., Ord.* 22, *r.* 1 (2) [The Bosworth] 146

Seaworthiness—*Due diligence to make ship seaworthy—Lloyd's Register and loadline surveys—Work entrusted to competent independent contractors—Unseaworthiness due to negligence of contractors' employee—Negligence not discoverable—Whether due diligence exercised by shipowners—Australian Sea Carriage of Goods Act*, 1924, *art.* III, *r.* 1, *art.* IV, *r.* 1 [Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd.] 198

SIGNATURE

Will. *See* Will (Execution).

SINGAPORE

See Privy Council.

SOCIAL WELFARE

Advancement. *See* Rates (Limitation of rates chargeable).

STAMP DUTY

Collateral security. *See* Guarantee, *post.*

STAMP DUTY—*continued.*

Guarantee—*Sale agreement not under seal for sale of stock—Duty claimed on guarantee as " Mortgage, bond, debenture, covenant "—Whether duty chargeable ad valorem as on principal or primary security or chargeable at 10s. as on a collateral, or auxiliary, or additional, or substituted security—Stamp Act,* 1891 (*c.* 39), *Sch.* 1, *Mortgage, Bond, etc.* [HENRY ANSBACHER & CO. *v.* INLAND REVENUE COMRS.] 686

STATUTE

Compulsory acquisition—*Intention to give compensation. See* COMPENSATION (Compulsory acquisition).

Construction—*Concession invalid unless obtained in accordance with procedure laid down by statute—Imperative words of statute—Whether waiver possible* [EDWARD RAMIA, LTD. *v.* AFRICAN WOODS, LTD.] 627

Construing Acts as one—Whether later Act affects the construction of earlier Act—Amendment of earlier Act by subsequent Act [CROWE (VALUATION OFFICER) *v.* LLOYDS BRITISH TESTING CO., LTD.] 411

Duty—Whether absolute [HAMILTON *v.* NATIONAL COAL BOARD] 76

Word—Same word bearing different meanings in different sections—Consolidation Act—Derivation of sections from different legislation [R. *v.* BURT, *Ex parte* PRESBURG] 424

Incorporation of English law by foreign ordinance—*Whether statute law included* [BASHIR *v.* COMR. OF LANDS] 117

Money paid in contravention of statutory prohibition—*Recovery. See* PRIVY COUNCIL (Eastern Africa—*Rent restriction—Premium*).

Retrospective operation—*Pending proceedings—Alteration of law after judgment and before appeal—Duty of the Court of Appeal—Vested substantive right not to be interfered with—Distinction for matters of procedure—Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 27 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959 (*c.* 39), *s.* 1 (1) [Re VERNAZZA] 183

STATUTORY DUTY

Absolute—*Maintenance. See* COAL MINING (Statutory duty—*Breach*).

Breach. *See* COAL MINING.

Delegation—*Emergency legislation—Detention order—Condition that governor should be satisfied of necessity for order to be made—Regulation authorising delegation of " powers "—Whether governor could delegate duty of being satisfied of necessity to exercise power* [MUNGONI *v.* ATTORNEY-GENERAL OF NORTHERN RHODESIA] 446

STATUTORY INSTRUMENT

Rules—*Procedural rules—Rules applicable to proceedings those in operation at date of proceedings—Alteration between date of divorce petition and date of application for maintenance* [PACHNER *v.* PARKER (FORMERLY PACHNER)] 159

SUPERANNUATION

Scheme—*Amendment—Employees' pension and life assurance scheme—Provision for change of scheme reserving the right to employers to discontinue the scheme in the event of " unforeseen circumstances "—Whether amendments changing beneficial interests validly made* [Re ALFRED HERBERT, LTD. PENSION AND LIFE ASSURANCE SCHEME TRUSTS] 618

SURCHARGE

Local government audit. *See* LOCAL GOVERNMENT (Audit).

SURRENDER

Tenancy, of. *See* LANDLORD AND TENANT.

SURTAX

Settlement—*Settlor retaining interest—Accumulation of income during settlor's lifetime—Trusts in favour of settlor's wife and unborn children—Beneficiaries benefiting on settlor's death—Power of advancement negatived by trust for accumulation—No assumption for tax purposes that child would not be born when wife beyond child-bearing age—Income Tax Act,* 1952 (*c.* 10), *s.* 405 (1), (2)—*Trustee Act,* 1925 (*c.* 19), *s.* 32 (1), *s.* 69 (2) [INLAND REVENUE COMRS. *v.* BERNSTEIN] 697

TAXATION

Costs. *See* COSTS; DIVORCE (Costs); PROBATE (Costs).

TENANCY

Surrender. *See* LANDLORD AND TENANT (Surrender of tenancy).

TOWN AND COUNTRY PLANNING

Development—*Material change in use of land—Revival of commercial use but for sale of caravans instead of portable garden buildings, etc.—Use for sale only in place of former manufacture and sale—Hut on land used, both before and after revival of commercial use, as office in which sales conducted—Whether revival of commercial use and different nature of article sold a material change in the use of the land—Hut a " shop " —Use of hut and other land for sale of caravans not development—Town and Country Planning (Use Classes) Order,* 1950 (*S.I.* 1950 *No.* 1131), *art.* 2 (2), *art.* 3 (1), *schedule* [MARSHALL *v.* NOTTINGHAM CITY CORPN.] .. 659

Enforcement notice—*Appeal against notice—Notice founded on breach of condition of grant of planning permission—Whether appellant could maintain that there had been no development and that no permission had been necessary—Development more than four years before notice—Town and Country Planning Act,* 1947 (*c.* 51), *s.* 23 (1), (4) [MOUNSDON *v.* WEYMOUTH AND MELCOMBE REGIS CORPN.] 538

Northern Ireland. *See* NORTHERN IRELAND.

TRADE DISPUTE

See TRADE UNION.

TRADE UNION

Trade dispute—*Recognition—Claim by union for recognition—Claim made after refusal of company to negotiate over dismissal of employees—Whether trade dispute—Trade Disputes (Arbitration and Inquiry) Ordinance (Laws of Trinidad and Tobago,* 1950 (*c.* 22 *No.* 10)), *s.* 2 (1) [BEETHAM *v.* TRINIDAD CEMENT, LTD.] 274

TRESPASS

Illegality—*Title to motor vehicle acquired by illegal transaction. See* DETINUE (Illegality).

TRIAL

Jury, by. *See* JURY.

Summary trial. *See* MAGISTRATES (Procedure).

TRIBUNAL

Decision—*Natural justice—Inquiry into examination offence—Principal witness not tendered by commission of inquiry for cross-examination by alleged offender—Whether failure to comply with principles of natural justice* [UNIVERSITY OF CEYLON *v.* FERNANDO] 631

TRIBUNAL—*continued.*

Estoppel—*Whether decision of tribunal can create estoppel per rem judicatam. See* RATES (Local valuation court—*Appeal—Res judicata*).

TRINIDAD

See PRIVY COUNCIL (West Indies).

TRINIDAD AND TOBAGO

See PRIVY COUNCIL.

TRUST AND TRUSTEE

Capital—*Right to call for payment of capital—Indefinite bequest of income to charities. See* CHARITY (Income—*Indefinite gift of income in perpetuity*).

Delegation of trusts by trustee during absence abroad—*Statutory declaration to be filed with each power of attorney—Trustee Act*, 1925 (*c.* 19), *s.* 25 (4) [PRACTICE DIRECTION] 716

Power of advancement. *See* Powers of trustee, *post.*

Powers of trustee—*Delegation. See* Delegation of trusts by trustee during absence abroad, *ante.*

Power of advancement—Exclusion by trust for accumulation—Contrary intention—Trust after settlor's death as to one-third for children and as to two-thirds for widow—Children's interests not prior interests—Trustee Act, 1925 (*c.* 19), *s.* 32 (1), *s.* 69 (2) [INLAND REVENUE COMRS. *v.* BERNSTEIN] 697

Trust for sale of land—*Refusal of trustee to concur in sale—Husband and wife—Matrimonial home purchased jointly out of money provided equally by them—Husband and wife divorced—Law of Property Act*, 1925 (*c.* 20), *s.* 30—*Distinction of position on application under Married Women's Property Act*, 1882 (*c.* 75), *s.* 17 [JONES *v.* CHALLENGER] 785

Variation of trusts by the court—*Alteration of trusts effected by court's approving the proposed arrangement—Written instrument not needed—Variation of Trusts Act*, 1958 (*c.* 53), *s.* 1 [Re VISCOUNT HAMBLEDEN'S WILL TRUSTS] 353

Overriding trustees' discretion—" Arrangement " substituting absolute beneficial interest for discretionary interest—Approval sought by beneficiary on behalf of possible future husband—Matters to be considered by the court—Arrangement need not be inter partes nor approved on behalf of proposer or trustees—Regard had to views of trustees—Variation of Trusts Act, 1958 (*c.* 53), *s.* 1 [Re STEED'S WILL TRUSTS] 487

Practice—Order—Direction that variation should be carried into effect not to be included in order—Alteration of trusts affected by court's approving arrangement—Variation of Trusts Act, 1958 (*c.* 53), *s.* 1 [Re VISCOUNT HAMBLEDEN'S WILL TRUSTS] 358

UNIVERSITY

Inquiry into alleged examination offence. *See* PRIVY COUNCIL (Ceylon—*Tribunal*).

VALUATION

See RATES.

VARIATION OF TRUST

Variation of Trusts Act, 1958. *See* TRUST AND TRUSTEE (Variation of trusts by the court).

VEXATIOUS PROCEEDINGS

Instituting " vexatious legal proceedings "—*Habitually and persistently and without any reasonable ground—Action instituted after Court of Appeal stated that there was no reason therefor—Subsequent proceedings by summonses in winding-up and by way of appeal, and further action—What may constitute " institution " of legal proceedings—Supreme Court of Judicature (Consolidation) Act*, 1925 (*c.* 49), *s.* 51 (1) [Re VERNAZZA] 183

WAIVER

Statutory requirement, of. *See* STATUTE (Construction—*Concession invalid unless obtained in accordance with procedure laid down by statute*).

WARD OF COURT

Application for leave to take out of jurisdiction—*Whether an interlocutory proceeding within R.S.C., Ord.* 38, *r.* 3, *proviso* [Re J. (AN INFANT)] 603

WARRANTY

Goods—*Fitness of goods. See* SALE OF GOODS (Implied condition of fitness).

WATER SUPPLY

Pumping station—*Whether a factory. See* FACTORY (Definition).

WEDDING PRESENTS

See HUSBAND AND WIFE (Property).

WEST AFRICA

See PRIVY COUNCIL.

WEST INDIES

See PRIVY COUNCIL.

WHOLESALER

Sale of goods, by. *See* SALE OF GOODS (Sale by sample).

WILL

Contract to leave property by will. *See* CONTRACT (Intention to create legal relationship—*Sharing home*).

Execution—*Place of signature—Will consisting of several sheets—Nexus between sheets—Signing and attesting below space on last page—Inference concerning testamentary intention—Holograph additions inserted above signature—Wills Act*, 1837 (*c.* 26), *s.* 9—*Wills Act Amendment Act*, 1852 (*c.* 24), *s.* 1 [Re LITTLE (*decd.*)] 387

Signature—Holograph will attested properly but signed " your loving mother "—Whether a signature within the meaning of Wills Act, 1837 (*c.* 26), *s.* 9 [*In the Estate of* COOK (*decd.*)] 689

Signature. *See* Execution, *ante.*

WINDING-UP

Company, of. *See* COMPANY.

WITNESS

Competency. *See* EVIDENCE.

Recall of witness. *See* PRACTICE (Trial—*Evidence*).

WRIT

Service. *See* PRACTICE (Service).

WRITING

Memorandum. *See* CONTRACT.

CASES NOTED

PAGE

Allen *v.* Waters & Co. ([1935] 1 K.B. 215; 104 L.J.K.B. 255; 152 L.T. 183). *Dictum of* GODDARD, J., *applied* in Schneider *v.* Eisovitch .. 169

Angliss (W.) & Co. (Australia) Proprietary *v.* Peninsular & Oriental Steam Navigation Co. ([1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727). *Applied in* Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. .. 193

Apex Film Distributors, Ltd. ([1959] 2 All E.R. 479; [1959] 3 W.L.R. 8). *Reversed on another ground.* C.A. .. 152

A.-G. *v.* Eyres ([1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396). *Applied in* Public Trustee *v.* I.R. Comrs .. 1

A.-G. *v.* Shillibeer (1849) (19 L.J.Ex. 115; 14 L.T.O.S. 273). *Followed in* R. *v.* Burt, *Ex p.* Presburg 424

A.-G. *v.* Till ([1910] A.C. 50; 79 L.J.K.B. 141; 101 L.T. 819). *Considered in* I.R. Comrs. *v.* Hinchy 505

Bell & Co. *v.* Antwerp, London & Brazil Line ([1891] 1 Q.B. 103; 60 L.J.Q.B. 270; 64 L.T. 276). *Applied in* Cuban Atlantic Sugar Sales Corpn. *v.* Compania de Vapores San Elefterio Limitada 141

Bigsby *v.* Dickinson (1876) (4 Ch.D. 24; 46 L.J.Ch. 280; 35 L.T. 679). *Distinguished in* Wexler *v.* Playle .. 338

Birch *v.* Birch (1873) (42 L.J.P. & M. 23; 28 L.T. 540). *Overruled* in Wright *v.* Wright .. 678

Birtley District Co-op. Soc., Ltd. *v.* Windy Nook & District Industrial Co-op. Soc., Ltd. ([1959] 1 All E.R. 623; [1959] 2 W.L.R. 415). *Overruled in* Bellshill & Mossend Co-op Soc., Ltd. *v.* Dalziel Co-op. Soc., Ltd. .. 673

Blakely Ordnance Co., Re, Brett's Case (1873) (8 Ch. App. 800; 43 L.J.Ch. 47; 29 L.T. 256). *Applied in* Re Apex Film Distributors, Ltd.. .. 152

Board of Education *v.* Rice ([1911] A.C. 182; 80 L.J.K.B. 798; 104 L.T. 691). *Dictum of* LORD LOREBURN, L.C., *as stated by* LORD HALDANE, L.C., *in* Local Government Board *v.* Arlidge ([1915] A.C. 132), *applied in* University of Ceylon *v.* Fernando .. 631

Board of Trade *v.* Owen ([1957] 1 All E.R. 414; [1957] A.C. 622; [1957] 2 W.L.R. 355). *Dictum of* LORD TUCKER *applied in* R. *v.* Welham .. 260

—— *Dictum of* LORD TUCKER *approved in* Welham *v.* Director of Public Prosecutions .. 805

Bosley *v.* Bosley ([1958] 2 All E.R. 167; [1958] 1 W.L.R. 645). *Applied in* Hall *v.* Hall .. 91

Bowmakers, Ltd. *v.* Barnet Instruments, Ltd. ([1944] 2 All E.R. 579; [1945] K.B. 65; 114 L.J.K.B. 41; 172 L.T. 1). *Applied in* Sajan Singh *v.* Sardara Ali.. .. 269

British Transport Commission *v.* Gourley ([1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41). *Distinguished in* Diamond *v.* Campbell-Jones.. .. 583

—— *Distinguished in* Judd *v.* Board of Governors of the Hammersmith, West London and St. Mark's Hospitals .. 607

British Westinghouse Electric & Manufacturing Co., Ltd. *v.* Underground Electric Rys. Co. of London, Ltd. ([1912] A.C. 689; 81 L.J.K.B. 1138; 107 L.T. 329). *Principle stated by* VISCOUNT HALDANE, L.C., *applied in* The Liverpool (No. 2) .. 465

Buchanan-Wollaston's Conveyance, Re ([1939] 2 All E.R. 302; [1939] Ch. 738; 108 L.J.Ch. 281; 160 L.T. 399). *Explained in* Jones *v.* Challenger .. 785

Bull *v.* Bull ([1955] 1 All E.R. 253; [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78). *Explained in* Jones *v.* Challenger .. 785

Bunge Y Born Limitada Sociedad Anonima etc. *v.* H. A. Brightman & Co. ([1925] All E.R. Rep. 607; [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738). *Applied in* South African Despatch Line *v.* Owners of the Panamanian S.S. Niki .. 285

Byrne *v.* Kinematograph Renters' Society, Ltd. ([1958] 2 All E.R. 599; [1958] 1 W.L.R. 784). *Dictum of* HARMAN, J., *approved in* University of Ceylon *v.* Fernando .. 631

Cadogan (Earl) *v.* Henthorne ([1956] 3 All E.R. 851). *Approved in* Legge *v.* Matthews .. 595

Carr Lane, Re No. 39 ([1953] 1 All E.R. 699; [1953] Ch. 299; [1953] 2 W.L.R. 545). *Explained in* Jones *v.* Challenger .. 785

Carroll *v.* Andrew Barclay & Sons, Ltd. ([1948] 2 All E.R. 390; [1948] A.C. 486; [1948] L.J.R. 1494). *Dictum of* LORD PORTER *applied in* Quintas *v.* National Smelting Co., Ltd. .. 104

Comber *v.* Leyland ([1898] A.C. 533; 67 L.J.Q.B. 888; 79 L.T. 183). *Dictum of* LORD SHAND *applied in* Cuban Atlantic Sugar Sales Corpn. *v.* Compania de Vapores San Elefterio Limitada 141

Cooper *v.* Cooper ([1954] 3 All E.R. 415; [1955] P. 99; [1954] 3 W.L.R. 867). *Considered in* Wright *v.* Wright .. 678

Corbett *v.* Corbett ([1953] 2 All E.R. 69; [1953] P. 205; [1953] 2 W.L.R. 1124). *Distinguished in* Hull *v.* Hull .. 378

Cowley (Earl) *v.* I.R. Comrs. ([1899] A.C. 212; 68 L.J.Q.B. 442; 80 L.T. 365). *Dictum of* LORD MACNAGHTEN *disapproved in* Public Trustee *v.* I.R. Comrs. .. 1

Cox *v.* Cutler & Sons, Ltd. & Hampton Court Gas Co. ([1948] 2 All E.R. 667; [1949] L.J.R. 297). *Dictum of* SCOTT, L.J., *applied in* Longhurst *v.* Guildford Godalming & District Water Board 54

Davie *v.* New Merton Board Mills, Ltd. ([1959] 1 All E.R. 346; [1959] 2 W.L.R. 331). *Applied in* Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. .. 193

Dawson, Re (1888) (39 Ch.D. 155; 57 L.J.Ch. 1061; 59 L.T. 725). *Applied in* I.R. Comrs. *v.* Bernstein 697

Debtor, Re, *Ex p.* Debtor ([1936] Ch. 242; 105 L.J.Ch. 132; 154 L.T. 47). *Dictum of* LORD WRIGHT, M.R., *applied in* Re Vernazza .. 183

Deloitte, Re ([1925] All E.R. Rep. 118; [1926] Ch. 56; 95 L.J.Ch. 154; 135 L.T. 150). *Applied in* I.R. Comrs. *v.* Bernstein .. 697

Dennis *v.* London Passenger Transport Board ([1948] 1 All E.R. 779). *Applied in* Schneider *v.* Eisovitch .. 169

Drummond *v.* Van Ingen (1887) (12 App. Cas. 296; 56 L.J.Q.B. 570). *Observations of* LORD MACNAGHTEN *applied* in Godley *v.* Perry .. 36

Duchesne *v.* Duchesne ([1950] 2 All E.R. 791; [1951] P. 113). *Dictum distinguished in* Hull *v.* Hull .. 378

Eastbourne Corpn. *v.* Fortes Ice Cream Parlour (1955), Ltd. ([1959] 2 All E.R. 102; [1959] 2 Q.B. 92; [1959] 2 W.L.R. 630). *Applied in* Mounsdon *v.* Weymouth and Melcombe Regis Corpn. .. 538

Edgelow *v.* MacElwee ([1918] 1 K.B. 205; 87 L.J.K.B. 738; 118 L.T. 177). *Explained in* Official Assignee *v.* Ek Liong Hin, Ltd. .. 440

English *v.* Bloom & London Passenger Transport Board ([1936] 2 All E.R. 1592; [1936] 2 K.B. 550; 105 L.J.K.B. 659; 155 L.T. 286). *Distinguished in* The Bosworth (No. 2).. .. 729

Farr (A. E.) Ltd. *v.* The Admiralty ([1953] 2 All E.R. 512; [1953] 1 W.L.R. 965). *Applied in* Akerib *v.* Booth & Others, Ltd. .. 481

Gilbey *v.* Gilbey ([1927] All E.R. Rep. 662; [1927] P. 197; 96 L.J.P. 55; 137 L.T. 31). *Observations referred to in* Schlesinger *v.* Schlesinger .. 721

Glamorgan Quarter Sessions *v.* Wilson ([1910] 1 K.B. 725; 79 L.J.K.B. 454; 102 L.T. 500). *Applied in* Grosvenor Place Estates, Ltd. *v.* Roberts 643

Glyn *v.* Weston Feature Film Co. ([1916] 1 Ch. 268; 85 L.J.Ch. 264; 114 L.T. 356). *Dictum of* YOUNGER, J., *applied in* Joy Music, Ltd. *v.* Sunday Pictorial Newspapers (1920), Ltd.. 703

Grant *v.* Australian Knitting Mills, Ltd. ([1935] All E.R. Rep. 215; [1936] A.C. 90; 105 L.J.P.C. 12; 154 L.T. 22). *Dictum of* LORD WRIGHT *applied in* Godley *v.* Perry 36

Gregory *v.* Queen's Proctor (1846) (7 L.T.O.S. 470). *Applied in* Re Little (*decd.*) 387

Grove (Dudley Revenue Officer) *v.* Lloyds British Testing Co., Ltd. ([1931] All E.R. Rep. 242; [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73). *Followed in* Crowe *v.* Lloyds British Testing Co., Ltd. 411

Guildford R.D.C. *v.* Penny ([1959] 2 All E.R. 113; [1959] 2 Q.B. 124; [1959] 2 W.L.R. 647). *Dictum of* LORD EVERSHED, M.R., *considered in* Marshall *v.* Nottingham City Corpn. 659

Hackney Borough Council *v.* Metropolitan Asylums Board (1924) (131 L.T. 136). *Considered in* Arbuckle Smith & Co., Ltd. *v.* Greenock Corpn. 568

Hanfstaengl *v.* Empire Palace ([1894] 3 Ch. 128, 129). *Dictum of* LINDLEY, L.J., *considered in* Joy Music, Ltd. *v.* Sunday Pictorial Newspapers (1920), Ltd. 703

Hankey *v.* Clavering ([1942] 2 All E.R. 313; [1942] 2 K.B. 329; 111 L.J.K.B. 713; 167 L.T. 194). *Dictum of* LORD GREENE, M.R., *applied in* Baker *v.* Merckel 668

Hanson *v.* Newman ([1933] All E.R. Rep. 194; [1934] Ch. 304; 103 L.J.Ch. 125; 150 L.T. 346). *Dictum of* LAWRENCE, L.J., *applied in* Jaquin *v.* Holland 402

Hichens *v.* Hichens ([1945] 1 All E.R. 453; [1945] P. 26; 114 L.J.P. 66; 172 L.T. 333). *Dictum of* LORD GODDARD *considered and applied in* Samson *v.* Samson 653

Horwood *v.* Statesman Publishing Co., Ltd. ([1929] All E.R. Rep. 558; 98 L.J.K.B. 453; 141 L.T. 57). *Observations of* SCRUTTON, L.J., *applied in* Daws *v.* Daily Sketch & Sunday Graphic, Ltd. 397

Hoystead *v.* Taxation Comr. ([1925] All E.R. Rep. 56; [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354). *Considered and criticised in* Society of Medical Officers of Health *v.* Hope 317

I.R. Comrs. *v.* Hinchy ([1959] 2 All E.R. 512; [1959] 2 Q.B. 357; [1959] 3 W.L.R. 66). *Reversed.* H.L. 505

I.R. Comrs. *v.* Sneath ([1932] All E.R. Rep. 739; [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434). *Considered in* Society of Medical Officers of Health *v.* Hope.. 317

Ivens *v.* Ivens ([1954] 3 All E.R. 446; [1955] P. 129; [1954] 3 W.L.R. 887). *Considered in* Wright *v.* Wright 678

Jamieson *v.* Jamieson ([1952] 1 All E.R. 875; [1952] A.C. 525). *Considered in* Wright *v.* Wright .. 678

Jarmain *v.* Chatterton (1882) (20 Ch.D. 493; 51 L.J.Ch. 471). *Applied in* Lenton *v.* Tregoning .. 717

Kaslefsky *v.* Kaslefsky ([1950] 2 All E.R. 401; [1951] P. 44). *Dictum of* BUCKNILL, L.J., *criticised in* Wright *v.* Wright 678

Kettlewell *v.* Kettlewell ([1898] P. 138; 67 L.J.P. 16; 77 L.T. 631). *Observations referred to in* Schlesinger *v.* Schlesinger 721

Kornatzki *v.* Oppenheimer ([1937] 4 All E.R. 133). *Applied in* Phrantzes *v.* Argenti 778

Lever Finance, Ltd. *v.* Trustee of Property of Needleman ([1956] 2 All E.R. 382, 383; [1956] Ch. 381; [1956] 3 W.L.R. 77, 78). *Dictum of* HARMAN, J., *followed in* Stroud Building Society *v.* Delamont.. 749

Lewis *v.* Lewis ([1908] P. 1; 77 L.J.P. 7; 98 L.T. 58). *Applied in* Re Little (*decd.*).. 387

London & General Bank, Re ([1895] 2 Ch. 166; 72 L.T. 611; sub nom. London & General Bank, Ltd., Theobald's Case, 64 L.J.Ch. 866). *Applied in* R. *v.* Shacter.. 61

London & Globe Finance Corpn., Re ([1903] 1 Ch. 732; 72 L.J.Ch. 370; 88 L.T. 195). *Dictum of* BUCKLEY, J., *considered in* R. *v.* Welham 260

—— *Distinction of* BUCKLEY, J., *explained and approved in* Welham *v.* Director of Public Prosecutions 805

Louis Dreyfus et Cie. *v.* Parnaso Cia. Naviera S.A. ([1959] 1 All E.R. 502; [1959] 1 Q.B. 498; [1959] 2 W.L.R. 405). *Reversed.* C.A. 759

Maritime Electric Co., Ltd. *v.* General Dairies, Ltd. ([1937] 1 All E.R. 748; [1937] A.C. 610; 106 L.J.P.C. 81; 156 L.T. 444). *Applied in* Society of Medical Officers of Health *v.* Hope .. 317

Mayo, Re ([1943] 2 All E.R. 440; [1943] Ch. 302; sub nom. Re Mayo's Will Trusts, 112 L.J.Ch. 257; 169 L.T. 205). *Applied in* Re Steed's Will Trusts 487

—— *Applied in* Jones *v.* Challenger 785

Monarch S.S. Co., Ltd. *v.* Karlshamns Oljefabriker (A.B.) ([1949] 1 All E.R. 14; [1949] A.C. 224; [1949] L.J.R. 786). *Dictum of* LORD WRIGHT *considered in* Diamond *v.* Campbell-Jones .. 583

Morelli *v.* Fitch & Gibbons ([1928] All E.R. Rep. 613; [1928] 2 K.B. 643; 97 L.J.K.B. 815; 140 L.T. 24). *Dictum of* BRANSON, J., *applied in* Godley *v.* Perry 36

Morgan, Re ([1893] 3 Ch. 222; 62 L.J.Ch. 789; 69 L.T. 407). *Considered in* Re Levy (*decd.*) .. 42

Munday *v.* Asprey (1880) (13 Ch.D. 857; 49 L.J.Ch. 216; 42 L.T. 144). *Dictum of* FRY, J., *not followed in* Parker *v.* Clark 93

N. *v.* N. ([1928] All E.R. Rep. 466; 138 L.T. 697). *Observations of* LORD MERRIVALE, P., *applied in* Schlesinger *v.* Schlesinger 721

National Assocn. of Local Government Officers *v.* Bolton Corpn. ([1942] 2 All E.R. 435; [1943] A.C. 189; 111 L.J.K.B. 685; 167 L.T. 318). *Dictum of* LORD WRIGHT *applied in* Beetham *v.* Trinidad Cement. Ltd. 274

National Deposit Friendly Society Trustees *v.* Skegness U.D.C. ([1958] 2 All E.R. 601; [1959] A.C. 293; [1958] 3 W.L.R. 172). *Explained in* Victory (Ex-Services) Assocn., Ltd. *v.* Paddington B.C. 498

Northumbrian Shipping Co., Ltd. *v.* E. Timm & Son, Ltd. ([1939] 2 All E.R. 651; [1939] A.C. 403; 108 L.J.K.B. 506; 160 L.T. 575). *Dictum of* LORD WRIGHT *applied in* Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. 193

Oriental Commercial Bank, Re, *Ex p.* European Bank (1871) (7 Ch. App. 99; 41 L.J.Ch. 217; 25 L.T. 648). *Applied in* The Liverpool (No. 2) 465

Pardy *v.* Pardy ([1939] 3 All E.R. 783; [1939] P. 303; 108 L.J.P. 147; 161 L.T. 211). *Dictum of* SIR WILFRID GREENE, M.R., *considered in* Hall *v.* Hall 91

Parkes' Settlement Trusts, Re ([1956] 1 All E.R. 843; [1956] 1 W.L.R. 412). *Dictum of* JENKINS, L.J., *approved and applied in* Parker *v.* Lord Advocate 20

Paterson Steamships, Ltd. *v.* Canadian Co-operative Wheat Producers, Ltd. ([1934] All E.R. Rep. 484; [1934] A.C. 543; 103 L.J.P.C. 169; 151 L.T. 551). *Dictum of* LORD WRIGHT *applied in* Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. 193

Payne *v.* British Time Recorder Co., Ltd. & Curtis, Ltd. ([1921] 2 K.B. 16; 90 L.J.K.B. 450; 124 L.T. 721). *Observations of* SCRUTTON, L.J., *applied in* Daws *v.* Daily Sketch & Sunday Graphic, Ltd. 397

Payne *v.* Railway Executive ([1951] 2 All E.R. 910; [1952] 1 K.B. 26). *Applied in* Judd *v.* Board of Governors of the Hammersmith, West London and St. Mark's Hospitals 607

Proudfoot *v.* Hart (1890) (25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171). *Applied in* Jaquin *v.* Holland 402

Public Trustee *v.* I.R. Comrs. ([1958] 2 All E.R. 720; [1958] Ch. 865; [1958] 3 W.L.R. 163). *Reversed.* H.L. 1

Quilter *v.* Mapleson (1882) (9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561). *Distinguished in* Re Vernazza 183

R. *v.* Birmingham (West) Rent Tribunal, *Ex p.* Edgbaston Investment Trust, Ltd. ([1951] 1 All E.R. 202; [1951] 2 K.B. 58). *Dictum of* LORD GODDARD, C.J., *disapproved in* Elmdene Estates, Ltd. *v.* White 306
R. *v.* Craske, *Ex p.* Metropolis Police Comr. ([1957] 2 All E.R. 772; [1957] 2 Q.B. 591; [1957] 3 W.L.R. 308). *Distinguished in* R. *v.* Bennett, *Ex p.* R. 335
R. *v.* Devine ([1956] 1 All E.R. 548n.; [1956] 1 W.L.R. 236). *Applied in* R. *v.* Chapman .. 452
R. *v.* Dickson ([1949] 2 All E.R. 810; [1950] 1 K.B. 394). *Explained in* Re Philpot 165
R. *v.* Hutchings (1881) (6 Q.B.D. 305; 50 L.J.M.C. 38; 44 L.T. 368). *Opinion of* LORD SELBORNE, L.C., *applied in* Society of Medical Officers of Health *v.* Hope 317
R. *v.* Ingram ([1956] 2 All E.R. 639; [1956] 2 Q.B. 424; [1956] 3 W.L.R. 309). *Explained in* R. *v.* Dawson 558
R. *v.* Luberg (1926) (135 L.T. 414). *Applied in* R. *v.* Dawson 558
R. *v.* Welham ([1960] 1 All E.R. 260; [1960] 2 W.L.R. 333). *Affirmed.* H.L. 805
Rederiakt. Transatlantic *v.* Compagnie Francaise des Phosphates de l'Oceanie (1926) (136 L.T. 619; 17 Asp. M.L.C. 216). *Distinguished in* Union of India *v.* Compania Naviera Aeolus S.A. .. 753
Rees *v.* Rees (1873) (L.R. 3 P. & D. 84; 29 L.T. 375). *Followed in* Re Little (*decd.*) 387
Reuss *v.* Picksley (1866) (L.R. 1 Exch. 342; 35 L.J.Ex. 218; 15 L.T. 25). *Applied in* Parker *v.* Clark 93
Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. ([1958] 3 All E.R. 261; [1959] 1 Q.B. 74; [1958] 3 W.L.R. 482). *Affirmed.* C.A. 193
Roberts *v.* Hopwood ([1925] All E.R. Rep. 24; [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289). *Applied in* Taylor *v.* Munrow 455
Rossage *v.* Rossage ([1960] 1 All E.R. 600; [1960] 1 W.L.R. 249). *Considered in* Hull *v.* Hull .. 378
—— *Considered in* Re J. (an infant) 603
Sass Re, *Ex p.* National Provincial Bank of England, Ltd. ([1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383). *Distinguished in* The Liverpool (No. 2) 465
Savile Settled Estates, Re ([1931] All E.R. Rep. 557; [1931] 2 Ch. 217; 100 L.J.Ch. 275; 145 L.T. 18). *Dictum of* MAUGHAM, J., *applied in* Baker *v.* Merckel 668
Scarfe *v.* Morgan (1838) (7 L.J.Ex. 326). *Dictum of* PARKE, B., *applied in* Sajan Singh *v.* Sardara Ali 269
Sedleigh-Denfield *v.* O'Callaghan ([1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. Sedleigh-Denfield *v.* St. Joseph's Society for Foreign Missions, 109 L.J.K.B. 893). *Applied in* Pemberton *v.* Bright 792
Smith *v.* Cammell Laird & Co., Ltd. ([1939] 4 All E.R. 390, 393; [1940] A.C. 258, 263; 109 L.J.K.B. 141, 144; 163 L.T. 14, 16). *Dicta of* LORD ATKIN *and* LORD RUSSELL OF KILLOWEN *applied in* Hamilton *v.* National Coal Board 76
Smith *v.* Neale (1857) (26 L.J.C.P. 143; 29 L.T.O.S. 93). *Applied in* Parker *v.* Clark 93
Smith, Hogg & Co., Ltd. *v.* Black Sea & Baltic General Insurance Co., Ltd. ([1940] 3 All E.R. 408; [1940] A.C. 1001; 109 L.J.K.B. 851; 163 L.T. 262). *Dictum of* LORD WRIGHT *applied in* Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. 193
Society of Medical Officers of Health *v.* Hope ([1959] 1 All E.R. 509; [1959] 1 Q.B. 462; [1959] 2 W.L.R. 377). *Affirmed.* H.L. 317
South African Despatch Line *v.* Owners of the Panamanian S.S. Niki ([1958] 3 All E.R. 590; [1959] 1 Q.B. 328; [1958] 3 W.L.R. 718). *Affirmed.* C.A. 285
Sperling, *In the Goods of* (1863) (33 L.J.P.M. & A. 25; 9 L.T. 348). *Followed in* In the Estate of Cook (*decd.*) 689
Squire *v.* Squire ([1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345). *Applied in* Wright *v.* Wright 678
Steed's Will Trusts, Re ([1959] 1 All E.R. 609; [1959] Ch. 354; [1959] 2 W.L.R. 470). *Affirmed.* C.A. 487
Stokes *v.* Bennett ([1953] 2 All E.R. 316; [1953] Ch. 573). *Dictum of* UPJOHN, J., *applied in* Grosvenor Place Estates, Ltd. *v.* Roberts 643
Summers (John) & Sons, Ltd. *v.* Frost ([1955] 1 All E.R. 876; [1955] A.C. 758; [1955] 2 W.L.R. 833). *Dictum of* LORD MORTON OF HENRYTON *applied in* Quintas *v.* National Smelting Co., Ltd. 104
Sussex Brick Co., Ltd., Re ([1960] 1 All E.R. 772). *Distinguished in* Re Bugle Press, Ltd. .. 768
Swain, Re (1908) (99 L.T. 606). *Dictum of* JOYCE, J., *applied in* Re Levy (*decd.*) 42
Swallow & Pearson *v.* Middlesex C.C. ([1953] 1 All E.R. 580; [1953] 1 W.L.R. 422). *Applied in* Mounsdon *v.* Weymouth and Melcombe Regis Corpn. 538
Tennant *v.* Smith ([1892] A.C. 164; 61 L.J.P.C. 18; 66 L.T. 331). *Dictum of* LORD MACNAGHTEN *applied in* Wilkins *v.* Rogerson 650
Tobacco Trade Benevolent Assocn., Re ([1951] 1 All E.R. 938; [1951] Ch. 567). *Not followed in* Re Jewish Orphanage Endowments Trusts 764
Trathan *v.* Trathan ([1955] 2 All E.R. 701; [1955] 1 W.L.R. 805). *Applied in* Pepper *v.* Pepper 529
Travers (Joseph) & Sons, Ltd. *v.* Cooper ([1915] 1 K.B. 101; 83 L.J.K.B. 1800; 111 L.T. 1096; 12 Asp. M.L.C. 569). *Dictum of* PHILLIMORE, L.J., *applied in* Akerib *v.* Booth & Others, Ltd. 481
Turner's Will Trusts, Re ([1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266). *Applied in* I.R. Comrs. *v.* Bernstein 697
Vernazza, Re ([1957] 2 All E.R. 200; [1959] 1 W.L.R. 622). *Affirmed.* C.A. 183
Victoria Laundry (Windsor), Ltd. *v.* Newman Industries, Ltd. ([1949] 1 All E.R. 1003; [1949] 2 K.B. 540). *Dictum explained in* Diamond *v.* Campbell-Jones 583
Wharton *v.* Masterman ([1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431). *Considered in* Re Levy (*decd.*) 42
White *v.* Elmdene Estates, Ltd. ([1959] 2 All E.R. 605; [1959] 3 W.L.R. 185). *Affirmed.* H.L. 306
Wilsons & Clyde Coal Co., Ltd. *v.* English ([1937] 3 All E.R. 640, 641, 646; [1938] A.C. 78, 87, 88; 106 L.J.P.C. 128, 130; 157 L.T. 412, 414). *Dicta of* LORD WRIGHT *and* LORD MAUGHAM *considered in* Riverstone Meat Co., Pty., Ltd. *v.* Lancashire Shipping Co., Ltd. 193
Wiltshire County Valuation Committee *v.* London Co-operative Society, Ltd. ([1950] 1 All E.R. 937). *Distinguished in* Longhurst *v.* Guildford Godalming & District Water Board 54

STATUTES, ETC., NOTED

PUBLIC GENERAL STATUTES

PAGE

- Adoption Act, 1958 (*c.* 5), *ss.* 3 (1), 35 (3) .. 711
- Affiliation Proceedings Act, 1957 (*c.* 55), *s.* 4 .. 524
- Bill of Rights (*c.* 2), *s.* 1, *art.* 9 .. 294
- Companies Act, 1948 (*c.* 38)—
  - *s.* 209 (1) .. 768, 772
  - *ss.* 212 (1) (*c*), 214 .. 152
  - *ss.* 328 (1) (*j*), 330, 331, 455 (1) .. 61
- Copyright Act, 1956 (*c.* 74), *ss.* 18 (3), 49 (1) .. 703
- Costs in Criminal Cases Act, 1952 (*c.* 48), *ss.* 6, 17 .. 424
- Criminal Appeal Act, 1907 (*c.* 23), *ss.* 14 (2), 21 .. 260
- Criminal Justice Act, 1948 (*c.* 58)—
  - *s.* 6 (4) .. 452
  - *s.* 21 (5) .. 165
- Debtors Act, 1869 (*c.* 62), *s.* 13 (1) .. 558
- Factories Act, 1937 (*c.* 67)—
  - *s.* 14 (1) .. 104
  - *s.* 151 (1) (*b*), (6) .. 54
- Fatal Accidents Act, 1846 (*c.* 93), *s.* 2 .. 429
- Finance Act, 1894 (*c.* 30)—
  - *s.* 1 .. 1
  - *s.* 2 (1) (*b*) .. 1
  - (*d*) .. 20
  - *s.* 9 (1) .. 553
- Finance Act, 1937 (*c.* 54), *s.* 19 (4) .. 800
- Forgery Act, 1913 (*c.* 27)—
  - *s.* 4 .. 805
  - *s.* 6 (2) .. 260, 805
- Government of Ireland Act, 1920 (*c.* 67), *s.* 5 (1) .. 65
- Hire-Purchase Act, 1938 (*c.* 53), *s.* 8 (2), (3) .. 611
- Housing Repairs and Rents Act, 1954 (*c.* 25), *s.* 41 .. 595
- Income Tax Act, 1952 (*c.* 10)—
  - *s.* 1 .. 643
  - *s.* 25 (3) (*a*) .. 505
  - *s.* 122, *Sch.* D .. 643
  - *ss.* 148, 170 (2), (3), 177 (2) .. 643
  - *s.* 405 (1), (2) .. 697
  - *Sch.* 9, Rules applicable to *Sch.* E, *r.* 1 .. 650
- Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (*c.* 17), *s.* 15 (3) .. 595
- Landlord and Tenant Act, 1927 (*c.* 36), *s.* 18 (1) .. 402
- Landlord and Tenant (Rent Control) Act, 1949 (*c.* 40), *ss.* 2 (1), (5), 18 (2) .. 306
- Landlord and Tenant Act, 1954 (*c.* 56), *ss.* 28, 65 (3) .. 301
- Landlord and Tenant (Temporary Provisions) Act, 1958 (*c.* 68), *s.* 3 (1) .. 595
- Larceny Act, 1861 (*c.* 96), *ss.* 83, 84 .. 61
- Larceny Act, 1916 (*c.* 50), *s.* 43 (3) .. 558
- Law of Property Act, 1925 (*c.* 20)—
  - *s.* 30 .. 785
  - *s.* 40 (1) .. 93
  - *s.* 99 .. 549
  - *s.* 171 (1), (5), (7) .. 393
- Law Reform (Miscellaneous Provisions) Act, 1934 (*c.* 41) .. 495
  - *ss.* 1 (2) (*c*), 2 (3) .. 429
- Legal Aid and Advice Act, 1949 (*c.* 51), *ss.* 2 (2) (*e*), 3 (4) .. 495
- Legitimacy Act, 1959 (*c.* 73), *s.* 1 (1) .. 711
- Local Government Act, 1933 (*c.* 51), *s.* 228 .. 455
- Local Government (Scotland) Act, 1947 (*c.* 43), *s.* 243 (1) (as amended by Valuation and Rating (Scotland) Act, 1956 (*c.* 60), *s.* 44, *Sch.* 7, *Part* 3), *s.* 379 (1) .. 568
- Magistrates' Courts Act, 1952 (*c.* 55), *ss.* 19 (5), 24 .. 335
- Maintenance Orders Act, 1958 (*c.* 39), *s.* 6 (3) .. 529
- Married Women's Property Act, 1882 (*c.* 75), *s.* 17 .. 653, 785
- Matrimonial Causes Act, 1950 (*c.* 25)—
  - *s.* 19 (3) .. 159
  - *s.* 20 (2) .. 721
  - *s.* 29 .. 159
  - *s.* 32 (3) .. 593
- Matrimonial Causes (Property and Maintenance) Act, 1958 (*c.* 35)—
  - *s.* 1 .. 159
  - *s.* 7 .. 653
- Mines and Quarries Act, 1954 (*c.* 70)—
  - *ss.* 48 (1), 51 (3) (*b*) .. 108
  - *s.* 81 (1) .. 76
  - *s.* 157 .. 108
- National Assistance Act, 1948 (*c.* 29), *s.* 44 (2) .. 524
- Parliamentary Papers Act, 1840 (*c.* 9), *s.* 3 .. 294
- Planning (Interim Development) Act (Northern Ireland) 1944 (*c.* 3), *ss.* 2, 6 (4) .. 65
- Planning and Housing Act (Northern Ireland), 1931 (*c.* 12), *s.* 10 (2) .. 65
- Public Bodies Corrupt Practices Act, 1889 (*c.* 69), *s.* 1 (2) .. 256
- Rating and Valuation Act, 1925 (*c.* 90), *ss.* 22 (1) (*a*), (*b*), (4) .. 411
- Rating and Valuation (Miscellaneous Provisions) Act, 1955 (*c.* 9)—
  - *s.* 5 (1), (2), (3) .. 411
  - *s.* 8 (1) (*a*) .. 433, 498
- Rent Act, 1957 (*c.* 25), *s.* 11 (1), (3), *Sch.* 4 .. 595
- Requisitioned Houses and Housing (Amendment) Act, 1955 (*c.* 24), *s.* 4 (4) .. 455

PUBLIC GENERAL STATUTES—*continued.* PAGE
Restrictive Trade Practices Act, 1956 (*c.* 68)—
  s. 6 (7) 227, 356
  s. 8 (8) 356
  s. 20 356
    (5) 227
  s. 21 (1) 227
    (*b*) 227, 356
    (*f*) 356
Sale of Goods Act, 1893 (*c.* 71), *ss.* 14 (1), (2), 15 (2) (*c*) 36
Scientific Societies Act, 1843 (*c.* 36), *s.* 1 129
Stamp Act, 1891 (*c.* 39), *Sch.* 1 686
Summary Jurisdiction (Married Women) Act, 1895 (*c.* 39), *s.* 7 529
Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *ss.* 27 (1), 51 (1) 183
Supreme Court of Judicature (Amendment) Act, 1959 (*c.* 39), *s.* 1 (1) 183
Town and Country Planning Act, 1947 (*c.* 51), *s.* 23 (1), (4) 538
Trustee Act, 1925 (*c.* 19)—
  s. 25 (4) 716
  ss. 32 (1), 69 (2) 697
Valuation for Rating Act, 1953 (*c.* 42), *s.* 2 (2), (3) (*a*) 338
Variation of Trusts Act, 1958 (*c.* 53), *s.* 1 353, 487
Wills Act, 1837 (*c.* 26), *s.* 9 387, 689
Wills Act Amendment Act, 1852 (*c.* 24), *s.* 1 387

PRIVATE STATUTE

Mersey Docks and Harbour Board Act, 1954 (*c.* xlv), *s.* 3 (3) 465

COMMONWEALTH AND DEPENDENCIES

Australian Sea Carriage of Goods Act, 1924, *arts.* III, *r.* 1, IV, *r.* 1 193
Concessions Ordinance (Laws of the Gold Coast (1951) *c.* 136), as amended, *ss.* 12 (2), (3), (4), 13 (11) 627
Crown Lands Ordinance, 1915 (Laws of Kenya, 1948, *c.* 155), *s.* 83 117
Motor Vehicles Commercial Use Regulations (of Malaya), *reg.* 3 (3), as amended 269
Northern Rhodesia Emergency Powers Regulations, 1956, *regs.* 16 (1), 47 446
Registration of Motor Vehicles Regulations, 1945 (of Malaya), *reg.* 2 269
Registration of Titles Ordinance, 1919 (Laws of Kenya, 1948, *c.* 160), *s.* 21, *Sch.* 1 117
Singapore Moneylenders Ordinance (Laws of the Colony of Singapore, 1955, *c.* 193), *s.* 2 (*d*) 440
Trade Disputes (Arbitration and Inquiry) Ordinance (Laws of Trinidad and Tobago, 1950 (*c.* 22 No. 10)), *ss.* 2 (1), 8 (1) 274
Uganda Rent Restriction Ordinance (Laws of Uganda 1951, *c.* 115), *s.* 3 (2) 177

RULES

Companies (Winding-up) Rules, 1949 (*S.I.* 1949 No. 330), *r.* 88 152
Matrimonial Causes Rules, 1957 (*S.I.* 1957 No. 619), *r.* 3 (3), *proviso* (ii), 44 (1) (as amended by Matrimonial Causes (Amendment) Rules, 1958 (*S.I.* 1958 No. 2082) 159
R.S.C.—
  Ord. 3, *r.* 10 720
  Ord. 11, *r.* 1 (*e*) 141
  Ord. 20, *r.* 10 720
  Ord. 22, *r.* 1 (2) 146
  Ord. 36, *r.* 1 (3) 709
  Ord. 36A, *r.* 7 (1) (*a*) 281
  Ord. 38, *r.* 3 600
    proviso 603
  Ord. 49, *r.* 8 397
  Ord. 55, *r.* 5A 720
Supreme Court Costs Rules, 1959, *Appendix* 2 347, 401

REGULATIONS

Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 No. 1145), *reg.* 24 (1), (5) (*d*) 775
Legal Aid (General) Regulations, 1950 (*S.I.* 1950 No. 1359), *regs.* 16, 17, as amended by *S.I.* 1954 No. 166 495

ORDERS

Coal and Other Mines (Support) Order, 1956 (*S.I.* 1956 No. 1763), *Sch.* 1, *reg.* 12 108
Town and Country Planning (Use Classes) Order, 1950 (*S.I.* 1950 No. 1131), *arts.* 2 (2), 3 (1), *schedule* 659

WORDS AND PHRASES

PAGE
Altering or cleaning .. 54
Annual voluntary contributions [voluntary character] .. 129
Appellant .. 261
Approximative cargo .. 759
Arrangement .. 487
Article .. 54
Circumstances. See "In any circumstances"; "Unforeseen circumstances".
Consideration. See "Pecuniary consideration"
Corruptly .. 256
Debris .. 108
Deemed .. 1
Defraud. See "Intent to defraud".
Deliver amended statement of claim in proper form .. 657
Development of mechanical engineering .. 129
Diligence. See "Due diligence".
Due diligence .. 193
Engineering. See "Development of mechanical engineering".
English law .. 117
Ex turpi causa non oritur actio .. 269
Folly . . . to neglect to provide it [negligence by master towards servant] .. 579, 582
Full and complete cargo .. 759
Functions [within Finance Act, 1937, *s.* 19 (4); *profits tax]* .. 800
Future tenancy .. 301
Ignorantia juris neminem excusat .. 181
In any circumstances [exemption clause] .. 481
Industrial purposes ("used wholly or mainly for industrial purposes": rating exemption) .. 411
Instituted. See "Institution".
Institution [of vexatious legal proceedings] .. 183
Intent to defraud .. 260, 805
Interlocutory .. 600
Law. See "Ignorantia juris neminem excusat".
Main principles [in relation to charity scheme] .. 764
Maintained. See "Properly maintained".
Means [within Legal Aid and Advice Act, 1949, *s.* 2 (2) (*e*)] .. 495
Mechanical engineering. See "Development of mechanical engineering".
Moneylender .. 440
Mortgage, bond, debenture, covenant .. 686
Normal deduction rate .. 529
Occupation. See "Unoccupied [rateable occupation]".
Occupied for the purposes of an organisation [rating relief] .. 433
Officer .. 61
Palm tree justice .. 655
Pecuniary consideration [in the definition of premium: Landlord and Tenant (Rent Control) Act, 1949, *s.* 18 (2)] .. 306
Platform. See "Temporary platform".
Powers .. 446
Premium .. 306
Principles. See "Main principles".
Proceedings. See "Vexatious legal proceedings".
Properly maintained [Mines and Quarries Act, 1954, *s.* 81 (1)] .. 76
Public officer .. 61
Purposes ("for the purposes whereof he lends money") .. 440
  See also "Occupied for the purposes of . . ."
Purposes of science .. 129
Reversionary tenancy .. 301
Science. See "Purposes of science . . ."
Shop .. 659
Social welfare .. 498
Temporary platform [Building (Safety, Health and Welfare) Regulations, 1948, *reg.* 24] .. 775
Trade dispute .. 274
Unforeseen circumstances .. 618
Unoccupied [rateable occupation] .. 568
Vexatious legal proceedings .. 183
Voluntary contributions. See "Annual voluntary contributions".

CORRIGENDA

[1959] 3 All E.R.

p. 781. HOURY *v.* COMMISSIONER OF INCOME TAX. Line H.2: for "s. 392" read "s. 393".

[1960] 1 All E.R.

p. 53. Re LEVY (*decd.*). Solicitors for the fifth and sixth defendants: read "*Hyman Isaacs, Lewis & Mills* (for the fifth defendant); *Malcolme Slowe & Co.* (for the sixth defendant)"; instead of as printed.

p. 64. R. *v.* SHACTER. Solicitor for the Crown: read "*Solicitor, Board of Trade*" instead of as printed.

p. 66 BELFAST CORPN. *v.* O. D. CARS, LTD. Line C.5: for "SHEILL, J." read "SHEIL, J."

p. 133. INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE. Line C.4: After "exclusively" insert "scientific any more than it can be said to be exclusively".

p. 258. R. *v.* SMITH. Line H.1: for "read the action" read "read the section".

p. 289. SOUTH AFRICAN DESPATCH LINE *v.* OWNERS OF THE PANAMANIAN S.S. NIKI. Line C.6: for "duty to land" read "duty to load".

p. 351. ISAAC *v.* HOTEL DE PARIS, LTD. Line G.5: for "May 27, 1957" read "May 27, 1958".

THE
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PUBLIC TRUSTEE *v.* INLAND REVENUE COMMISSIONERS.

D [HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), November 5, 9, 10, December 14, 1959.]

Estate Duty—Exemption—Interest as holder of an office—Share of income of residuary estate given to trustee for life while a trustee—Death of trustee—Whether capital of share exempted from liability to duty—Finance Act,
E 1894 (57 *&* 58 *Vict.* c. 30), *s.* 1, *s.* 2 (1) (*b*).

Estate Duty—Passing of property—Property deemed to pass—Inter-relation of s. 1 *and s.* 2 *of Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30).

Section 1 and s. 2 of the Finance Act, 1894, are not mutually exclusive. Dictum of LORD MACNAGHTEN in *Earl Cowley* v. *Inland Revenue Comrs.*
F ([1899] A.C. at p. 212) disapproved.

By his will a testator appointed A. to be one of his executors and trustees and directed that the income of his residuary estate be divided among a number of persons, of whom A. was one, in specified shares, and so that when one beneficiary died the total income was divided among the survivors or survivor. The income directed to be paid to A. was expressed to be given
G to him in respect of his acting as executor and trustee and by way of remuneration for his so doing. At the date of his death, A. was receiving $\frac{6}{99}$ of the income of the residuary estate, and estate duty was claimed on $\frac{6}{99}$ of the capital of the fund under the Finance Act, 1894, s. 1. It was not disputed that that proportion of the capital passed on A.'s death within the meaning of s. 1* of the Act of 1894, but the trustee contended
H that the claim was precluded by virtue of s. 2 (1) (b)† of that Act, which excluded " property the interest in which of the deceased . . . was only an interest as holder of an office " from property deemed by s. 2 (1) (b) to be included in property passing on the death of the deceased.

Held (LORD KEITH OF AVONHOLM dissenting): (i) the property passing on the death of A. was excluded from charge to estate duty by the words of
I exception in s. 2 (1) (b) of the Finance Act, 1894, notwithstanding that the property also fell within s. 1 of the Act (see particularly p. 9, letter D, post).

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* The terms of s. 1 are printed at p. 3, letter I, post.

† Section 2 (1) of the Finance Act, 1894, provides, so far as relevant: " (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased . . .; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office . . ."

(ii) the trusteeship of a will was an office and the deceased had received the income only as the holder and in respect of an office; thus the property on which duty was sought to be levied was within the exception in s. 2 (1) (b) notwithstanding that the income was not attached to an office (see p. 9, letter H, and p. 15, letter D, post).

A.-G. v. *Eyres* ([1909] 1 K.B. 723) applied.
Decision of the COURT OF APPEAL ([1958] 2 All E.R. 720) reversed.

[**Editorial Note.** The application of LORD MACNAGHTEN'S well-known dictum to the effect that s. 1 and s. 2 of the Finance Act, 1894, were mutually exclusive is stated to have made little practical difference to the incidence or quantum of estate duty, and it seems that only in one line of cases has it been the determining factor, namely, *Re Cassel* (*decd.*) ([1927] All E.R. Rep. 739) and *Re Duke of Norfolk* ([1950] 1 All E.R. 664); see per LORD RADCLIFFE at p. 14, letters C to F, post, cf., however, per LORD KEITH at p. 17, letter H, post.

As to interest in property as the holder of an office, see 15 HALSBURY'S LAWS (3rd Edn.) 38, para. 75; and for a case on the subject, see 21 DIGEST 46, *297*.

For the Finance Act, 1894, s. 1 and s. 2, see 9 HALSBURY'S STATUTES (2nd Edn.) 348, 350.]

Cases referred to:

A.-G. v. *Adamson*, [1932] All E.R. Rep. 159; 148 L.T. 365; sub nom. *Adamson* v. *A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; Digest Supp.

A.-G. v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 21 Digest 7, *26*.

A.-G. v. *Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, *97*.

A.-G. v. *Eyres*, [1909] 1 K.B. 723; 78 L.J.K.B. 384; 100 L.T. 396; 21 Digest 46, *297*.

A.-G. v. *Lloyds Bank, Ltd.*, [1935] All E.R. Rep. 518; [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp.

A.-G. v. *Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, *296*.

Cassel (*decd.*), *Re, Public Trustee* v. *Mountbatten*, [1927] All E.R. Rep. 739; [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.

Christie v. *Lord Advocate*, [1936] 1 All E.R. 443; [1936] A.C. 569; 105 L.J.P.C. 65; 154 L.T. 441; Digest Supp.

Cowley (*Earl*) v. *Inland Revenue Comrs.*, [1898] 1 Q.B. 355; *revsd.* H.L., [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, *27*.

De Trafford v. *A.-G.*, [1935] All E.R. Rep. 219; [1935] A.C. 280; 104 L.J.K.B. 396; 153 L.T. 17; Digest Supp.

Hood v. *Newby*, (1882), 21 Ch.D. 605; 52 L.J.Ch. 204; 47 L.T. 721; 5 Digest 925, *7569*.

Nevill v. *Inland Revenue Comrs.*, [1924] A.C. 385; 93 L.J.K.B. 321; 130 L.T. 802; 21 Digest 22, *128*.

Nokes v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 2nd Digest Supp.

Norfolk (*Duke*), *Re, Public Trustee* v. *Inland Revenue Comrs.*, [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.

Northcliffe, Re, Arnholz v. *Hudson*, [1928] All E.R. Rep. 310; [1929] 1 Ch. 327; 98 L.J.Ch. 65; 140 L.T. 300; Digest Supp.

Sanderson v. *Inland Revenue Comrs.*, [1956] 1 All E.R. 14; [1956] A.C. 491; [1956] 2 W.L.R. 98; 36 Tax Cas. 239; 3rd Digest Supp.

Appeal.

Appeal by the Public Trustee, the trustee of the will of Viscount Northcliffe, deceased, from an order of the Court of Appeal (LORD EVERSHED, M.R., ROMER and ORMEROD, L.JJ.), dated June 26, 1958, and reported [1958] 2 All E.R. 720, affirming an order of DANCKWERTS, J., dated Feb. 13, 1958, and reported [1958] 1 All E.R. 550. By an originating summons under the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, the appellant had applied for the determination of the question whether, on the death of the late Henry Preuss Arnholz, who was a trustee of the will of the deceased, estate duty became payable on a share of the testator's residuary estate corresponding to the share of the income to which the deceased trustee was entitled immediately before his death under cl. 6 of the testator's will as his trustee. By cl. 6 of his will, the testator devised and bequeathed his real and personal estate on the usual trusts for conversion, and the resulting residuary trust fund was directed to be held on trust to pay the net income arising therefrom in each year in the shares and manner directed in cl. 6. The direction in cl. 6 (26) was: "As to three equal one hundredth parts of the said income to the said Henry Preuss Arnholz during his life so long as he shall act as executor and trustee of this my will by way of remuneration for so doing and in addition to any professional charges which he may be entitled to make in accordance with cl. 23 of this my will".

John Pennycuick, Q.C., and *J. A. Wolfe* for the appellant.
Sir Lynn Ungoed-Thomas, Q.C., and *E. Blanshard Stamp* for the Crown.

Their Lordships took time for consideration.
Dec. 14. The following opinions were read.

VISCOUNT SIMONDS: My Lords, at the date of his death on Aug. 31, 1955, the late Henry Preuss Arnholz was, in the events that had happened, entitled to a fractional share amounting to 3/49½ of the income of the residuary estate of the late Lord Northcliffe. This income he enjoyed under a bequest in Lord Northcliffe's will to him "during his life so long as he shall act as executor and trustee of this my will by way of remuneration for so doing". On his death, a claim was made against the Public Trustee as his executor for estate duty on a share of Lord Northcliffe's residuary estate corresponding to the share of income to which he was entitled. The Public Trustee resisted the claim on the ground that the interest of the deceased was only an interest as holder of an office and was, therefore, exempted from estate duty. This plea having been rejected by the Commissioners of Inland Revenue, he took out an originating summons in the Chancery Division of the High Court of Justice to have the question of liability determined. It was determined adversely to him by DANCKWERTS, J., and by the Court of Appeal. Hence this appeal to your Lordships, and I will say now that it is at once as simple and as difficult a question as any that I have had to decide in the long years that I have been privileged to sit in this House.

Let me first, my Lords, set out the material parts of the sections of the Finance Act, 1894, by which for the first time the duty called "estate duty" was imposed. Section 1, which imposed the charge, provided as follows:

> "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty', at the graduated rates hereinafter mentioned, and the existing duties mentioned in Sch. 1 to this Act shall not be levied in respect of property chargeable with such estate duty."

I pause to observe that the word "passes", familiar as it has now become to us, was not in 1894 a term of art in the law relating to death duties, and that it would appear to have been a matter of sheer necessity for the Act to proceed to a definition of the area of charge. It was natural that the draftsman should do so by the use of the word " deem ", a word which, as my noble and learned friend, LORD RADCLIFFE, has said in another case (1), is apt to include the obvious, the uncertain and the impossible. So it is that s. 2 opens with the words in sub-s. (1): " Property passing on the death of the deceased shall be deemed to include the property following, that is to say: ". Then follow categories of property, some of which must, on any fair meaning of the word " pass ", be considered to pass on the death of the deceased, as to others of which there might be uncertainty and as to others there would be no doubt that, but for the deeming, they would not pass. Then, appropriately enough, there follow sub-s. (2) and sub-s. (3), of which sub-s. (2) deals with property situate out of the United Kingdom, including some part and excluding other part of such property from " property passing on the death of the deceased ", and sub-s. (3) (having recourse once more to " deeming ") provides that property passing on the death of the deceased shall not be deemed to include property held by him as trustee, and so on.

My Lords, if I were today looking at this Act for the first time, I should say that these sections were straightforward and clear, the first section imposing the charge in general terms and the second defining by inclusion and exclusion the precise area of that charge. I should unhesitatingly reject any suggestion that the two sections were in any way mutually exclusive or, as a corollary, that, if any property clearly " passed " on the death of the deceased under s. 1, it was unnecessary to look at s. 2. I should point to the first category of property which, under s. 2 (1) (a), is to be deemed to be included in property passing on the death, viz., " property of which the deceased was at the time of his death competent to dispose " and ask how this category which embraces the whole free estate of the deceased can be excluded from s. 1, and, if it must (as it clearly must) pass under that section, what meaning can so far be given to s. 2 (1), except that it is not purporting to bring into charge property which is not within s. 1 but aims at defining all the various kinds of property which it is thought fit to charge. I should then look at s. 2 (1) (b), and, bearing in mind that s. 1 referred to property " settled or not settled ", and that s. 2 (1) (a) had dealt with property that was not settled, I should expect to find that s. 2 (1) (b) dealt with settled property. And that is what I should find. In language that is apt to cover all settled property and, in particular, the commonest form of settled property, viz., property in which a life interest is given with remainders over, the second main category of property is exhaustively defined. It would not occur to me that s. 2 (1) (b) was intended to cover only property which did not pass (whatever that as yet undefined word might mean) under s. 1. Moreover, if I had any doubt, it must have been dispelled by the words which are material to the present appeal; for the paragraph proceeds to exclude from what is deemed to be included property, the interest in which of the deceased was " only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole ". It would appear to be a wholly untenable view that these words of exclusion could refer not to a life interest but only to something less than a life interest. Strange as are the conclusions to which one is sometimes driven in the consideration of taxing statutes, I doubt whether in the whole realm of tax law a more fantastic result could be reached than to say that, if a person has a life interest in property as holder of an office, duty shall be leviable in respect of that property on his death, but that, if his interest is less than a life interest, then duty shall not be leviable. I should, in fact, find in the very words that I have cited the strongest argument against a construction of the statute for which the Crown has so far successfully contended.

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(1) In *St. Aubyn (L.M.)* v. *A.-G. (No. 2)*, [1951] 2 All E.R. at p. 498, letter F, LORD RADCLIFFE said: " The word ' deemed ' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible." This was cited by LORD EVERSHED, M.R., in *Barclays Bank, Ltd.* v. *Inland Revenue Comrs.*, [1959] 3 All E.R. at p. 144.

I need say little about s. 2 (1) (c) and (d). These paragraphs bring the subject-matter within the area of charge which without a "deeming" clause would remain outside it. Nor need I say more about s. 2 (2) and (3) than that in a section which comprehensively describes the area of charge I find, as I expect, a description of those categories of property and interest which are outside that area. Thus, my Lords, I come to the end of my examination of s. 1 and s. 2 with the clear conviction, which is not weakened but rather is confirmed by other sections, that s. 2 is a categorical description of the property "settled or not settled" on which the new estate duty is imposed.

How is it then that, in the present case, DANCKWERTS, J., and the Court of Appeal have come to a conclusion which rests on a finding that the words of exclusion in s. 2 (1) (b) have no relevance to a life interest enjoyed by a person as holder of an office? My Lords, they have been driven to this conclusion by those considerations which led me at the outset of this opinion to say that I have found this simple case so difficult to decide. They are founded on expressions of opinion in this House, primarily by LORD MACNAGHTEN, but in some degree by other learned Lords also. If in what I have already said I have impliedly criticised, and if in what I now say I venture to challenge, anything that LORD MACNAGHTEN has said, I do so with the greatest diffidence. For I am well aware that to generations who have passed their lives in the law his is truly clarum et venerabile nomen. But his observations to which I must now refer have created so much doubt and difficulty that I come to the conclusion, in which I understand that the majority of your Lordships concur, that the time has come to re-examine not indeed any decision of this House nor any reasoning that was strictly necessary to such a decision but certain observations on the inter-relation of s. 1 and s. 2 which, as I humbly think, were made without full consideration of their consequences and particularly of their bearing on the words which are the special subject of this appeal.

My Lords, any discussion of this matter must begin with *Earl Cowley* v. *Inland Revenue Comrs.* (2). That case had a curious history. The facts were simple enough. A father and son (the second and third Lord Cowley) disentailed certain estates and, after mortgaging them to secure a large sum, resettled them so that a charge of an annuity was created in favour of the son and, subject thereto, the father enjoyed a life interest with remainders over. The father died and the question arose what estate duty was payable in respect of the settled estates; in particular, could a deduction be made in respect of (a) the mortgage and (b) the son's annuity? It was decided by this House that the answer to (a) was "yes" and to (b) "No". I may interpolate that it took more than fifty years to remedy by legislation (3) the palpable injustice of the second answer. But, my Lords, the curiosity of the case was this. Until it reached this House the claim of the Revenue had been based on s. 2 (1) (b). Were not the settled estates property in which the deceased father had an interest ceasing on his death? Neither in the Court of Appeal nor in the reported argument in this House nor in the formal case book, which I sent for and examined, was there any suggestion that the revenue claim was based not on s. 2 (1) (b) but on s. 1 to the exclusion of that section. Nine months passed, *A.-G.* v. *Beech* (4) having in the meantime been decided in this House, and then the judgment was given in which for the first time in the familiar words of LORD MACNAGHTEN (5) the suggestion was made that "if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive." It is undeniable that the learned Lord expanded on this theme. But to me it seems plain that his observation was per incuriam and that when he said (6) " Section 2 might with equal propriety be headed, ' and with regard to property not passing on death ' ", he had forgotten sub-s. (2) and sub-s. (3) of s. 2, and forgotten, too, the words of s. 2 (1) (a) and the definition of those words in s. 22 (2) (a). No other explanation of his speech has ever to my knowledge been offered until this hour.

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(2) [1899] A.C. 198.
(3) See the Finance Act, 1956, s. 32; 36 HALSBURY'S STATUTES (2nd Edn.) 345.
(4) [1899] A.C. 53.
(5) [1899] A.C. at p. 212.

My Lords, I do not get any assistance from *A.-G.* v. *Beech* (7) which, as I have said, was heard and determined while *Cowley's* case (8) was in gremio. But it is at least clear that the revenue claim was based on s. 2 (1) (b) (see [1899] A.C. bottom of p. 53), and that the mutual exclusiveness of s. 1 and s. 2 was not advanced on either side. I return to *Cowley's* case (8). In the speech of Lord Morris, there is at least an indication that the provisions of s. 2 (1) (b) were uppermost in his mind. The speech of Lord Shand is neutral. In that of Lord Davey, I find much that puzzles me. That learned Lord, having said that he agreed with Lord Macnaghten as to the construction of the Act and that the case clearly fell within the first section, said (9): " But, in my opinion, whether it falls within the first or second section we arrive at the same result ", then briefly stated the effect of those sections and proceeded: " The only material words for the present purpose are in sub-s. (1) (b) [i.e., of s. 2] ", which he cited. Thus, my Lords, for him the only material words were in a section which Lord Macnaghten (with whom he agreed) had said should not be looked at. I have omitted to refer to the speeches which preceded that of Lord Macnaghten. In that of Lord Watson, there is no support for Lord Macnaghten's construction. On the contrary, his reference to the fact that (10) " upon his father's death no interest or benefit accrued to the appellant in respect of any part of the equitable estates . . ." shows that he had s. 2 (1) (b) in mind and determined the liability to duty by reference to that subsection. The Earl of Halsbury, L.C., on the other hand, appears to have taken the same view as Lord Macnaghten. I must cite his words (11):

> " I see no ground for dealing with s. 2, since, for the reasons I have given, I think it is s. 1 to which you must look to see what property real or personal, settled or not settled, passed upon the death of the second to the third Earl; but if I were compelled to give a construction to s. 2 (1) (b), I should come to the same conclusion in respect to the liability to duty, since I think the benefit accruing or arising to the third Earl was only to the extent of the value of the equity of redemption. But, as I have said, the question must be determined on s. 1 alone."

My Lords, I will refer again to *Cowley's* case (8) but now I pass on. Within a few months *A.-G.* v. *Dobree* (12) came before the court. Already the difficulty created by Lord Macnaghten's words had become obvious, and Channell, J., a very learned judge, thus expressed himself (13):

> " To my mind there is a little difficulty in fully following the exact literal words of Lord Macnaghten's judgment in *Earl Cowley* v. *Inland Revenue Comrs.* (8) with respect to cases falling within ss. 1 and 2. It is quite true that if you can arrive at the conclusion that the case falls within s. 1, then s. 2 may be said to be excluded—you do not want s. 2. But one of the operations of s. 2 seems to me clearly to be to sweep into s. 1 some cases which might be doubtful upon the construction of s. 1, but which s. 2 includes in clear words, and therefore brings them in to be subject to the duty, whether they were within s. 1 on the true interpretation of it, or not. I

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(6) [1899] A.C. at p. 212.

(7) [1899] A.C. 53.

(8) [1899] A.C. 198.

(9) [1899] A.C. at pp. 218, 219.

(10) [1899] A.C. at p. 210.

(11) [1899] A.C. at p. 207.

(12) [1900] 1 Q.B. 442.

(13) [1900] 1 Q.B. at p. 450.

> think that Lord Macnaghten must have meant that in such cases, if you took the trouble to decide whether they were within s. 1 or not, and came to the conclusion that they were, then you would not want s. 2. At any rate, it was not necessary for him in the case before him to express an opinion contrary to what I have said."

These observations were, no doubt, directed to the argument of Mr. Haldane, Q.C. (14): "The two sections are distinct and mutually exclusive. If a case falls within s. 2 it cannot co within s. 1." I shall call in aid the last words that I have cited of the learned judge, which appear to me incontrovertible.

My Lords, I will now refer to two cases decided in this House, *A.-G.* v. *Milne* (15) and *Nevill* v. *Inland Revenue Comrs.* (16). In neither case was the validity of Lord Macnaghten's words in *Cowley's* case (17) necessary to the decision. I cite them to illustrate the surprising confusion that has grown up around these words. In the first case, Viscount Haldane, L.C., after referring to *Cowley's* case (17) said (18): "Section 2 is thus not a definition section, but an independent section operating outside the field of s. 1." In the latter case, the same learned Lord said (19):

> "'Passes' may be taken as meaning 'changes hands'. The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all . . ."

Lord Haldane, whose irreconcilable statements encourage a new look at the sections, was the only learned Lord to take part in both cases. I do not find that any other Lord who took part in *Nevill's* case (16) expressly or impliedly dissented from his view of the inter-relation of the sections. It was otherwise in *Milne's* case (15). In that case, Lord Atkinson appears to have adopted Lord Haldane's earlier view, treating s. 2 as merely supplementary to s. 1 and as designed to make liable to estate duty certain dispositions of property which were outside the scope and beyond the reach of s. 1. He said (20): "This section, however, is not a definition section". He did not, however, say (and this is significant) that the two sections were mutually exclusive. Section 2 may well not be a definition section in the sense that any property escapes the charge which is not included in it, though I have not for myself been able to think of any property which would not be so included. It does not follow that the same property may not be caught by the general words in s. 1 (Lord Haldane's "principle" in *Nevill's* case (16)) and by the categorical description in s. 2. It is, I think, possible to attribute this meaning also to Lord Parker of Waddington's words (21): "It is in no sense a definition section". If so, I would agree with it, as I think did my noble and learned friend, Lord Radcliffe, in a case to which I will presently refer. Lord Dunedin took a different view. Having said "Whether Lord Macnaghten was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little", he added (22):

> "It seems to me that that is as much as to say that the words, 'property passing on the death,' in the first section, are to be read as if the words, 'including the property following, that is to say'—(and then all the sub-sections)—had been there inserted."

My Lords, I find it difficult to see how Lord Dunedin's view could march with Lord Macnaghten's words. But perhaps his statement that it mattered little whether Lord Macnaghten was strictly correct or not meant that he thought he was clearly wrong.

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(14) [1900] 1 Q.B. at p. 447.
(15) [1914] A.C. 765.
(16) [1924] A.C. 385.
(17) [1899] A.C. 198.
(18) [1914] A.C. at p. 769.
(19) [1924] A.C. at p. 389.
(20) [1914] A.C. at p. 773.
(21) [1914] A.C. at p. 779
(22) [1914] A.C. at p. 775.

The next case in this House on which reliance was placed was *A.-G.* v. *Adamson* (23). But I think it unnecessary to pause over it, for it throws no light on the inter-relation of the two sections except to illustrate the confusion of mind which *Cowley's* case (24) has caused.

I come to *De Trafford* v. *A.-G.* (25). In that case the material question was the same as the second question in *Cowley's* case (24), and the answer given was inevitably the same. It was unnecessary to consider the relation of the two sections, either of which would cover the case. Lord Russell of Killowen, in whose opinion the other noble and learned Lords concurred, adopted the words of Lord Watson in *Cowley's* case (26), which, as I have already pointed out, do not rest on Lord Macnaghten's construction of the two sections. Finally, so far as decisions of this House are concerned, I must refer to *Sanderson* v. *Inland Revenue Comrs.* (27). I do so only for the purpose of saying that I concur in what my noble and learned friend, Lord Radcliffe, said in that case (28) and welcome the opportunity now given to him to elucidate this " minor mystery of the law ".

My Lords, I have not thought it necessary to refer to the numerous cases in which *Cowley's* case (24) has been commented on in the Court of Appeal. It was natural and proper that that court should feel bound to follow not only the decision but the dicta of Lord Macnaghten in that case. But I will refer to *Re Cassel (decd.), Public Trustee* v. *Mountbatten* (29) for a particular reason. That case illustrates in a special degree the importance of putting an end to the controversy about the meaning and scope of Lord Macnaghten's words. It will be remembered that *Cowley's* case (24) was a decision partly in favour of the Crown (though not on any ground urged by the Crown), and it has since that case been frequently contended that, if a case fall within s. 1, s. 2 must be disregarded. That is the whole of the argument in the case under appeal. Yet in *Re Cassel* (30), Russell, J., said:

> " This, indeed, was the contention before me of counsel for the Inland Revenue Commissioners, who contended that in the ordinary case of property settled on A. for life, with remainder to B., estate duty was leviable on A.'s death not under s. 1 simpliciter, but under s. 1 by virtue of s. 2. In other words, such a case was a s. 2 case, and not a s. 1 case . . ."

It is true that Russell, J., felt himself constrained by *Cowley's* case (24) to reject the contention which otherwise appealed to him. With great respect, I doubt whether his analysis of the speeches of all the Lords who took part in that case is correct, but my purpose in citing this case is to show into what confusion the law has been thrown when the Revenue authorities, whose duty it is to administer this difficult branch of the law, advance at one time an argument founded on Lord Macnaghten's dictum and at another an argument directly opposed to it. And, lest it should be said that *Re Cassel* (29) is after all ancient history, I will remind your Lordships that as recently as 1950, in *Re Duke of Norfolk, Public Trustee* v. *Inland Revenue Comrs.* (31), it was argued by counsel for the Crown that the fact that duty can be claimed in respect of the passing of an annuity under s. 1 does not preclude a claim for duty under s. 2 (1) (b).

This brings me, my Lords, to a point directly apposite to the present appeal. The contention of the Crown, which has so far prevailed, is that the excluding words in s. 2 (1) (b) have no application where property passes under s. 1 and that, therefore, duty is payable in respect of property held by the holder of an office for his life, or presumably by a recipient of the benefits of a charity for his life or by a corporation sole (e.g., a rector)—the last a somewhat difficult conception. Yet in the sixty-five years that have passed since the Finance Act, 1894, came into operation, such a claim has never before, so far as I or learned counsel are aware, been advanced by the Revenue authorities. In 1947, another trustee of Lord Northcliffe's will died. He, too, was entitled as trustee to a fractional share of the income of the residuary estate. Yet no claim was made for duty in respect of the proportionate share of capital. Why not? I do not find it easy to accept the suggestion that the omission was inadvertent.

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(23) [1932] All E.R. Rep. 159; [1933] A.C. 257.
(24) [1899] A.C. 198.
(25) [1935] All E.R. Rep. 219; [1935] A.C. 280.
(26) [1899] A.C. at p. 208.
(27) [1956] 1 All E.R. 14; [1956] A.C. 491.
(28) [1956] 1 All E.R. at p. 19.
(29) [1927] All E.R. Rep. 739; [1927] 2 Ch. 275.
(30) [1927] All E.R. Rep. at p. 740; [1927] 2 Ch. at p. 279.
(31) [1950] 1 All E.R. 664; [1950] Ch. 467.

What, then, my Lords, is the proper course to be taken? I believe that I yield to no one in the importance that I attach to the rule of precedent. But this case stands alone in my experience. Observations so patently wrong (may I be forgiven for saying so) that they leave only a sense of wonderment —unnecessary to the decision, for, as LORD DAVEY pointed out (32), the same result could be reached by another route—by LORD DAVEY himself accepted and dissented from in the same breath—flatly contradicted in 1924 by LORD HALDANE who in 1914 had adopted them—the source of endless doubt and confusion to all who have been concerned in the examination or administration of this branch of law—all these factors lead me to the conclusion that I can properly invite your Lordships to say that s. 1 and s. 2 are not mutually exclusive, and that the excepting words in s. 2 (1) (b) are operative in regard to property which falls within that subsection even though that property may fall also within the wide words of s. 1. And I feel the less reluctance in doing so because these very words, had they been called to the attention of the House in *Cowley's* case (33), might well have led to re-examination of the sections and to a different conclusion, and because I do not think that in any reported case the same conclusions could not have been reached if the construction of s. 1 and s. 2 which I submit had been adopted.

A further point was taken on behalf of the Crown with which I can deal briefly. It is stated in the formal reasons of the Crown thus:

> "Because on the true construction of the exception . . . it is limited in its application to interests attached to an office and which the deceased had virtute officii and does not extend to interests not attached to an office and which the deceased merely enjoyed as an individual so long as he held a particular office."

If these words are intended to cut down the plain words of exception in the subsection I see no justification for substituting them. The words of the statute and of the will are equally clear. Mr. Arnholz received a share of income during his life so long as he acted as executor and trustee of the will by way of remuneration for so doing. His trusteeship was an office and there is no reason for saying that his beneficial interest in the property was any other than in respect of that office. This is in accordance with the decision in *A.-G.* v. *Eyres* (34), the correctness of which has never, I think, been questioned.

In these circumstances, I am of the opinion that the judgment of the Court of Appeal should be reversed, that the question asked by the originating summons should be answered in the negative and that the Crown should pay the appellant's costs here and in the courts below.

LORD RADCLIFFE: My Lords, I agree that the interest of the late Mr. Arnholz in the income of Lord Northcliffe's residuary estate was "only an interest as holder of an office" within the meaning of s. 2 (1) (b) of the Finance Act, 1894. I do not think it necessary to add anything to what has been said on that point by my noble and learned friend, VISCOUNT SIMONDS. In saying that, however, I have begged the main question that was the subject of argument in your

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(32) [1899] A.C. at p. 219.

(33) [1899] A.C. 198.

(34) [1909] 1 K.B. 723.

Lordship's House; for the case for the Commissioners of Inland Revenue was founded on the proposition that, though Mr. Arnholz's interest was conferred by the will as a right to

> " three equal one hundredth parts of the said income . . . during his life so long as he shall act as executor and trustee ",

this did not mean that the trust fund in which he enjoyed that interest was property in which he had an interest ceasing on his death such as is referred to in s. 2 (1) (b), and that, accordingly, the exception from the class of property mentioned in that subsection of any property in which the deceased was interested only as holder of an office could not apply to his case. The proposition as thus stated by me is contorted. But then I think that the construction of s. 1 and s. 2 which the commissioners invite us to adopt is itself singularly contorted. That is not their fault. Their reading seems, at any rate at first sight, to have tradition behind it, even if the original pronouncement of LORD MACNAGHTEN from which it is derived has been, I believe, much more often repeated than it has been understood. I can only say that, at the end of the day, I am relieved to find that we are not constrained by any authority to impose on ourselves a construction of taxing provisions which seems to me as much contrary to the plain meaning of the Act as it would be frivolously capricious in its result.

If one were to undertake in 1959 the very difficult task of interpreting the scheme of the Finance Act, 1894, without knowledge of the two generations of judicial decision that have imparted to such words as " passing on death " exact shades of meaning that could not originally have been discerned, I believe that the general purport of the Act and the inter-relation of its parts would still be tolerably clear. Settled estate duty apart, s. 1 would be read as the section that imposed the charge of duty for all the purposes of the Act and it would be noted that the duty is granted on " all property, real or personal, settled or not settled, which passes on . . . death ". It would be appreciated that the words " passing on death " had not at that time any precise significance in law; that they were not words of art or technical import; and that the conception of " estate duty " that was then being imposed was in many of its aspects radically different from the conceptions that had governed the familiar legacy and succession duties. Nor, since it was to be imposed on property settled as well as property not settled, did it present itself as another form of probate duty. So approached, s. 2 seems to be a natural sequel of s. 1. Its purpose is to explain and refine on the meaning of the words " property . . . which passes on . . . death " which s. 1 had declared to be subject to the charge of duty. Subsection (1), therefore, selects certain categories of property and, aided by the interpretation section, s. 22, brings them expressly under the description of property passing on death, indifferent to the question whether, if it itself had not been part of the original scheme of the Finance Act, 1894, any one of those categories or any particular form of property falling within one of the categories would, or would not, have been treated by the courts as covered by the general words of s. 1. I can see no significance one way or the other in the fact that it declares its purpose by saying that the categories selected shall be " deemed " to be included in the "property passing " which is charged by s. 1. Such a phrase gives statutory certainty to what might otherwise be in some aspects uncertain and, in a few, impossible. Thus, sub-s. (1) (a) names a category, " Property of which the deceased was . . . competent to dispose ", which seems plainly to embrace all property which was within his absolute disposition at his death. Other uses of the same phrase in other sections of the Act show that there at least it is used in this general sense. Subsection (1) (b), consistently with this, names a category " Property in which the deceased or any other person had an interest ceasing on the death of the deceased "; this seems the apt and natural expression to describe settled property in which the deceased had a life interest, settled property in which some other person had an interest terminable with the life of the deceased, and property in which there subsisted some interest for life, such as a life annuity, which did not carry the ownership of the whole income. No doubt, much that is described in these two heads of s. 2 (1) would have been charged in any event by force of the words used in s. 1. In that sense, it is permissible to say of s. 2 (1), as has so often been said, that it " sweeps up " what is not covered by s. 1. But that is to describe its effect, or rather the effect that s. 1 would have in the hypothetical situation of s. 1 standing without s. 2. It is not to describe its construction; and the distinction is important.

Having thus dealt with the two main heads of property, the situation of which was such that it was to be regarded as passing on death, sub-s. (1) adds two other categories, of which it is enough to say that some cases that fall within them would anyway, most would certainly not without them, have been regarded as passing on death. Subsection (2), on the other hand, provided a rule for determining whether property situate outside the United Kingdom, assuming that it came within the description now established of what passed on death, should be subject to or exempt from duty. Subsection (3) deals with the special case of the passing of property on the death of a trustee holder. No one has ever questioned that the rules of inclusion or exemption contained in sub-s. (2) and sub-s. (3) apply to all property within, or that would otherwise be within, the charge imposed by the terms of s. 1.

I think that, in the first years after the Act of 1894 came into force, its structure must have been generally understood to be as I have described it above. In particular, s. 2 (1) (b) was regarded as being applicable to the interest of a life tenant of settled property. No doubt this era must now be looked back on as some primitive golden age in the history of judicial dealings with the Estate Duty Act; but I cannot otherwise explain how it was that, when *Earl Cowley* v. *Inland Revenue Comrs.* (35) came before the courts, it was throughout argued by counsel on both sides on the basis that it was the words of s. 2 (1) (b) that provided the statutory rule for determining what property passed on the termination of a life interest in settled property such as was then in question. Neither side raised or argued any issue to the contrary. The real controversy in the *Cowley* case (36) was about something different, whether, a mortgage having been effected under a joint power of appointment created by tenant for life and remainderman on a resettlement, what was to be treated as passing on the life tenant's death was the equity of redemption, not the unincumbered fee. It was only when the House of Lords came to deliver their speeches on that issue that there appeared for the first time in the speech of LORD MACNAGHTEN (37) this theory of the " mutual exclusiveness " of s. 1 and s. 2 which is solely responsible for the difficulty in the present case.

The purport of the *Cowley* decision (36) has been fully analysed in the speech which my noble and learned friend has just delivered. I do not want to take up time by repeating or enlarging on it. All that I am concerned to state is what I think that authority amounts to for the purpose that we have now in hand. I accept that nearly every member of the House who took part in the decision held that settled property in which a life interest terminated " passed under " s. 1. That unfortunate phrase, however, means no more, indeed could mean no more, than that such property would have been treated as charged with duty by virtue of s. 1, even if s. 1 had stood in the context of the Act without the accompaniment of s. 2. And so, I expect, it would have been, since s. 1 contains the words " settled or not settled ", and the courts might from the first, unaided by s. 2, have grasped that general conception of passing as being equivalent to changing hands in enjoyment which after two generations has become so natural to us. I confess that, since s. 2 has from the first been as much part of the Act as s. 1, I do not understand the value of this particular form of interpretation, which is a mere essay in hypothesis, unless one is to go further, as LORD MACNAGHTEN himself did, and conclude that at no point does the property described by s. 1 coincide with or overlap the various categories of property listed in s. 2. This conclusion was not, I think, shared or laid down by any of the other members of the House who decided the case, nor did it appear to have any bearing on the outcome. On the contrary, they all seem to have thought that, though the property then in question " passed under " s. 1, it did not matter whether it was s. 1 or s. 2 (1) (b) which provided the governing words, since in either case the practical result would be the same.

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(35) [1898] 1 Q.B. 355; [1899] A.C. 198. (36) [1899] A.C. 198.
(37) [1899] A.C. at p. 212.

What the House did not decide is the question which we have here. That question can be set out as follows:—If the words of s. 2 (1) (b), " Property in which the deceased . . . had an interest ceasing on [his] death ", are a fit and natural description of the property on which duty is claimed, are the words of exemption found in that subsection which relate to the holder of an office, a recipient of charitable benefit or a corporation sole to be ignored, merely because the property would have been charged with duty by force of s. 1, even if there had been no s. 2 (1) at all? Now, if we were to treat LORD MACNAGHTEN'S own reading as if it had binding authority, I think that we should be compelled to answer that we must ignore them. For the construction that he adopted was that the categories of property which are spoken of in s. 2 are only such " residual " items of property as would not have been charged by s. 1 as passing on death if s. 1 had stood by itself. From that it would seem necessarily to follow, if you allow that on Mr. Arnholz's death a share of the trust capital " passed " within the meaning of s. 1 (see *Re Northcliffe, Arnholz* v. *Hudson* (38), *Christie* v. *Lord Advocate* (39)), that the exemption attached to s. 2 (1) (b) has no application to this capital share, since the exemption is attached exclusively to some species of property which s. 1 does not touch.

In my opinion, LORD MACNAGHTEN'S construction is mistaken. I think that there is no foundation for it to be found in the words or scheme of the Finance Act, 1894, and it introduces into the interpretation of the Act a contorted and unnatural reading of s. 2 (1) which, while normally of no practical effect, would produce in this particular case a consequence that I would regard as an absurdity. The words of s. 2 (1) (a) " Property of which the deceased was . . . competent to dispose " would shrink to signifying no more than the property over which a deceased person had possessed but had not executed a general power of appointment; the words of s. 2 (1) (b) " Property in which the deceased or any other person had an interest ceasing on the death of the deceased " would stand for no more than such property as had been subject to a terminable annuity. What meaning would be found for s. 7 (7) (a) of the Act on this construction I have never yet been able to perceive, for it is clear that, in that subsection, it is assumed that the property described in s. 2 (1) (b) may include property the deceased's interest in which extended to the whole income and which would, therefore, pass by virtue of s. 1, even if it stood alone.

I speak of the consequence of this construction as an absurdity. I do not think those words are too strong. It would mean that the framers of this Act must be supposed to have intended to establish a scheme under which relief from duty was given where an office holder had been enjoying in respect of his office, say, an annuity for life charged on property, while no relief was to be available if the profit of the office had taken the form of the enjoyment of a house or land, the income of a trust fund or a perpetual annuity. Yet no ground of policy can be suggested for exempting the one class of property and taxing the others; and of all the typical cases of property which passes on the death of an office holder, recipient of charity, or corporation sole the enjoyment of a residence stands, I should say, first.

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(38) [1928] All E.R. Rep. 310; [1929] 1 Ch. 327.
(39) [1936] 1 All E.R. 443; [1936] A.C. 569.

It is worth observing how various have been the explanations of s. 2 which have been given in this House since the *Cowley* decision (40). Perhaps the only common ground is that it is not a definition section; and that I follow, though I think that Rigby, L.J.'s description of it (41) as an "explanation" section comes very near the truth. My citations are not exhaustive, but they include the following. In *A.-G.* v. *Beech* (42) (a case which was heard after, but decided before, *Cowley's* case (40)), Lord Watson said:

> "It apparently was anticipated that a court of law might place upon these words, 'which passes on the death of such person', a construction limited to property which passed in the ordinary sense of the term from the deceased into the possession and property of another person after his death. But the second section of the statute widens that interpretation very much; for it extends it to all cases where a survivor of the deceased takes a succession, or I should say rather, derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased."

This is not only very different from, but also conflicts with, Lord Macnaghten's dichotomy. Viscount Haldane, L.C., dealt with the function of s. 2 on two separate occasions. In *A.-G.* v. *Milne* (43), he said of it: "Section 2 is thus not a definition section, but an independent section operating outside the field of s. 1." In 1924, on the other hand, in *Nevill* v. *Inland Revenue Comrs.* (44), he laid it down:

> "'Passes' may be taken as meaning 'changes hands'. The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all . . ."

While I think that his two explanations must be regarded as "mutually exclusive", to borrow Lord Macnaghten's phrase, I find it much easier to relate the second to the actual form of the section. In the *Milne* case (45), Lord Dunedin expressed himself as follows about s. 2:

> "It seems to me that that is as much as to say that the words, 'property passing on the death', in the first section, are to be read as if the words, 'including the property following, that is to say'—(and then all the subsections)—had been there inserted."

I do not see how the effect of the two sections could be put more succinctly, so far as s. 2 (1) is concerned; but it is a very different reading from that of Lord Macnaghten. To complete my citations, Lord Parker of Waddington said in the same case (46):

> "The second section of the Act, by providing that property passing at the death shall be deemed to include certain kinds of property which do not in fact pass at the death, artificially enlarges the ambit of the expression 'property passing at the death'."

Any construction that is couched in such terms fails to explain why, for instance, "property of which the deceased was competent to dispose" does not cover a great deal of property which does "in fact pass at the death".

There are two reflections which have pressed on me in considering whether or not to favour this appeal. One is that, if we allow it, we find ourselves deciding that Lord Macnaghten's deliberate opinion as to the construction of the Finance Act, 1894, was on this point quite wrong. That is an unusual situation, for we are accustomed to regard with exceptional respect any pronouncement on law by that great judge. Moreover, one would expect him to have been peculiarly familiar with such a matter as the scheme and purport of this remarkable Act. I can only say that, just as it was his talent to see further beneath the surface of the law than most judges and to discern with clarity what, until he revealed it, had been unseen, so, on a very few occasions, he may have been led to perceive what was actually not there. I think that this must have been one of those rare occasions. The second disturbing aspect of our decision is the possibility that it may invalidate the reasoning on which a number of other decisions on estate duty have been founded. LORD MACNAGHTEN's exposition of the inter-relation of s. 1 and s. 2 contained the essential characteristics of a statement of legal principle; it was expressed in very precise language, and with a confidence that excluded the possibility of any alternative view. Indeed, it was not long before his words were taken to represent the *Cowley* decision (47) itself, something which, as I see it, they were far from doing. They have become entwined with a great deal of judicial analysis of the estate duty scheme. In *Re Duke of Norfolk* (48), SIR RAYMOND EVERSHED, M.R., referred to the " celebrated pronouncement " as " one of the most significant decisions on the interpretation of the Finance Act, 1894 ". Even so, despite its fame, there seem to have been very few cases in which the application of LORD MACNAGHTEN's formula has made any practical difference either in the incidence of duty or in the quantum of duty charged. In nearly every case it does not matter whether the property is regarded as passing " under " s. 1 or " under " s. 2, as " actually " passing or as " notionally " passing. That is because, in the typical instance of settled property passing on the expiry of a life interest, the prescribed method of valuation is just the same whether you apply s. 7 (5) or s. 7 (7) (a). Certainly it was not part of the Crown's argument on this appeal that a decision in favour of the appellant would have a far-reaching consequential effect on established practice. It would not be fair to press this, for the consequences may take time to work out; but I find in it some support for my own view that the Macnaghten formula has been more of theoretical than practical importance.

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(40) [1899] A.C. 198.
(41) [1898] 1 Q.B. at p. 375.
(42) [1899] A.C. at p. 58.
(43) [1914] A.C. at p. 769.
(44) [1924] A.C. at p. 389.
(45) [1914] A.C. at p. 775.
(46) [1914] A.C. at p. 779.

I have been able to detect for myself only one line of case in which this particular method of construction has been the determining agent of the judgment arrived at. These are the cases of terminable annuities settled for successive life interests. It is obvious, for instance, that in *Re Cassel (decd.)* (49) RUSSELL, J., would not have decided, contrary to his own judgment and to the argument of Mr. J. H. Stamp for the Revenue, that there was a passing " under " s. 1 and, therefore, a valuation according to s. 7 (5), if he had not thought himself compelled by LORD MACNAGHTEN's words in *Cowley* (47) to reject a passing " under " s. 2 (1) (b) and a valuation according to s. 7 (7) (b). Similarly, the foundation of the Court of Appeal's judgment in *Re Duke of Norfolk* (50) is the Macnaghten formula. It would be wrong on this occasion to say anything more about those cases; it may or may not be necessary on another occasion to find out whether they would have been decided differently even if LORD MACNAGHTEN had never spoken and to what extent in such cases a valuation according to s. 7 (7) (b) would produce any result materially different from a valuation according to s. 7 (5). Here it is necessary only to note their existence; and to observe with relief that, apart from them, there does not seem to be any line of cases the issue of which would be changed by a refusal to apply LORD MACNAGHTEN's formula for the future.

I would allow the appeal.

LORD COHEN: My Lords, under the will of the late Viscount Northcliffe, the late Henry Preuss Arnholz (to whom I shall hereafter refer as " Mr. Arnholz ") was entitled immediately prior to his death to three of the 49½ shares of the income of the residuary estate of Lord Northcliffe. The interest in the income which Mr. Arnholz enjoyed was expressed by para. (26) of cl. 6 of Lord Northcliffe's will to be given to him " during his life so long as he shall act as executor and trustee of this my will and by way of remuneration for so doing ". The Crown claimed estate duty on the share of the capital of Lord Northcliffe's residuary estate corresponding to the share of the income thereof to which Mr. Arnholz was entitled immediately before his death on the footing that it had passed on the death of Mr. Arnholz within the meaning of s. 1 of the Finance Act, 1894, but the appellant resisted this claim on the ground that liability to duty was avoided by the effect of the words in para. (b) of sub-s. (1) of s. 2 of the said Act which excludes property " the interest in which of the deceased . . . was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole ".

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(47) [1899] A.C. 198. (48) [1950] 1 All E.R. at p. 666; [1950] Ch. at p. 473.

(49) [1927] All E.R. Rep. 739; [1927] 2 Ch. 275.

(50) [1950] 1 All E.R. 664; [1950] Ch. 467.

The Crown contended (i) that this exception has no application in relation to property which passes within the meaning of s. 1, and (ii) that, in any event, the interest of Mr. Arnholz in the income of the share of the capital which passed on Mr. Arnholz's death was given to him as an individual while he was living and held office as a trustee, and was not attached to the office of trustee and was, therefore, not enjoyed by Mr. Arnholz as holder of an office within the meaning of the said para. (b). DANCKWERTS, J., rejected the Crown's second contention but upheld the first, as did the Court of Appeal. The Court of Appeal did not find it necessary to reach a conclusion on the second point. My Lords, so far as the second point is concerned, I agree with DANCKWERTS, J., that trusteeship of a will is an office within the meaning of s. 2 (1) (b), and that Mr. Arnholz received his remuneration in the form of a share of the income of Lord Northcliffe's residuary estate only as holder of that office. I cannot usefully add anything to what has been said by the noble and learned Lord on the Woolsack on this branch of the case.

I turn, therefore, to the first point. Do the words of exclusion in s. 2 (1) (b) apply to the present case since it is admitted that the property in question would pass under s. 1 even if s. 2 (1) were omitted from the Act? In approaching this question, I have in mind the words of VISCOUNT SIMON, L.C., in *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* (51), where he said: "The golden rule is that the words of a statute must prima facie be given their ordinary meaning." It was not, I think, disputed that, giving the words of the statute their ordinary meaning, the exclusion in s. 2 (1) (b) would apply to the case now before your Lordships but it was argued that your Lordships were precluded from so holding by reason of the decision of this House in *Earl Cowley* v. *Inland Revenue Comrs.* (52), and, in particular, by the reasons given by LORD MACNAGHTEN for his conclusion. The short facts of that case were that a father and a son, after disentailing, had mortgaged certain estates to an assurance company to secure £230,000, and had then resettled the estates so that, subject to a charge of annuity for the son during his father's life, the estates were held in trust for the father for life, and after his death for the son, with remainders over. The House of Lords held that the case fell under s. 1 of the Act, and that the property which passed on the father's death was the equity of redemption, without any deduction for the annuity. Thus there were two questions, first, was what passed the estate or was it only the equity of redemption? and secondly, should a deduction be made from the value of the estate or the equity in respect of the annuity? In answering the first question, LORD MACNAGHTEN said (53):

> " The two sections are mutually exclusive. Section 1 might properly, I think, be headed, ' With regard to property passing on death, be it enacted as follows.' Section 2 might with equal propriety be headed, ' And with regard to property not passing on death, be it enacted as follows.' I cannot, therefore, agree with RIGBY, L.J. (54), when he says that s. 2 is a provision 'explanatory ' of s. 1. In my opinion the two sections are quite distinct, and s. 2 throws no light on s. 1. But, then, no doubt s. 2 speaks of ' property in which the deceased . . . had an interest ceasing on the death of the

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(51) [1940] 3 All E.R. at p. 553; [1940] A.C. at p. 1022. (52) [1899] A.C. 198.

(53) [1899] A.C. at p. 212. (54) See [1898] 1 Q.B. at p. 375.

> deceased.' And that, it may be said, was just the position of the second Earl with regard to the Mornington settled estates. So it was. But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section."

If these observations are read without regard to what was the exact point before the House, they would be fatal to the appellant in the present case; but, so read, they would shut out the taxpayer not only from taking advantage of the excluding words in s. 2 (1) (b) but also from the excluding provisions of sub-s. (2) and sub-s. (3) of s. 2. This can hardly have been Lord Macnaghten's intention. Indeed, in *A.-G.* v. *Dobree* (55), where the court was considering the question of liability for duty under s. 2 (1) (d) of an interest purchased or provided by a deceased, Channell, J., referred to Lord Macnaghten's observations in *Cowley's* case (56) and suggested that some qualification seemed required on the apparently wide effect thereof. He said (57):

> " It is quite true that if you can arrive at the conclusion that the case falls within s. 1, then s. 2 may be said to be excluded—you do not want s. 2. But one of the operations of s. 2 seems to me clearly to be to sweep into s. 1 some cases which might be doubtful upon the construction of s. 1, but which s. 2 includes in clear words, and therefore brings them in to be subject to the duty, whether they were within s. 1 on the true interpretation of it, or not. I think that Lord Macnaghten must have meant that in such cases, if you took the trouble to decide whether they were within s. 1 or not, and came to the conclusion that they were, then you would not want s. 2."

My Lords, I return to *Cowley's* case (56), having in mind what was said by Jessel, M.R., as to the use of authorities in *Hood* v. *Newby* (58). He said: " You must always look to what was being discussed by the judges as well as to the words used."

Now applying the principle thus laid down by the Master of the Rolls, in *Cowley's* case (56) it is manifest that Lord Macnaghten had not in mind the excluding provisions of s. 2 and in the case before your Lordships counsel for the Crown admitted that sub-s. (2) and sub-s. (3) would apply to property passing under s. 1. This admission was justified by what was said by Lord Parker of Waddington in *A.-G.* v. *Milne* (59):

> " It [s. 2] also artificially limits such ambit [the ambit of s. 1] by expressly excluding certain kinds of property which do in fact pass at the death."

Counsel for the Crown argued, however, that the position was different as regards the excluding provision in s. 2 (1) (b); this provision, he said, comes into the deeming provisions of s. 1 and Lord Macnaghten's dictum must apply to the whole of sub-s. (1). My Lords, I am unable to agree. The material excluding provisions could equally have been expressed as a separate subsection thus:

> " Property passing on the death of the deceased shall not be deemed to include property the interest in which of the deceased or of some other person having an interest ceasing on the death of the deceased was only an interest as holder of an office ",

etc. Had it been so expressed, the provisions would plainly have been on a par with sub-s. (2) and sub-s. (3), and I do not think that the situation has been altered by the fact that, as a matter of convenience and for the sake of brevity, it is included in sub-s. (1) (b) of s. 2. I prefer to conclude that Lord Macnaghten's mind was not directed to any of the excluding provisions in any part of sub-s. (2), and that, had his attention been called to them, he would have modified his observations so as to reserve that point. In expressing this opinion, I do not, of course, intend to question the decision in *Cowley's* case (60) nor do I desire to challenge the validity of decisions such as that in *Re Duke of Norfolk* (61) which have been based thereon. But, in so far as any of the observations of learned judges in such cases might appear to support the Crown in the case now before your Lordships, they are open to the same criticism as I have made on Lord Macnaghten's speech in *Cowley's* case (60), namely, that they were not directed to any of the excluding provisions in s. 2.

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(55) [1900] 1 Q.B. 442. (56) [1899] A.C. 198. (57) [1900] 1 Q.B. at p. 450.
(58) (1882), 21 Ch.D. at p. 608. (59) [1914] A.C. at p. 779.

For the reasons that I have given, I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, for over sixty years Lord Macnaghten's judgment in *Earl Cowley* v. *Inland Revenue Comrs.* (60) has, I should have said, been accepted as laying down a leading principle in the determination of estate duty cases. It has been repeatedly followed and made the ratio of subsequent decisions, and it must in very many cases which never reached the courts have been accepted as determining the liability to duty. As recently as 1950, in *Re Duke of Norfolk* (62), it was referred to by Sir Raymond Evershed, M.R., as

> " the celebrated pronouncement of Lord Macnaghten, which has constituted one of the most significant decisions on the interpretation of the Finance Act, 1894 . . ."

In the same case, Jenkins, L.J., referred (63) to Wynn-Parry, J., in that case having held himself bound, by the decision in *Cowley* (60) as applied by Russell, J., in his judgment in *Re Cassel (decd.)* (64), to hold

> " that s. 1 and s. 2 [of the Finance Act, 1894] are mutually exclusive, and that the application of s. 1, accordingly, precluded recourse to s. 2 (1) (b) . . ."

Jenkins, L.J., proceeded (63):

> " In my judgment, the learned judge was clearly right in the conclusion to which he came, and the principles by which he was guided in arriving at it are no less binding on this court than they were on him."

These views are not, of course, binding on this House, but they evidence the general acceptance of an interpretation of the statute that plainly stems from Lord Macnaghten's pronouncement. And similar recognition of this view is not wanting in this House. It has been accepted by various of their Lordships in *A.-G.* v. *Milne* (65), *A.-G.* v. *Adamson* (66), *A.-G.* v. *Lloyds Bank, Ltd.* (67) and *Christie* v. *Lord Advocate* (68) in which case Lord Russell of Killowen had his earlier judgment in *Re Cassel (decd.)* (64) before him. A somewhat ambiguous passage in the speech of Viscount Haldane, L.C., in *Nevill* v. *Inland Revenue Comrs.* (69), a shadow of a doubt by Lord Dunedin in *A.-G.* v. *Milne* (65), and the doubts expressed by my noble and learned friend, Lord Radcliffe, in the recent case of *Sanderson* v. *Inland Revenue Comrs.* (70) would seem to be the only expressions of opinion in this House indicating anything other than a complete acceptance of Lord Macnaghten's pronouncement. It is impossible to say what effect a departure from a practice based on this pronouncement may have on the future development of estate duty law, but it could be, I should think, not inconsiderable and may lead to the building up of a new body of estate duty decisions. In this situation, I would examine afresh, but very briefly, the *Cowley* case (60).

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(60) [1899] A.C. 198. (61) [1950] 1 All E.R. 664; [1950] Ch. 467.
(62) [1950] 1 All E.R. at p. 666; [1950] Ch. at p. 473.
(63) [1950] 1 All E.R. at p. 673; [1950] Ch. at p. 484.
(64) [1927] All E.R. Rep. 739; [1927] 2 Ch. 275.
(65) [1914] A.C. 765. (66) [1932] All E.R. Rep. 159; [1933] A.C. 257.
(67) [1935] All E.R. Rep. 518; [1935] A.C. 382.
(68) [1936] 1 All E.R. 443; [1936] A.C. 569.
(69) [1924] A.C. 385. (70) [1956] 1 All E.R. 14; [1956] A.C. 491.

I would first observe that, when LORD MACNAGHTEN referred to s. 2 of the Act of 1894, he was clearly thinking of s. 2 (1) of the Act. His observations could have no application to s. 2 (2) or s. 2 (3) of the Act which brought in exceptions to the operation of s. 1 and which had no relevance at all to the subject-matter under consideration by this House. LORD MACNAGHTEN, indeed, has himself excluded these subsections for, in referring to s. 1, he said (71):

> " Subject to certain exceptions or savings, it imposes a duty called estate duty upon the principal value of all property ' settled or not settled ' which passes on death."

The main exceptions or savings are to be found in s. 2 (2) and (3), s. 3, s. 15 and s. 21.

To turn then to s. 2 (1), para. (a) and para. (b) of the subsection, taken literally and independently of any context, cover property that would come within s. 1 of the Act as well as property that would not. But these heads must be read along with the opening words of s. 2 (1): " Property passing on the death of the deceased shall be deemed to include the property following, that is to say ", and then follow para. (a), para. (b), para. (c) and para. (d). On a well-known meaning of the word " deemed ", much employed in legislation, this language may naturally be taken to mean:

> " The property following would not be property which would be capable of being property passing on death under s. 1 but it is to be taken to be such property."

This may seem nonsense when one considers the language of sub-s. (1) (a) and sub-s. (1) (b). But LORD MACNAGHTEN cannot have failed to observe the terms of these subsections. It was, I think, their very obviousness that caused him to emphasise that they must not be read as including property that came under s. 1. His reference to the view of RIGBY, L.J. (72) alone shows that the matter was clearly before his mind. Property coming under s. 2 is thus brought within s. 1, and s. 2 (1) has nothing to do with property which, from its own nature, passes on death without any need of a deeming provision. I do not say that initially this was the construction that need necessarily have been taken of the relationship of the two sections. RIGBY, L.J., in the *Cowley* case (73) took a different view, as did CHANNELL, J., a few months later in *A.-G.* v. *Dobree* (74), and the opinions expressed in the speeches delivered by your Lordships in the present case show that the opposite view was always open. What I have said is intended to epitomise in a few words what I understand to have been the train of reasoning in LORD MACNAGHTEN'S mind, as expressed much more fully in his speech delivered in the *Cowley* case (75). I find it unnecessary to quote passages from a speech, already examined by your Lordships and so well known in the law, to elaborate the point. I am not convinced that what has been accepted as settled law should now be reversed and a new chapter of estate duty law entered on afresh. It is not, I think, possible to say that each of the categories in s. 2 (1) has not a content that would apply to cases that could not come under s. 1 and which would be sufficient to explain the purpose of s. 2 (1). And I cannot think that, if there had been no s. 2, the courts would have had any difficulty in determining in the vast majority of cases what property passed on death, particularly having in view the definition in s. 22 (1) (l). It would undoubtedly have been a more limited category than the legislature intended when it introduced s. 2.

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(71) [1899] A.C. at p. 211. (72) [1899] A.C. at p. 212. (73) [1898] 1 Q.B. 355.
(74) [1900] 1 Q.B. 442. (75) [1899] A.C. 198.

But, as s. 1 includes property "settled or not settled" and as, on a cesser of life interests in settled property on death, there has been held to be a passing of property under s. 1, without any reference to s. 2, it might reasonably be assumed that this result would have been reached if there had been no s. 2 (1) in the statute at all.

My difficulties do not, however, end here. To turn to the facts of the present case, Mr. Arnholz enjoyed an aliquot share of the income of the residuary trust fund during his life so long as he should act as executor and trustee of the will and by way of remuneration for so doing. Had he enjoyed this income as an ordinary beneficiary of a life interest, estate duty would have been levied on his death as on a passing of property under s. 1. But it is claimed that, as his enjoyment was that of a holder of office as trustee, the exemption in s. 2 (1) (b) applies. Even if s. 2 (1) (b) can be invoked, I feel some difficulty in thinking that the facts bring the case within the exemption. The excluding clause appears to me to point to property the interest in which pertained to the holder of an office, or receipient of charitable benefit, or a corporation sole, and fell to be enjoyed by a succession of such persons. In such cases it could not be said that there was any true passing of property on death, but there would be an interest in property within the meaning of sub-s. (1) (b). This would satisfy the limited meaning that LORD MACNAGHTEN thought should be put on s. 2 (1). I do not, however, fail to note that there may be hereditary and remunerative offices of which it may be said that there is a true passing of property under s. 1. If so, I can see no reason why there should be any exemption from duty in the case of such property. This leads me to think that the exemption should be given a limited effect which does not apply to the facts of this case.

In the result, I am of opinion, for the reasons which I have endeavoured to express, that the appeal should be dismissed.

Appeal allowed.

Solicitors: *Russell & Arnholz* (for the appellant); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PARKER AND OTHERS *v.* LORD ADVOCATE (ON BEHALF OF INLAND REVENUE COMMISSIONERS).

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Jenkins), November 23, 24, December 15, 1959.]

Estate Duty—Passing of property—Property deemed to pass—Beneficial interest—Income of trust fund during life of settlor to be divided equally among her children—Capital of trust fund to be divided among them on her death—All children surviving settlor—Extent of beneficial interest arising or accruing on settlor's death—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*d*).

By a Scots settlement made in 1938 a trust fund was settled on trusts under which during the lifetime of the settlor the income of the trust fund was to be paid to her three children in equal shares, and on her death the trust fund was to be divided into three equal parts, and one part was to be paid over to each of the children as his or her absolute property. By Scots law the children had no interest in the trust fund before the settlor's death and after her death the trust came to an end and each child then owned one-third of the capital of the trust fund*. In 1956 the settlor died and her three children survived her. Estate duty was claimed on the capital value of the whole of the trust fund as beneficial interests accruing or arising on the settlor's death within s. 2 (1) (d)† of the Finance Act, 1894, as amplified by s. 28 of the Finance Act, 1934. It was objected on behalf of the settlor's children that the beneficial interests which accrued or arose within s. 2 (1) (d) on the settlor's death must exclude entitlement to the income of the trust fund, as they were entitled to that both before and after the settlor's death; and, accordingly, that duty was chargeable only on the difference between the capital value of the trust fund and the value of the income rights.

Held: on the settlor's death her children's right to income came to an end and instead they became entitled to corresponding shares of the capital of the trust fund; the benefits that accrued or arose, therefore, on the settlor's death extended to the capital of the whole of the trust fund on the principal value of which, accordingly, estate duty was leviable under s. 2 (1) (d).

Dictum of JENKINS, L.J. in *Re Parkes' Settlement Trusts* ([1956] 1 All E.R. at p. 843) approved and applied; decision in that case questioned on another point (see infra).

Per VISCOUNT SIMONDS: I would reserve the question whether in *Re Parkes' Settlement Trusts* ([1956] 1 All E.R. 833) it was correctly decided that duty was not payable in respect of the annuities to which the daughters were entitled on the death of the settlor (see p. 22, letter D, post).

Appeal dismissed.

[**Editorial Note.** Though the settlement was Scottish, a different result would not have been reached if it had been an English settlement in similar terms (see per LORD COHEN at p. 24, letter D, post).

As to estate duty on interests arising on death, see 15 HALSBURY'S LAWS (3rd Edn.) 25, para. 47; and for cases on the subject, see 21 DIGEST 15, 16, *73-80*.

For the Finance Act, 1894, s. 2, and the Finance Act, 1934, s. 28, see 9 HALSBURY'S STATUTES (2nd Edn.) 350, 453.]

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* The material clause of the settlement is set out at p. 25, letter G, and the opinion of LORD PATRICK on which this statement in the headnote, supra, is based is at pp. 23, 24, post.

† The relevant terms of the Finance Act, 1894, s. 2 (1), are as follows:—" Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . (d) Any annuity or other interest purchased or provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

The effect of s. 28 of the Finance Act, 1934, is conveniently stated at p. 28, letter B, post.

A Cases referred to:

A.-G. v. *Adamson*, [1932] All E.R. Rep. 159; 148 L.T. 365; sub nom. *Adamson* v. *A.-G.*, [1933] A.C. 257; 102 L.J.K.B. 129; Digest Supp.

A.-G. v. *Lloyds Bank, Ltd.*, [1935] All E.R. Rep. 518; [1935] A.C. 382; 104 L.J.K.B. 523; 152 L.T. 577; Digest Supp.

D'Avigdor-Goldsmid v. *Inland Revenue Comrs.*, [1953] 1 All E.R. 403; [1953] B A.C. 347; [1953] 2 W.L.R. 372; 3rd Digest Supp.

Inland Revenue v. *Clark's Trustees*, 1939 S.C. 11; Digest Supp.

Parkes' Settlement Trusts, Re, Midland Bank Executor & Trustee Co., Ltd. v. *Inland Revenue Comrs.*, [1956] 1 All E.R. 833; [1956] 1 W.L.R. 397; 3rd Digest Supp.

Westminster Bank, Ltd. v. *Inland Revenue Comrs.: Wrightson* v. *Inland* C *Revenue Comrs.*, [1957] 2 All E.R. 745; [1958] A.C. 210; [1957] 3 W.L.R. 427; 3rd Digest Supp.

Appeal.

Appeal by the trustees of a deed of declaration of trust, George Coats Parker, Marie Symington Parker and Elsa Balfour Parker, from an interlocutor of the D Second Division of the Court of Session (the Lord Justice-Clerk (LORD THOMSON), LORD PATRICK, LORD MACKINTOSH and LORD BLADES), dated July 9, 1958, dismissing an appeal by the appellants under the Finance Act, 1894, s. 10, against an assessment to estate duty dated Nov. 15, 1957, made by the Commissioners of Inland Revenue. The deed of declaration of trust was a settlement in Scottish form registered in the books of the Council and Session on Aug. 9, 1938. E The facts appear in the opinion of VISCOUNT SIMONDS.

John Pennycuick, Q.C., and *W. Ian Stewart* (of the Scottish Bar) for the appellants.

The Solicitor-General for Scotland (*William Grant, Q.C.*) (of the Scottish Bar), *E. Blanshard Stamp* and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondent.

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Their Lordships took time for consideration.

Dec. 15. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I am so fully in agreement with the opinion given by their Lordships of the Second Division of the Court of Session G that I can be very brief.

In the month of April, 1938, the late Mrs. Parker, whom I will call " the truster ", transferred certain investments to trustees for behoof of her three children. The trust deed (which is sufficiently and accurately described by the learned Lord Justice-Clerk (LORD THOMSON) in these terms) provided that during the truster's lifetime the three children were to be paid the whole income of the trust H fund equally among them with provision for the event of any of the children dying leaving issue or not leaving issue; on the death of the truster, the trust fund was to be divided into three parts and one part paid over to each child as his or her absolute property. There was a destination over in favour of issue of predeceasers and a survivorship clause. Vesting in the fee was clearly postponed to the date of the truster's death. The truster died on Feb. 16, 1956, survived I by her three children. All of them had then attained their majority. On the death of the truster, the respondent claimed that estate duty was payable on the whole of the trust fund under s. 2 (1) (d) of the Finance Act, 1894, on the footing that the trust fund was an interest provided by the truster and that a beneficial interest accrued to the three children on her death and that the extent of that beneficial interest was the whole corpus of the fund. This claim, which was resisted by the appellants, was held to be well founded by the Court of Session. Hence their appeal to this House, and, in spite of the strenuous and ingenious arguments of counsel on their behalf, I have no doubt that the decision was right.

It must be asked what were the rights of the beneficiaries before and after the death of the truster. Before the death, it was the usufruct of a fund in the hands of trustees during the joint lives of the beneficiary and the truster; the beneficiary had no right in the corpus of the fund; vesting was expressly postponed until the truster's death. After the death, the child, if surviving the truster, became entitled to one-third of the fund absolutely. The beneficial interest that then arose or accrued to each child was an absolute interest in one-third of the corpus subject to the expenses of administration and distribution and duties, if any. This, then, and nothing more nor less was the extent to which the interest provided by the truster must be deemed to be included in the property passing on her death.

The answer to this claim, as I understand it, is that, in order to ascertain what beneficial interest so accrues under a disposition, it must first be asked what rights of enjoyment in possession the beneficiary had immediately before the death on which the property passed. Then, the argument proceeds, the value of the rights enjoyed before the death is to be deducted from the value of the rights enjoyed after the death and duty is payable only on the excess of the one over the other. In other words, it was argued that duty is exigible only in respect of any enlargement of interest arising on the death. But this is a contention for which I can find no justification except, perhaps, within very narrow limits. I would reserve the question whether, in *Re Parkes' Settlement Trusts, Midland Bank Executor & Trustee Co., Ltd.* v. *Inland Revenue Comrs.* (1), it was correctly decided that duty was not payable in respect of the annuities to which the daughters were entitled on the death of the settlor. In that same case, the difference is emphasised between the case in which the rights of the beneficiary merely become more valuable and that in which such rights are materially changed on the death. In regard to the latter, JENKINS, L.J., said in respect of the interest accruing to the children on the death of the settlor (2):

> "I find it impossible consistently with the ratio decidendi in *A.-G.* v. *Adamson* (3), as explained in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* (4) to hold that such vested interest in capital was not a beneficial interest accruing or arising on the death of the deceased within the meaning of s. 2 (1) (d)."

So, here, the rights that accrued or arose on the death of the truster were substantially different in kind from any rights previously enjoyed by the children and no deduction can be made for any rights previously enjoyed.

I would dismiss the appeal with costs.

LORD RADCLIFFE: My Lords, I agree that the appeal should be dismissed.

The only question that we have to consider is how to apply the provisions of s. 2 (1) (d) of the Finance Act, 1894, to the interests accruing or arising under this particular declaration of trust dated Apr. 21, 1938. I do not pretend that I understand or can reconcile all that has been laid down judicially about the meaning or effect of this subsection, the purport of which seems to become only the more elusive with each authoritative explanation of what it is; but, even so, if one is to determine what were the beneficial interests which accrued or arose on the death of the settlor, Mrs. Parker, I do not see how one is to avoid going to the settlement itself and ascertaining what was the exact nature of the interests which were created by its particular terms. I am afraid that I cannot get out of this settlement anything that will aid the argument of the appellants. During the lifetime of Mrs. Parker, each child was entitled to receive the income of a share of the trust fund during his life. He was also entitled (a) to certain contingent interests in expectancy by way of accruer of the other children's shares of income during Mrs. Parker's life, and (b) to an interest in expectancy contingent on his surviving Mrs. Parker in his share of capital and, subject to contingencies, in the other shares as well. On Mrs. Parker's death, each child who survived her found that his right to receive the income of a share of the trust fund came to an end, and that what the settlement provided for him was a right to have made over to him a corresponding share of the capital of the fund as his own absolute property.

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(1) [1956] 1 All E.R. 833.

(2) [1956] 1 All E.R. at p. 843.

(3) [1932] All E.R. Rep. 159; [1933] A.C. 257.

(4) [1953] 1 All E.R. 403; [1953] A.C. 347.

In my opinion, the beneficial interest that thus accrued or arose to him was that right to capital, with all its incidental rights and advantages. I cannot see that the value of that right (which, under s. 28 of the Finance Act, 1934, has to be ascertained without regard to the pre-existing interest in expectancy) can be reduced by the circumstance that, under the settlement, it had been preceded by an interest for the same child's life which was limited to cease on the death of Mrs. Parker. It may be correct to speak of that interest as being enlarged by the death; but it seems to me that what is important for the purpose of s. 2 (1) (d) is that it was the death that was the occasion of the contingent right to capital becoming absolute and displacing the previous limited right which had come to an end.

LORD COHEN: My Lords, the question for your Lordships' decision is as follows:—Whether on the true construction of a deed of declaration of trust registered on Aug. 9, 1938, and of s. 2 (1) (d) of the Finance Act, 1894 (as amended by s. 28 of the Finance Act, 1934), estate duty became payable on the death of the truster, Mrs. Eliza Parker, on the principal value of the trust property on the footing that a beneficial interest in one-third thereof thereupon accrued or arose to each of her three children or whether, as the appellants contend, each of Mrs. Parker's children had a single continuing interest in the trust estate during Mrs. Parker's life the only effect of her death on that interest being to enlarge it.

The relevant trust purposes were (First) payment of the expenses of the administration of the trust, (Second) during the lifetime of the truster the whole income of the trust fund, less the expenses of administration, was payable to the three children equally between them. If any of them died leaving issue, the issue should take equally between them per stirpes the share of income to which his or her parent would have been entitled on survivance. If any of them died without leaving issue, the share of income of such predeceaser should accrue to the survivors equally between them. On the death of the truster, the trust fund was to be divided into three equal parts and one part paid over to each of the three children. If any child predeceased the truster leaving issue, the issue should take the parent's share. If any child predeceased the truster without leaving issue, his or her share of capital should be divided equally among the survivors and the issue of any children who predeceased leaving issue.

The Commissioners of Inland Revenue assessed the funds held under the deed of declaration of trust to estate duty under s. 2 (1) (d) of the Finance Act, 1894, on the footing that the entire trust fund was liable to estate duty because beneficial interests in the entire trust fund accrued or arose on the death of the truster. Before the Inner House, as before your Lordships, the appellants contested the correctness of this assessment, arguing that each of the children had a single continuing interest in the trust fund from the date of its execution, and that the only beneficial interest accruing or arising on the truster's death was the disappearance of the risk of his predeceasing the truster or, alternatively, that the measure of the accruing interest was the value of a reversion on a full life interest. The Inner House unanimously rejected these contentions. I respectfully agree with them. I should be content to adopt the language of LORD PATRICK in the concluding paragraph of his judgment where he said:

> " Before the death of the truster the children, according to Scots law had no interest of any kind in the trust fund. They had only a right to call on the

> trustees to administer the trust property so as to give them the income resulting from that administration according to the provisions of the trust. See per LORD PRESIDENT NORMAND in *Inland Revenue* v. *Clark's Trustees* (5). After the death of the truster the trust came to an end. Each child then owned the corpus of one-third of the trust fund. Each child's enjoyment of income would now depend on his or her own disposition, provident or otherwise, of the share of the trust fund owned by him or her. Ownership of the tree carries with it as an accessory the right to the fruits of the tree, but a right to the fruits of a tree as cultivated by oneself is a very different thing from a right to share in the fruits of an orchard cultivated by others. As I view the matter a share of the capital of the trust fund accrued or arose to each child at the date of the truster's death. The capital of the trust fund must therefore in terms of s. 2 (1) (d) be deemed to have passed at that date. The children's rights to the fruits of their respective shares of the capital after the truster's death are a mere accessory to their ownership of their shares of the capital of the trust fund. These rights certainly accrued and arose in a literal sense to the children on the death of Mrs. Parker. Moreover, they are rights substantially different in kind to any rights the children previously enjoyed."

A B C D

I should add that I do not think any different result would have been reached had the deed of declaration of trust been an English settlement in similar terms.

The Lord Justice-Clerk (LORD THOMSON) referred to the decision of the Court of Appeal in England in *Re Parkes' Settlement Trusts* (6). I agree with him that the facts of that case were similar to the case now before your Lordships; indeed, we could not allow this appeal without disapproving the decision on one point in *Re Parkes* (6). The facts of that case are set out in the headnote. By a settlement made in 1929 a settlor, who died in 1952, directed his trustees to stand possessed of the settled property on trust during his lifetime to pay the income of the trust fund equally to his two daughters so long as they both remained alive and unmarried, but so that the amount paid to each daughter was not to exceed £250 in any year, or if one of them died or married, the income payable to the other should not exceed £410 in any year. Subject to this trust the income of the surplus of the fund was to be paid equally between the surviving children of the settlor. After the death of the settlor the trustees were directed to appropriate, in respect of such of the daughters as should then be unmarried, a fund sufficient at that time to produce an annuity of £250 for her life, to be paid so long as she continued unmarried. The trustees were empowered to resort to the capital of the appropriated fund to make good any deficiency of the annual income of that fund. Subject to those trusts, the capital and income of the trust fund, including any surplus income of the appropriated fund, was to be held on trust for such of the settlor's children as should survive him and if more than one in equal shares absolutely. All the four children of the settlor survived him and both the daughters had remained unmarried. The Crown claimed estate duty under s. 2 (1) (d) of the Finance Act, 1894, first in respect of the annuities which became payable to the daughters out of the appropriated funds on the death and, second in respect of the corpus of the settled property to which the four children of the settlor became absolutely entitled at his death. Only the decision on the second claim is relevant to the point now before your Lordships. The Court of Appeal decided it in favour of the Crown. JENKINS, L.J., said (7):

E F G H I

> "Before the death of the settlor, each child had a future interest in the capital of the fund contingent on him or her surviving the settlor and uncertain as regards its amount, which depended on the number of children who might survive him. After the death of the settlor, each child had an

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(5) 1939 S.C. at p. 24.

(6) [1956] 1 All E.R. 833.

(7) [1956] 1 All E.R. at p. 843.

> absolutely vested interest in one-fourth of the capital of the trust fund, and the future income thereon. I find it impossible consistently with the ratio decidendi in *A.-G.* v. *Adamson* (8), as explained in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* (9) to hold that such vested interest in capital was not a beneficial interest accruing or arising on the death of the deceased within the meaning of s. 2 (1) (d). It is further, to my mind, quite plain that, in arriving at the extent or value of such beneficial interest, no deduction can be made in respect of the four children's interests pur autre vie in the surplus income during the life of the settlor, for these interests came to an end on his death. Any deduction in respect of their interests in expectancy is, of course, precluded by the Finance Act, 1934, s. 28."

Those observations are directly in point in the present case and I respectfully agree with them.

Appellants' counsel said that a deed having exactly the same substantive effect as the deed of declaration of trust could have been so framed as unquestionably to reduce the liability to duty to the extent for which he contended. That may be so. He went on to say that liability to estate duty ought not to depend on the mere words of the trust disposition. But in practice it must. I respectfully agree with the observations of LORD REID in *Westminster Bank, Ltd.* v. *Inland Revenue Comrs.* (10), where he said:

> " It may seem unduly technical that liability for estate duty should depend on the form of the settlement and not on the fact that a financial benefit emerges on the death, but that seems to me to be inevitable once it is found, as it was in *D'Avigdor-Goldsmid's* case (9), that ' beneficial interest ' in s. 2 (1) (d) means a legal right and not a financial benefit."

For these reasons, I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, this case raises a short point which turns on the effect, for estate duty purposes, of a clause in a trust deed on property deemed to have passed under s. 2 (1) (d) of the Finance Act, 1894. The deed takes the form of a declaration of trust, dated Apr. 21, 1938, in respect of certain investments transferred to the trustees by a Mrs. Parker for behoof of her three children. Mrs. Parker (the truster) died on Feb. 16, 1956, survived by her children, who had all attained majority. The material clause is as follows:

> " During the lifetime of the said Mrs. Eliza Balfour Coats or Parker the whole income of the trust fund shall, after deduction of the expenses of administration be paid and made over to the said children equally between them and in the event of any of them dying leaving issue, such issue shall take, equally among them, per stirpes the share of income to which their parent would have been entitled on survivance, and in the event of any of the said children dying without leaving issue, the share of income of such predeceaser shall accrue to the survivors equally between them and on the death of the said Mrs. Eliza Balfour Coats or Parker, the trust fund shall be divided into three equal parts, and one part shall be paid over to each of the said children as their absolute property and that either by transference of the investments then constituting the trust fund, or by realisation of the trust fund and payment in cash, or partly in the one way and partly in the other, in the absolute discretion of the trustees: and in the event of any of the said children predeceasing the said Mrs. Eliza Balfour Coats or Parker leaving issue, such issue shall take equally among them per stirpes, the share of capital to which their parent would have been entitled on survivance; declaring, however, that during the minority of such issue, the trustees shall

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(8) [1932] All E.R. Rep. 159; [1933] A.C. 257.
(9) [1953] 1 All E.R. 403; [1953] A.C. 347.
(10) [1957] 2 All E.R. at p. 754; [1958] A.C. at p. 230.

> retain the share of capital to which such minor issue would have been entitled, and shall pay to them the income therefrom during minority and the capital only on such issue attaining majority: and in the event of any of the said children predeceasing the said Mrs. Eliza Balfour Coats or Parker without leaving issue the share of capital effeiring to such predeceaser shall be divided equally among the survivors, and the issue, per stirpes, of any of the said children who may have predeceased leaving issue; declaring further that no interest in the trust fund shall vest in any of the beneficiaries thereunder until the death of the said Mrs. Eliza Balfour Coats or Parker."

A B

An assessment for estate duty has been made on the entire trust fund in respect of the death of Mrs. Parker under s. 2 (1) (d). The trustees appealed to the Commissioners of Inland Revenue who upheld the assessment and the trustees then appealed against the assessment to the Court of Session. The appeal was heard by the Second Division of the Court of Session who refused the appeal and granted leave to appeal to this House. The contentions of the appellants are that each of the truster's children had a single continuing interest in the trust fund, and that the only effect of her death on that interest was to enlarge it by removing the risk of the beneficiary predeceasing her. Accordingly, the value of the beneficial interest should be assessed, the argument runs, by calculating the amount, if any, by which the value of the beneficiary's interest immediately after the truster's death exceeded the value of that interest before her death. This should be calculated, it is said, either (i) by taking into account the fact that, immediately before her death, the truster was in articulo mortis so that the risk of a beneficiary's predecease was negligible and his interest at that time almost equal to the capital value of his share; or (ii) by measuring the difference in value actuarially by reference to their respective ages and the age of the truster and their eventual interests.

C D E

I find it unnecessary to consider these consequential contentions, for I find myself, in limine, in agreement with their Lordships of the Second Division that the relevant clause of the trust deed conferred no single continuing interest in the trust fund which was merely enlarged on the death of the truster. The argument for the appellants was put in its most attractive form by saying that, during the life of the truster, the children had an interest in possession in the enjoyment of the income of the trust fund, and that on the truster's death, in the events that have happened, they continue to enjoy that income. But granted they enjoy the same income, the income before and after the death is derived from quite different rights. Before the truster's death, there was merely a right in the children to call the trustees to account for their administration of the trust and to pay to them the income arising: *Inland Revenue* v. *Clark's Trustees* (11). After the death, their income derived from ownership of the corpus of the trust estate vested in them for the first time on the death of the truster. These are radically different rights. It is not possible to say that there were single continuing interests in possession enjoyed before and after the truster's death. The trust came to an end with the truster's death and the right to receive the income of the trust fund ceased with it. I am merely repeating the reasons which commended themselves to their Lordships of the Second Division and to which I cannot usefully contribute anything further. A similar question came up in *Re Parkes' Settlement Trusts* (12), on a settlement in English form the terms of which I do not find it necessary to repeat. I cite it only for the observation of LORD EVERSHED, M.R., where he said (13):

F G H I

> " But whatever the ' substance ' of the children's interests might be in the sense in which counsel used that term, it is to my mind incontrovertible that the legal effect of the settlement was to confer or give rise for the first time on the death of the settlor to an absolute interest in capital in favour of each of

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(11) 1939 S.C. 11. (12) [1956] 1 All E.R. 833. (13) [1956] 1 All E.R. at p. 836.

> the settlor's four children who survived the settlor. Those interests were, to my mind, distinct and different in kind and quality from the rights of the four children to share in surplus income during the life of the settlor."

This passage, in my opinion, precisely covers this case.

I would dismiss the appeal.

LORD JENKINS: My Lords, I agree. By a deed of declaration of trust made in the month of April, 1938, a trust fund provided by the late Mrs. Eliza Balfour Coats or Parker (hereinafter called " the deceased ") was settled on trusts whereunder during the lifetime of the deceased the income of the trust fund was to be paid to her three children in equal shares, with a gift over in the event of any child dying in the lifetime of the deceased to the issue of the child so dying, or in default of such issue by way of accruer to the surviving children equally between them; and on the death of the deceased the trust fund was to be divided into three equal parts and one part was to be paid over to each of the said children as their absolute property, with provisions of the effect that, in the event of any child dying in the lifetime of the deceased leaving issue, such issue were to take equally among them per stirpes the share of capital which their parent would have taken on survivance, and that, in the event of any of the said children dying in the lifetime of the deceased without leaving issue, the share of capital which the child so dying would have taken was to be divided equally among the survivors and the issue per stirpes of any of the said children who might have died before the deceased leaving issue. The deed also contained an express provision to the effect that no interest in the trust fund should vest in any of the beneficiaries thereunder until the death of the deceased. The deceased died on Feb. 16, 1956, survived by her three children, all of whom had attained majority; and the trust fund thereupon became immediately divisible in equal shares among the three children as their absolute property.

In these circumstances, the Commissioners of Inland Revenue assessed the entire trust fund to duty on the death of the deceased under s. 2 (1) (d) of the Finance Act, 1894, on the footing that the trust fund was, within the meaning of that provision, an " interest . . . provided by the deceased ", and was, accordingly, to be deemed to pass on the death of the deceased " to the extent of the beneficial interest accruing or arising . . . on the death of the deceased "; that a beneficial interest did so accrue or arise to each of the three children, in the shape of the absolute interest in one-third of the capital of the trust fund to which he or she then became absolutely entitled in possession; and that the beneficial interests so accruing or arising to the three children collectively extended to the whole of such capital. From this assessment, the trustees of the deed of trust appealed to the Court of Session under the provisions of s. 10 and s. 23 (1) of the Finance Act, 1894. Their appeal was refused by an interlocutor of the Second Division of the Court of Session dated July 9, 1958, and from that interlocutor the trustees, pursuant to leave granted by the Second Division of the Court of Session, now appeal to your Lordships' House.

In view of the decision in *A.-G.* v. *Adamson* (14) counsel in his argument for the appellants did not dispute that the trust fund was an interest provided by the deceased within the meaning of s. 2 (1) (d); or that any beneficial interests in the trust fund which could be shown to have accrued or arisen to the three children on the death of the deceased attracted estate duty under that provision, according to their extent when properly ascertained; or that *some* beneficial interests did so accrue or arise. His sole complaint was to the effect that the beneficial interests which did admittedly so accrue or arise did not, when properly ascertained, extend to the entire capital of the trust fund, because allowance ought to be made for the beneficial interests in possession in the income of the trust fund to which (according to his argument) the three children were entitled

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(14) [1932] All E.R. Rep. 159; [1933] A.C. 257

A before, and continued to be entitled after, the death of the deceased under the provisions of the deed of trust.

Before proceeding to examine this argument, I should refer to s. 28 of the Finance Act, 1934, which was passed to counteract the effect of the decision in *Adamson's* case (15). Under that section, the extent of any beneficial interest accruing or arising on the death of the deceased in cases falling within s. 2 (1) (d)

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> " . . . shall be ascertained, and shall be deemed always to have been ascertainable, without regard to any interest in expectancy the beneficiary may have had therein before the death."

It follows that the extent of the beneficial interests here in question must be ascertained without regard to the value of the interest in expectancy in one-third of the capital of the trust fund to which each child was entitled immediately before the death of the deceased contingently on surviving her. C

Accepting this, as he must, counsel for the appellants seeks to reduce the extent of the beneficial interests accruing or arising on the death of the deceased by reference to pre-existing interests in possession as distinct from pre-existing interests in expectancy, and he puts his case in this way. He says that from the date of the deed of trust each child became in any event entitled in possession D to a life interest in one-third of the income of the trust fund; and that the death of the deceased only affected the position in that it removed the risk to which each child was subject of losing his or her interest in the trust fund through dying in the lifetime of the deceased, and enlarged each child's life interest into an absolute interest. He submits, accordingly, that the beneficial interest accruing or arising to each child on the death of the deceased must be limited to the E difference between the value at the death of the deceased of one-third of the capital of the trust fund and the value at the same date of an interest for the life of that child in a like share of such capital. The life interest, he says, cannot be treated as part of the beneficial interest accruing or arising on the death of the deceased, because the child already had it before the death of the deceased.

I cannot accept this argument, which appears to me to do violence to the F provisions of the deed of trust as they actually stand. It is plain that, under those provisions, the income trusts are confined to the period from the date of the deed down to the date of the death of the deceased. During that period, if he or she so long lives, each child is entitled to one-third of the income, or it may be more in the event of accruer by reason of the death of one or both of the others without issue. On the death of the deceased, the income trusts come to an end, and there G arise new and distinct trusts of a different character for the payment to each child if then living of one-third of the capital of the trust fund as his or her absolute property, with the provisions already described for the substitution of the issue of any child dying in the lifetime of the deceased, and for the accruer to the other children or their issue of the share of any child dying in the lifetime of the deceased without leaving issue. During the lifetime of the deceased, these trusts of capital H conferred no more than contingent future interests, and the persons to become actually entitled under them were not, and could not be, ascertained until the death of the deceased. In the event which happened of all three children surviving the deceased, the trust of capital which actually took effect was the primary trust to divide it among them in equal shares as their absolute property, and this trust took effect in their favour on the death of the deceased by reason of the fact that I they survived the deceased. It appears to me that the designation of a " beneficial interest accruing or arising on the death of the deceased " is wholly apt to describe the entire interest in capital taken by each child on the death of the deceased under this trust, and that, in ascertaining the extent of such beneficial interest, there is no ground for making any deduction in respect of the very different interest previously enjoyed by the child under the trusts of income which the death of the deceased had brought to an end. I cannot reconcile with the terms of the deed counsel for the appellants' submission to the effect that each child took from the outset a life interest in one-third of the income of the fund continuing after the death of the deceased. This prolongation of a child's life interest, as I understand the argument, depends on the theory that each child on receiving his or her share of capital became an absolute owner of such share entitled to whatever income it might produce, and thus remained life tenant of the share, albeit also entitled if so minded to dispose of the capital. I find it impossible to accept this novel doctrine; and even if (contrary to my view) the theory that each child is to be considered as a life tenant of the absolute interest in capital taken by him or her on the death of the deceased is tenable at all, I fail to see any justification for tacking this constructive life interest, depending as it did on the child surviving the deceased and so becoming absolutely entitled to one-third of the capital, on to the interest in income which ceased on the death of the deceased, so as to piece together one continuous life interest in one-third of the income beginning at the date of the deed and persisting after the death of the deceased. Moreover, quoad the period of prolongation, this so-called life tenancy would itself be a product of the receipt by the child of his or her share of capital, or in other words an incident of the beneficial interest accruing or arising to the child on the death of the deceased in the shape of the right to enjoy the income produced by his or her share of capital when paid over. I do not see how this incident of the beneficial interest accruing or arising can constitute a proper deduction from the value of that interest for the purposes of s. 2 (1) (d). Indeed, it would form part of the interest in expectancy which the child had in the share of capital before the death and, accordingly, could not be deducted consistently with s. 28 of the Finance Act, 1934.

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(15) [1932] All E.R. Rep. 159; [1933] A.C. 257.

In the course of the argument, your Lordships were referred to a number of cases including *A.-G.* v. *Adamson* (16) and *A.-G.* v. *Lloyds Bank, Ltd.* (17). These cases, so far as they decided that regard should be had to expectant interests in measuring for the purposes of s. 2 (1) (d) of the Act of 1894 the extent of the benefit accruing or arising, have been displaced by s. 28 of the Finance Act, 1934, but this passage in the speech of Lord Buckmaster in *A.-G.* v. *Adamson* (18) has some bearing on the present case. Lord Buckmaster there said, in holding that s. 2 (1) (d) applied:

> " The interest here provided by the deceased was materially changed at his death from being an interest liable to be divested and contingent into an interest absolute and undefeatable, and that new interest arose on the death of the deceased."

The following passage to the like effect occurs in the speech of Lord Warrington of Clyffe (19), where Lord Warrington, after rejecting the claim to duty on the ground of an actual passing under s. 1, continued as follows:

> " But this does not conclude the matter. It is still necessary to consider the alternative claim of the Crown under s. 2 (1) (d). This section, unlike s. 1, which deals only with property as a whole, brings within the ambit of the charge individual interests provided by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the interest of each child was unquestionably provided by the deceased, and is, therefore, to be deemed to be included in the expression ' property passing on the death of the deceased ', but only to the extent of the beneficial interest accruing or arising on the death of the deceased. Prior to his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death

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(16) [1932] All E.R. Rep. 159; [1933] A.C. 257.
(17) [1935] All E.R. Rep. 518; [1935] A.C. 382.
(18) [1932] All E.R. Rep. at p. 164; [1933] A.C. at p. 268.
(19) [1932] All E.R. Rep. at p. 168; [1933] A.C. at p. 277.

> of the child in the lifetime of the deceased; on his death without exercising A his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value, if any, of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under s. 1 be charged with duty accordingly." B

So far as this passage limits the beneficial interest accruing or arising on the death to the excess in value of that beneficial interest over the interest (sc. the interest in expectancy) to which the child was entitled previously to the death of the deceased, it has, as already mentioned, been overruled by s. 28 of the Finance Act, 1934, but it still affords authoritative guidance as to the character of the changes of beneficial interest on a death to which s. 2 (1) (d) is directed. C

On the other hand, in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* (20) it was sought to charge with duty under s. 2 (1) (d) as a beneficial interest accruing or arising on the death of the deceased the proceeds of a policy of insurance on the life of the deceased to which a son of the deceased had become absolutely entitled in the deceased's lifetime, and it was held in your Lordships' House (reversing the decision of the Court of Appeal) that this claim was ill founded, D inasmuch as the death of the deceased merely enhanced the value of an asset (viz., the contract of assurance) of which the son was already the absolute owner, and, accordingly, no beneficial interest which the son had not previously possessed accrued or arose to the son on the death of the deceased. The ratio decidendi of this case sufficiently appears from the speech of LORD PORTER and that of LORD REID. LORD PORTER said (21): E

> "From the date of the assignment to him in 1934, the appellant was the absolute owner of the policy and, subject to payment of the premium, entitled to receive the sum insured, with any bonus, when the stipulated time of payment, viz., the death, had been reached. He did not get a new interest: he obtained the fruition of the interest which he already held. As one of your F Lordships expressed it in the course of argument, the value of the chose in action is increased, the interest of the beneficiary is not altered."

LORD PORTER said later (22):

> "In *Adamson's* case (23) there was, as the majority of their Lordships held, a change in the interest of the beneficiaries: before the death they had a G contingent interest which might have been divested; after it they had a vested interest. The reasoning is best seen in the observations of LORD WARRINGTON OF CLYFFE."

Then, after citing the passage from the speech of LORD WARRINGTON to which I have already referred, LORD PORTER continued:

> "On that reasoning there was as a result of the death a change in the rights H which each child enjoyed. Until it occurred he might have got all or nothing or some intermediate sum: afterwards his rights were finally determined. The case differs from the present one in which the rights of the appellant have not changed. He is, and has been since 1934, full and absolute owner of the policy. All that has happened is that, though its value is greater, his interest is the same. It follows that, in my view, this alternative argument, like that I previously presented, should not succeed."

LORD REID said (24):

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(20) [1953] 1 All E.R. 403; [1953] A.C. 347.
(21) [1953] 1 All E.R. at p. 407; [1953] A.C. at p. 364.
(22) [1953] 1 All E.R. at p. 408; [1953] A.C. at p. 365.
(23) [1932] All E.R. Rep. 159; [1933] A.C. 257.
(24) [1953] 1 All E.R. at p. 415; [1953] A.C. at p. 375.

> "In the cases where the Crown has succeeded it has been because it was held that some right or property of a different kind from that previously enjoyed by the beneficiary arose or accrued on the death or the right of the beneficiary was in some way enlarged or altered and not merely because the beneficiary's existing right became more valuable after the death."

In *Westminster Bank, Ltd.* v. *Inland Revenue Comrs.* and *Wrightson* v. *Inland Revenue Comrs.* (25), which concerned insurance policies comprised in settlements, a majority of your Lordships' House reached the same conclusion as in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* (26) by a similar process of reasoning.

I would finally refer to the case in the Court of Appeal of *Re Parkes' Settlement Trusts* (27). In that case, a settlor who died in 1952 had, by a settlement made in 1929, settled a fund on trust during his lifetime to pay the income of the fund to his two daughters in equal shares so long as they remained alive and unmarried, but not exceeding £250 to each of them in any one year. Subject to this trust, the income was to be paid equally between the surviving children of the settlor. After the death of the settlor, the trustees were directed to appropriate in respect of each daughter then unmarried a fund sufficient to produce an annuity of £250 for her life with power to resort to capital. Subject to those trusts, the capital and income of the fund, including any surplus income of the appropriated fund, was to be held in trust for such of the settlor's children as should survive him and if more than one in equal shares. All four children of the settlor survived him and both the daughters remained unmarried. Estate duty was claimed under s. 2 (1) (d) first in respect of the annuities which became payable out of the appropriated funds on the death, and secondly in respect of the corpus of the settled property to which the four children of the settlor became absolutely entitled at his death. It was held by the Court of Appeal that the first of these claims failed, on the ground that the effect of the trusts of income during the settlor's life was to entitle each daughter so long as she remained alive and unmarried to an annual payment of £250 out of the income of the entire fund, while the effect of the trusts which came into operation on the settlor's death was to entitle each daughter so long as she continued unmarried to an annual payment of £250 out of the income, or, if need be, out of the capital, of the appropriated fund. In the result, therefore, each daughter became entitled from the date of the settlement to an annuity of £250 during her life and spinsterhood whether the settlor was alive or dead, the only difference being that before the death of the settlor each daughter's annuity was payable out of the income of the entire fund, whereas after his death it was payable out of the income, and, if need be, out of the capital, of the fund appropriated to meet it. This change in the mode of payment of, and security for, the annuity did not appear to the Court of Appeal to involve any such change in the character of the daughter's beneficial interest on the death of the settlor as was required on the *D'Avigdor-Goldsmid* (26) principle in order to make the annuity payable to her after his death a beneficial interest accruing or arising on his death within the meaning of s. 2 (1) (d), as opposed to a mere continuation of the annuity to which she had been entitled ever since the date of the settlement. As I have already indicated, it is to my mind clear that no such continuing interests were created by the deed of trust in the present case.

The second claim in *Re Parkes' Settlement Trusts* (27), viz., the claim to duty on the corpus of the settled property, was upheld in the Court of Appeal. In my own judgment (28) I summarised my reasons for that view in terms which are to my mind so closely applicable to the present case that I venture to repeat them here:

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(25) [1957] 2 All E.R. 745; [1958] A.C. 210.

(26) [1953] 1 All E.R. 403; [1953] A.C. 347.

(27) [1956] 1 All E.R. 833.

(28) [1956] 1 All E.R. at p. 843.

"As regards the interest of each of the four children in the capital of the trust fund, I think the learned judge was clearly right in holding, as he did, that s. 2 (1) (d) applied. Before the death of the settlor, each child had a future interest in the capital of the fund contingent on him or her surviving the settlor and uncertain as regards its amount, which depends on the number of children who might survive him. After the death of the settlor, each child had an absolutely vested interest in one-fourth of the capital of the trust fund, and the future income thereon. I find it impossible consistently with the ratio decidendi in *A.-G.* v. *Adamson* (29), as explained in *D'Avigdor-Goldsmid* v. *Inland Revenue Comrs.* (30) to hold that such vested interest in capital was not a beneficial interest accruing or arising on the death of the deceased within the meaning of s. 2 (1) (d). It is further, to my mind, quite plain that, in arriving at the extent or value of such beneficial interest, no deduction can be made in respect of the four children's interests pur autre vie in the surplus income during the life of the settlor, for these interests came to an end on his death. Any deduction in respect of their interests in expectancy is, of course, precluded by the Finance Act, 1934, s. 28."

For the reasons that I have endeavoured to state, which are substantially in accord with those on which their Lordships of the Second Division of the Court of Session proceeded, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Baddeleys & Co.*, agents for *Moncrieff, Warren, Paterson & Co.*, Glasgow, and *Hunter, Harvey, Webster & Will*, Edinburgh (for the appellants); *Solicitor for England of the Board of Inland Revenue*, agent for *Solicitor for Scotland for the Board of Inland Revenue* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

THE SEISTAN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J., assisted by Commodore Owen, Trinity Master, and Mr. Ivor Gray, Nautical Assessor), November 23, 24, 25, 26, 27, 1959.]

Shipping—Investigation of casualty—Report—Rider by one assessor censuring chief engineer—No charge against chief engineer—Irregularity.

Where, on a formal investigation of a shipping casualty by a court composed of a wreck commissioner assisted by assessors, there is no charge against an officer of the ship who is not a party to the proceedings, it is irregular for one assessor to add to a document accompanying the court's report a rider expressing censure on the officer. Moreover in the circumstances censure was not justified.

[As to shipping casualty appeals and re-hearings, see 1 HALSBURY'S LAWS (3rd Edn.) 121, para. 285, and note (h), and 30 HALSBURY'S LAWS (2nd Edn.) 920-922, paras. 1261, 1262; and for cases on the subject, see 41 DIGEST 912, *8047*.

For the Merchant Shipping Act, 1894, s. 466 and s. 475, see 23 HALSBURY'S STATUTES (2nd Edn.) 635, 641.]

Re-hearing of investigation of shipping casualty.

The Seistan, a motor vessel of 7,440 tons gross owned by Strick Line, Ltd. carrying a crew of sixty-six with two supernumeraries sank at about 9 p.m. on Feb. 19, 1958, off the South Sintra beacon, Bahrein, in the Persian Gulf, as a result of an explosion, with the loss of fifty-seven lives.

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(29) [1932] All E.R. Rep. 159; [1933] A.C. 257.
(30) [1953] 1 All E.R. 403; [1953] A.C. 347.

A court of formal investigation consisting of a wreck commissioner and three assessors* was convened under s. 466 of the Merchant Shipping Act, 1894, to inquire into the circumstances attending the sinking of the Seistan. The hearing took place on Feb. 10, 11, 12, 13, 16, 17, 18, 19, 20 and 23, 1959, at Church House, Westminster. It was found, for reasons stated in the annex to the report, that the most probable cause of the loss of the Seistan was the spontaneous combustion of toe-puff material in No. 5 lower hold thereby originating a fire which spread to the No. 5 'tween deck where it increased until a temperature was reached which caused detonation of explosives stowed therein. To the last question of the questions and answers signed by the commissioner and two of the assessors†, namely, " Was the loss of the motor vessel Seistan caused or contributed to by the wrongful act or default of any person or persons ", the court answered " No ". A rider was added and signed by Capt. Parfitt which was as follows:

> " I concur in the above [i.e., the questions and answers] but in my opinion the advice given by the chief officer, Mr. Jones, as to the flooding the lower hold offered a better chance of a quicker extinction of the fire. The conduct of the chief engineer in misinforming the chief officer regarding No. 5 bilge line non-return valve was reprehensible."

The chief engineer, Mr. George Robertson, appealed to the Minister of Transport and Civil Aviation against the finding in the rider and, on May 27, 1959, the Minister ordered a re-hearing under s. 475 (1) of the Merchant Shipping Act, 1894‡.

R. F. Stone for the chief engineer. The censure in the rider was a heavy penalty because it implied that the chief engineer contributed to this disaster. He had no opportunity to prepare his defence, for he was never made a party to the formal investigation. On the evidence before the wreck commissioner nothing justified this censure.

Peter Bucknill for the Minister of Transport. The chief engineer was not a party to the formal investigation and at no time was he adversely criticised until the rider. It would be helpful if the court would give guidance on what should be done when one assessor feels it incumbent to criticise adversely conduct that is not censured by the court.

Cur. adv. vult.

Nov. 27. **LORD MERRIMAN, P.,** read the following report of the court: This is a re-hearing by order of the Minister of Transport and Civil Aviation, dated May 27, 1959, of a formal investigation into the loss of the motor vessel Seistan on Feb. 19, 1958, at Bahrein. The finding of the court was that the most probable cause of the loss of the Seistan was spontaneous combustion of toe-puff material in No. 5 lower hold, thereby originating a fire which spread to the No. 5 'tween deck where it increased until a temperature was reached which caused the detonation of explosives therein.

The matter to be re-heard is restricted to so much of the case heard at the formal investigation as relates to the conduct of the chief engineer, Mr. George Robertson, between Feb. 17 and Feb. 19, 1958. By an order for directions dated June 19, 1959, it was ordered that the court of re-hearing should be a Divisional Court of this Division, and that the court should be assisted by one Elder Brother of Trinity House and one Nautical Assessor, and that oral evidence should be heard. We have had the advantage of hearing the evidence of the chief A officer, Mr. Jones, and the chief engineer, Mr. Robertson; and the case has been very well presented by counsel. In the course of the hearing of the investigation no charge was made against the chief engineer, and no notice was given to him of the possibility of any such charge. He was not made a party, nor was there any reason why he should have applied to be made a party.

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* J. V. Naisby, Q.C., Capt. L. Parfitt, D.S.C., Capt. H. S. Hewson and Capt. C. W. Ede.

† J. V. Naisby, Q.C., Capt. Hewson and Capt. Ede.

‡ Accordingly r. 21 of the Shipping Casualties and Appeals and Re-hearings Rules, 1923 (S.R. & O. 1923 No. 752) (20 Halsbury's Statutory Instruments 132) applied, and certain provisions of r. 20 relating to procedure on appeals were made applicable.

The court was referred to the following authorities—Temperley, Merchant Shipping Acts (5th Edn.), p. 305; McMillan, Shipping Inquiries and Courts (1929), pp. 18, 20, 21, 118; *The Chelston*, [1920] P. 400; *The China* (1899) Shipping Gazette, and *The Royal Star*, [1928] P. 48.

During the original hearing Mr. Robertson became seriously ill. Accordingly, B a discussion took place on Feb. 19, 1959, about the best way of dealing with his inability to attend. Two statements signed by him had already been taken, and a third statement was taken on that day. The commissioner (1) said that in view of the medical certificate he did not intend to press for the presence in the witness-box of Mr. Robertson, and added that he thought that the medical certificate obviated any complaint that could be made by anyone that Mr. C Robertson was not called, and stated specifically that he would not draw any adverse inference if in those circumstances he was not called.

Some confusion was caused by the fact that the original report has been put together and copied in the wrong order. It is now accepted that the proper order is: report, annex, questions and answers and the rider. The report itself was signed by the commissioner and the three assessors (2). Then followed the annex, D which was not signed, the questions and answers, which were signed by the commissioner and two of the assessors (3); and finally what has been called the rider was added by Capt. Parfitt, the third assessor, in the following words:

> " I concur in the above but in my opinion the advice given by the chief officer, Mr. Jones, as to flooding the lower hold offered the better chance of a quicker extinction of the fire. The conduct of the chief engineer in misinforming the chief officer regarding No. 5 bilge line non-return valve was reprehensible." E

Having regard to the absence of any charge against the chief engineer, and the consequent lack of any opportunity to meet any such charge, this expression of censure by one assessor in the rider was wholly irregular whatever view may F be taken of the merits.

It is obvious, however, that the real object of this re-hearing is to inquire into the merits of the censure. As to the merits, the evidence satisfies us that on Feb. 19, 1958, the chief officer wished to use the method of flooding No. 5 hold, to extinguish the fire. The first sentence of the rider shows that Capt. Parfitt accepted the view that flooding, as against steam-smothering, was the preferable G method. We find that on the instructions of the master, the chief officer inquired of the chief engineer whether he could assist in flooding No. 5 hold through the bilge line. The chief engineer replied: " No, because of the non-return valves in the bilge line ". At that time the chief officer knew that the master had ordered that No. 4 hold should be pumped dry and kept dry, and also, as was the fact, that this order had not been countermanded. He also knew that if the bilge H line were used for flooding No. 5 hold it would be impossible also to use it for pumping out No. 4 hold, both holds being on the same bilge line. There were also other possible disadvantages, in flooding through the bilge line, on which we need not enlarge. The chief officer accepted without demur the above answer from the chief engineer, and at once asked him what alternative assistance the chief engineer could give. To this the chief engineer replied that he would give the I maximum pressure possible on the deck service line to flood No. 5 hold. The earlier flooding of No. 5 hold and 'tween deck had been done by the general service pump and the fire emergency pump with one hose through the port ventilator and another through the starboard ventilator. Accordingly, the chief engineer ordered steam for the more powerful ballast pump, and two additional hoses were attached, making two in each ventilator, that is, four in all. The nozzles were removed from all the hoses and the hoses were introduced into the ventilators in such a manner as to allow the water to flow direct into No. 5 lower hold. This method of flooding was in operation for about one hour, and was working to the complete satisfaction of the chief officer, who stated that he received every possible assistance from the chief engineer and the engine room staff.

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(1) J. V. Naisby, Q.C.
(2) J. V. Naisby, Q.C., Capt. Parfitt, Capt. Hewson and Capt. Ede.
(3) J. V. Naisby, Q.C., Capt. Hewson and Capt. Ede.

If the rider is taken to imply that the chief enginer's answer caused retardation of the flooding of the hold, we are convinced that the implication is unjustified. On the contrary, we go further; we are convinced that, taking all the relevant factors into account, the method of flooding adopted was at least as efficacious as flooding through the bilge line would have been, so far as speed is concerned.

It should be noted that counsel for the Ministry of Transport satisfied us that it had been assumed before the investigation started that the chief engineer thought that he could not use the bilge line for flooding No. 5 hold because he was under the mistaken belief that the non-return valves were in the hold itself, instead of being, as is the fact, in the tunnel. Some colour was lent to this assumption by the fact that in earlier ships of the same line this had been the case. It was not until the chief engineer's statement, taken during the inquiry on Feb. 19, 1959, was seen that this assumption was shown to be unfounded. In that statement the chief engineer said: " I was of course quite aware that the non-return valve to No. 5 was situated in the tunnel and was accessible for removal if necessary, and that the hold could have been flooded by the bilge line ". But he added that the reason why this was not done was the master's requiring No. 4 to be kept pumped out. Counsel for the Ministry of Transport made it clear that he had not challenged this statement. In any case, even if the chief engineer had made this assumed mistake the question would still remain whether it had any bearing on the casualty. For the reasons already given we are convinced that the chief engineer's answer to the chief officer had no adverse effect on the course of events.

It remains, however, to consider why the method of flooding which was in process for about an hour on the morning of Feb. 19 with the approval of the chief officer, who had reported to the master, was abandoned in favour of a resumption of the method of steam-smothering. This decision was made after a conference in which the marine superintendent representing the owners at Bahrein, took part. We are satisfied that the dominating factor was the belief that the earlier attempts at steam-smothering had been effective in extinguishing, or at least in damping down the fire before it broke out again in No. 5 hold. We find as a fact that the decision taken by the master together with the marine superintendent was to resort again to steam-smothering for a consecutive period of twenty-four hours, and then, if that proved ineffectual, to beach the vessel and flood her. The fact that the explosion occurred during this period has, in our opinion, no bearing on the question with which we are concerned.

Our conclusion on the matter is that there was no justification for censuring George Robertson, the chief engineer, in connexion with the answer he gave to the chief officer, or otherwise in connexion with this casualty. That is signed by all of us.

Appeal allowed.

Solicitors: *Ingledew, Brown, Bennison & Garrett* (for the chief engineer of the Seistan); *Treasury Solicitor* (for the Ministry of Transport).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

GODLEY *v.* PERRY (BURTON & SONS (BERMONDSEY), LTD. Third Party. GRAHAM Fourth Party).

[Queen's Bench Division (Edmund Davies, J.), November 23, 25, 1959.]

Sale of Goods—Sale by sample—Reasonable examination of sample—Sale between wholesalers—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 15 (2) (*c*).

Sale of Goods—Implied condition of fitness—Merchantable quality—Catapult—Purchaser boy aged six—Catapult displayed in shop window where seen by boy who then purchased it in shop—Reliance on seller's skill or judgment—Whether sale by description—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1), (2).

The defendant was a newsagent who sold also children's toys; some plastic toy catapults were displayed in his shop window. The plaintiff, a boy aged six, saw the catapults in the window, came into the defendant's shop and purchased one of them for 6d. While using it to fire a stone, the catapult broke and the plaintiff was struck in the left eye either by a piece of the catapult or by the stone; at the time of the accident he was using the catapult as it was expected to be used, pulling back the elastic to a proper extent. The plaintiff lost his left eye as a result of the accident. A chemist's report stated that the catapults were made by injection moulding, from polystyrene, the cheapest kind of injection moulding material; in the chemist's opinion this material was unsuitable for making children's toys because it was brittle and fractured with a sharp dog-tooth fracture. Examination of the broken catapult revealed internal voids which indicated indifferent moulding. The defendant had bought the catapults from a wholesaler, B., with whom he had dealt for some time. The sale between B. and the defendant was by sample, the defendant's wife having examined, by pulling back its elastic, the sample catapult shown to her by B.'s traveller before placing an order with B. for two dozen catapults. B.'s supplier was G., another wholesaler who imported the catapults from Hong Kong where they were made; B. had done business for some years with G. The sale between them of the consignment of catapults of which the two dozen sold to the defendant formed part was also a sale by sample, B., having first tested a sample catapult shown to him by G.'s traveller by pulling back its elastic. B. did not otherwise test the plastic frame of the sample. In an action by the plaintiff alleging against the defendant breach of the conditions implied by s. 14 (1) and (2)* of the Sale of Goods Act, 1893, the defendant brought in his supplier, B., as third party, alleging against him breach of the condition implied by s. 15 (2) (c) of the Act of 1893, that the goods would be free from any defect rendering them unmerchantable which was not apparent on reasonable examination of the sample; B., in turn, brought in his supplier, G., alleging breach of s. 15 (2) (c) against him.

Held: (i) the defendant was in breach of s. 14 (1) and (2)* of the Sale of Goods Act, 1893, since—

(a) (as regards s. 14 (1)) the catapult was not reasonably fit for the purpose for which it was required, and the plaintiff had relied on the seller's skill or judgment, such reliance being a matter of inference (dictum of Lord Wright in *Grant* v. *Australian Knitting Mills, Ltd.*, [1935] All E.R. Rep. at p. 215, applied) and the inference being readily drawn where the customer was of very tender years, and

(b) (as regards s. 14 (2)) the catapult was bought by description, although it was sold over the counter, and it was not of merchantable quality (dictum of Branson, J., in *Morelli* v. *Fitch & Gibbons*, [1928] All E.R. Rep. at p. 613, applied).

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* The relevant provisions of s. 14 (1) and (2) of the Sale of Goods Act, 1893, are set out in footnote (3) to p. 39, post.

(ii) the third and fourth parties were both in breach of s. 15 (2) (c) because the catapult had a defect which rendered it unmerchantable but such a defect would not have been apparent on reasonable examination of the sample, the test made by pulling back the elastic of the samples being all that could be reasonably expected of a potential purchaser; moreover, on the sale between the fourth and third parties, who were wholesalers who had previously done business together, the third party was entitled to regard without suspicion the sample shown to him and to rely on the fourth party's skill in selecting his goods.

Observations on dealings between merchants and manufacturers of Lord Macnaghten in *Drummond* v. *Van Ingen* ((1887), 12 App. Cas. at p. 296) applied to dealings between two wholesalers.

[As to implied warranty of fitness on a sale of goods, see 29 Halsbury's Laws (2nd Edn.) 63-66, para. 73; and as to conditions implied on a sale of goods by sample, see ibid., p. 68, para. 76. For cases on the subject, see 39 Digest 444-446, *725-744*, and p. 454, *811-814*.

For the Sale of Goods Act, 1893, s. 14 and s. 15, see 22 Halsbury's Statutes (2nd Edn.) 993-995.]

Cases referred to:

Bristol Tramways, etc., Carriage Co., Ltd. v. *Fiat Motors, Ltd.*, [1910] 2 K.B. 831; 79 L.J.K.B. 1107; 103 L.T. 443; 39 Digest 418, *512*.

Drummond v. *Van Ingen*, (1887), 12 App. Cas. 284; 56 L.J.Q.B. 563; 57 L.T. 1; 39 Digest 454, *813*.

Grant v. *Australian Knitting Mills, Ltd.*, [1935] All E.R. Rep. 209; [1936] A.C. 85; 105 L.J.P.C. 6; 154 L.T. 18; Digest Supp.

Morelli v. *Fitch & Gibbons*, [1928] All E.R. Rep. 610; [1928] 2 K.B. 636; 97 L.J.K.B. 812; 140 L.T. 21; Digest Supp.

Action.

In this action the plaintiff, Nigel Godley, an infant, suing by his next friend, Reginald Ronald Godley, claimed damages for personal injuries sustained on Apr. 13, 1958, when a toy catapult, which the plaintiff had bought from the defendant, broke and injured the plaintiff's left eye. As a result of the injury the plaintiff's left eye was removed. At the time of the accident the plaintiff was aged six years. The defendant, James A. Perry, carried on the business of newsagent and, in addition, sold the sidelines commonly found in such a business, including children's toys. By his statement of claim the plaintiff alleged that the defendant was in breach of the implied conditions of sale, provided by s. 14* of the Sale of Goods Act, 1893, that the catapult would be reasonably fit for the purpose for which it was required and would be of merchantable quality; the plaintiff also alleged negligence. The defendant denied all liablity and brought in as third party the wholesale supplier from whom the catapults had been acquired, Burton & Sons (Bermondsey), Ltd., alleging against them that they were in breach of the conditions implied by s. 14 in their contract of sale with the defendant, or alternatively, that the sale to the defendant was a sale by sample and the third party was in breach of the condition implied by s. 15 (2) of the Act of 1893, that the catapults would be free from any defect, rendering them unmerchantable, which was not apparent on reasonable examination of the sample; the defendant also alleged negligence against the third party. The third party, in turn, sued the fourth party, Stella H. Graham, the personal representative of the third party's supplier and the importer of the catapults from Hong Kong, one Ernest Martin Graham deceased, alleging against the fourth party breach of the conditions implied by s. 14 and s. 15 (2) of the Act of 1893. The respective claims for damages for negligence were ultimately abandoned and all the claims proceeded on the basis of alleged contractual liability only.

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* The relevant terms of s. 14 of the Sale of Goods Act, 1893, are set out in footnote (3) to p. 39, post.

The facts were as follows. On Apr. 10, 1958, a consignment of two dozen toy catapults was delivered to the defendant's shop and was displayed in the shop window by his wife, Mrs. Perry. On the same day, the plaintiff bought one of the catapults from Mrs. Perry for 6d. His parents did not know that he was buying it and he wrongly told Mrs. Perry that he had his father's permission to do so. Mrs. Perry was reluctant to sell the plaintiff a catapult because she thought that he was a destructive boy and might damage windows with it, but she did not distrust the toy itself. On the afternoon of Apr. 13, 1958, the plaintiff, having put a stone in the catapult, which he was holding in his left hand, pulled back the elastic and stone with his right hand to fire it when, as the plaintiff put it, " the thing broke " and he was struck in the left eye, either by the sharp stone or by a piece of the catapult; the eye was ruptured and was subsequently removed. His screams brought his mother to the scene where she found the plaintiff holding in his left hand, by its elastic, the top of the catapult, the handle of the catapult having fractured and broken off just below the point where it joined the fork. At the time of the accident the plaintiff was using the catapult in a proper way, pulling back the elastic to a proper extent to project the stone. Mrs. Perry said in evidence that when the catapults were delivered to the defendant's shop she pulled back the elastic of each one and found it to be sound; she also tested the catapults in this way on selling each one. She demonstrated in the witness-box what happened when the elastic of one of the catapults was pulled back to the maximum extent: the plastic frame immediately broke in pieces which flew across the court; the tests she carried out in the shop, however, were more restrained. The agreed report of a consulting chemist was that this consignment of catapults was made by the process of injection moulding, the material used being polystyrene, the cheapest injection moulding material which for the past ten years had been used for making cheap plastic toys. The chemist was of opinion that polystyrene was unsuitable for making toys since it was brittle and broke with a sharp dog-tooth fracture. He said that the catapults made in Hong Kong were indifferently moulded from low grade reconstituted polystyrene, but that even if they had been moulded from virgin polystyrene he would regard them as dangerous toys because of that material's fragility and its propensity to break with a dog-tooth fracture. Examined pieces of the catapult which caused the accident revealed faults of internal voids which indicated indifferent moulding conditions.

For some time the defendant had been buying a variety of articles from the third party. On Apr. 7, 1958, the third party's traveller called in the usual way on the defendant and showed his wife a plastic catapult saying, " Here's a good selling line ", pulling back the elastic to demonstrate the toy's worth and attraction. The defendant's wife then examined the catapult and pulled back the elastic; she concluded that it was worthwhile placing a small order and in fact ordered from the third party two dozen catapults at 3s. 4d. a dozen. The catapults were delivered to the defendant three days later, on Apr. 10. The third party became possessed of a supply of the catapults in the following way. For some time they had done business with Graham Brothers, who were importers of children's toys from Hong Kong. On Aug. 30, 1957, a traveller for the fourth party called in the usual way on the third party and showed them a sample catapult quoting the wholesale price of 2s. 6d. a dozen. There is a rule in the toy trade that the elastic of a catapult should not be capable of being pulled back more than two and a half feet because of the danger of serious damage if a greater pull-back is possible. Accordingly, Mr. Burton for the third party looked at the catapult and tested the extent of its pull back, and so did the third party's manager. Mr. Burton concluded that the catapult would be a successful toy and he ordered thirty gross from the fourth party;

it never occurred to Mr. Burton that the plastic frame of the catapult might fracture while the catapult was being properly used for its designed purpose. On about Dec. 6, 1957, the third party received the consignment of which the two dozen catapults later sold to the defendant formed part. Mr. Burton said in evidence that the accident to the plaintiff was the only one he knew of arising out of the use of this toy, although some two or three dozen catapults had been returned to him in a broken condition which, apparently, was not an unusually high figure for plastic toys.

D. H. Farquharson for the plaintiff.
R. H. W. Dunn for the defendant.
T. M. Eastham for the third party.
N. C. Bridge for the fourth party.

Cur. adv. vult.

Nov. 25. **EDMUND DAVIES, J.,** having referred to the pleadings and having stated the circumstances in which the plaintiff purchased the toy catapult from the defendant and the circumstances in which the accident occurred (see p. 38, letters A to D, ante), said that the accident should never have happened and would not have happened had the catapult been reasonably suitable for its designed use. HIS LORDSHIP continued, reading the following judgment: On the chemist's report (1), on what happened to the plaintiff himself, on what happened when Mrs. Perry gave a demonstration in the witness-box (2), I have no hesitation in concluding that this catapult was a most dangerous toy to be released on the market. As a result, the plaintiff, a child of six, was grievously injured, and his left eye completely destroyed. The injuries are the subject of agreed medical reports, and the general damages to which, subject to liability, the plaintiff is entitled in respect of pain and suffering, the loss of his eye, and the discomfort of daily removal of the artificial eye, are, in my judgment, the sum of £2,500.

On the issue of liability, the plaintiff seeks to rely on the Sale of Goods Act, 1893, s. 14 (1) and (2). In my judgment he is entitled to succeed on both heads (3). That the catapult was not in fact " reasonably fit for such purpose " as it was designed for, and that it was not " of merchantable quality " are propositions established beyond any sort of doubt.

As to s. 14 (1), that the child was relying on the shopkeeper's skill and judgment is, I think, clear. As LORD WRIGHT said in *Grant* v. *Australian Knitting Mills, Ltd.* (4):

> " The reliance will seldom be express; it will usually arise by implication from the circumstances; thus to take a case like that in question of a purchase from a retailer the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment . . ."

Furthermore, when the customer is, as here, of extremely tender years, an inference of reliance on the retailer's skill and judgment readily and properly arises.

As to s. 14 (2), counsel for the defendant submitted that there was here no sale " by description "; that the subsection applies only to unseen goods, whereas here the catapults were displayed in the window and the plaintiff then bought one of these over the counter. In support he cited a passage from Farwell, L.J.'s judgment in *Bristol Tramways, etc., Carriage Co., Ltd.* v. *Fiat Motors, Ltd.* (5) which reads:

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(1) For the chemist's report, see p. 38, letters E and F, ante.

(2) See p. 38, letter E, ante.

(3) The Sale of Goods Act, 1893, s. 14 (1), provides: " Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply . . . there is an implied condition that the goods shall be reasonably fit for such purpose . . ."

Section 14 (2) provides: " Where goods are bought by description from a seller who deals in goods of that description . . . there is an implied condition that the goods shall be of merchantable quality . . ."

(4) [1935] All E.R. Rep. at p. 215; [1936] A.C. at p. 99.

> " The phrase ' merchantable quality ' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine . . . "

It is to be noted, however, that the learned lord justice went on to add (5): " but it is clear that it extends to both." That a sale over the counter can be a sale " by description " is clear from the judgment of Branson, J., in *Morelli* v. *Fitch & Gibbons* (6) and where, as here, a child asks for " a catapult ", and one is sold to him over the counter, that is no less, in my judgment, a " sale by description " than one where an order is placed on the strength of a catalogue.

I turn to consider the defendant's claim to be indemnified by the third party, and the latter's claim over against the fourth party. The facts are but slightly disputed, if at all. [His Lordship then stated the circumstances in which the defendant purchased the catapults from the third party and those in which the third party purchased his supply from the fourth party (for which see p. 38, letters G to I, ante). His Lordship continued:] On the foregoing facts, counsel for the defendant was content to base his claim against the third party on s. 15 (2) (c) of the Act of 1893. Here, he submitted, was clearly a sale by sample, and there was accordingly an implied condition that:

> " the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

I hold that this was indeed a sale by sample, and that the implied condition accordingly existed, and it is unnecessary for me to deal with the further suggestion—raised only by counsel for the third party, and promptly sought to be demolished by him—that s. 14 (1) might also be invoked by the defendant.

Again, on the facts I hold that as between the third and fourth parties there was a sale by sample, with the like implied condition. That in breach of such condition, what I may call the accident catapult was so defective as to be unmerchantable is clear. Nevertheless learned counsel for the fourth party submitted that a reasonable examination of the sample would have revealed its defects, and that accordingly no such condition could be implied. The fragility of the toy was, he submitted, perfectly obvious, and however widely his clients might have departed from a proper standard of mercantile ethics in placing large supplies of such an object on the market, to be snapped up by juveniles, liability under s. 15 (2) (c) could not be established as against them.

Counsel for the fourth party demonstrated that by squeezing together the two prongs of the catapult in the hand they could be fractured, and further suggested that by holding the toy down with one's foot and then pulling on the elastic its safety could be tested and, as I understand it, its inherent fragility would thereby inevitably be discovered. True, the potential customer might have done any of these things. He might also, I suppose, have tried biting the catapult, or hitting it with a hammer, or applying a lighted match to ensure its non-inflammability, experiments which, with all respect, are but slightly more bizarre than those suggested by learned counsel. But, looking at the matter realistically, as one must, in my judgment none of these tests is called for by a process of " reasonable examination ", as that phrase would be understood by the common-sense standards of everyday life. All these suggested tests

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(5) [1910] 2 K.B. at p. 840.

(6) [1928] All E.R. Rep. at p. 613; [1928] 2 K.B. at p. 643.

A were doubtless practicable, but the Act speaks not of a "practicable", but of a "reasonable" examination. In my judgment, to pull back the elastic as Mr. Burton and Mr. Waters (7) did in August, 1957, and as Mrs. Perry (8) did in April, 1958, was all that could be reasonably expected of any potential customer, and such an examination wholly failed to make apparent to them, or even render them alive to the possibility of, such a defect as undoubtedly B existed in the accident catapult. Whether the sample displayed to Mr. Burton and to Mrs. Perry corresponded with the bulk which, of course, included the accident catapult, there is no means of telling, for Mr. Redfern's report (9) speaks of "internal voids" in the latter, and these presumably might differ in number and location in different catapults. If the samples did not correspond with the accident catapult, the third and fourth parties were also in breach of C s. 15 (2) (a) of the Act of 1893, but for the present purposes that matters not.

In *Drummond* v. *Van Ingen* (10), decided before the Act of 1893, but nevertheless authoritative, LORD MACNAGTHEN said:

> "Then it was argued, defect or no defect, the sale was a sale by sample: the goods delivered correspond with the sample, and there is an end to the matter: the seller has fulfilled his bargain. I think the sale was strictly a D sale by sample. Certainly the goods corresponded with the sample only too well. But does this exact correspondence, when it is found to involve an unforeseen and unsuspected defect, relieve the seller from his obligation to supply goods fit for the purpose for which they were intended? After all, the office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract which, owing E to the imperfection of language, it may be difficult or impossible to express in words. The sample speaks for itself. But it cannot be treated as saying more than such a sample would tell a merchant of the class to which the buyer belongs, using due care and diligence, and appealing to it in the ordinary way and with the knowledge possessed by merchants of that class at the time. No doubt the sample might be made to say a great deal F more. Pulled to pieces and examined by unusual tests which curiosity or suspicion might suggest, it would doubtless reveal every secret of its construction. But that is not the way in which business is done in this country. Some confidence there must be between merchant and manufacturer. In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill, and he does so all the more readily when, G as in this case, he has had the benefit of that skill before."

The learned law lord was there dealing with the position as between the manufacturer and a person dealing with him. In my judgment his observations apply mutatis mutandis to circumstances such as the present, where there are deals between one wholesaler and another. Applying that passage to the present case, H I hold that the defect which was undoubtedly present in the accident catapult, and which rendered it unmerchantable and, indeed, a most dangerous toy to be let loose on the juvenile market, was not apparent on reasonable examination of the samples shown by Mr. Sinclair (11) to Mrs. Perry and by Mr. Ford (12) to Mr. Burton. The third and fourth parties were accordingly each in breach of s. 15 (2) (c) of the Act of 1893.

I In the result there must be judgment for the plaintiff against the defendant for £2,500 with costs; judgment for the defendant against the third party for the like amount with costs, such costs to include the defendant's costs of his defence as between solicitor and client in addition to his costs of the third-party proceedings; and judgment for the third party against the fourth party for the same amount of damages with costs, such costs to include the costs hereby ordered to be paid by the third party to the defendant, the third party's own costs of defence against the defendant as between solicitor and client and the third party's costs of the fourth-party proceedings. [His Lordship added that the plaintiff was to have any extra costs incurred by reason of the third and fourth party having been joined to the action.]

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(7) The director and manager of Burton & Sons (Bermondsey), Ltd., the third party.

(8) The defendant's wife.

(9) The report of the chemist on the construction of the catapults, for which see p. 38, letters E and F, ante.

(10) (1887), 12 App. Cas. at p. 296.

(11) The third party's traveller.

(12) The fourth party's traveller.

Judgment accordingly.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Bartlett & Gregory*, Bromley (for the defendant); *Harveys* (for the third party); *Guyer & Co.* (for the fourth party).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

Re LEVY (*deceased*). BARCLAYS BANK, LTD. *v.* BOARD OF GUARDIANS AND TRUSTEES FOR THE RELIEF OF THE JEWISH POOR AND OTHERS.

[Court of Appeal (Lord Evershed, M.R., Sellers and Harman, L.JJ.), October 29, 30, November 2, 3, 20, 1959.]

Charity—Income—Indefinite gift of income in perpetuity—Whether charity entitled to call for corpus—Question of construction.

Though an indefinite bequest of income to an individual shows, as a matter of interpretation and in the absence of words indicating the contrary, an intention that the donee shall be entitled to call for the capital, since he will not live to have full enjoyment of the bequest otherwise, that principle does not apply to a bequest to a charity, as a charity continues in perpetuity and effect can validly be given to a perpetual trust of income for its purposes (see p. 45, letter I, p. 46, letters C and I, and p. 52, letter A, post).

Dicta of Sir Richard Arden, M.R., in *Philipps* v. *Chamberlaine* ((1798), 4 Ves. 51) and of Joyce, J., in *Re Swain* ((1908), 99 L.T. at p. 606) applied.

By his will, a testator directed his trustees to stand possessed of the capital as well as the income of the residue of his estate on trust to pay or transfer the same to the Official Trustees of Charitable Funds, the capital to form a fund to be known as the "Levy Family Charitable Trust" and the income thereof to be divided into eight equal parts and paid in certain proportions to six charities, one of which (the London Hospital) was incorporated by royal charter. The testator also provided that if any charity challenged anything that his trustees had done or omitted to do in the exercise of the directions conferred on them, the interest taken by such beneficiary should be forfeited, and the capital and income representing such interest should pass to the trustees of King Edward's Hospital Fund. It was claimed on behalf of some of the six charities that they were entitled to call for payment of the capital of the residue of the testator's estate in the proportions in which they were given the income.

Held: the charities were not entitled to call for the capital because—

(a) on the true construction of the testator's will each gift of income to the six charities was given for the general purposes of the work carried on by the charities, and it was not the intention of the testator that any charity (other than King Edward's Hospital Fund) should have the capital.

(b) for the reasons stated at letter E, above, there was no principle of law which prevented effect being given to this intention of the testator.

(c) though the London Hospital, as a corporation incorporated by royal

A charter, stood in the same position as an individual donee, yet the gift of income in its favour was equally impressed with a charitable trust for its general purposes and it had no greater right to capital than the other five charities had.

Re Morgan ([1893] 3 Ch. 222) and *Wharton* v. *Masterman* ([1895] A.C. 186) considered.

B Appeal allowed.

[**Editorial Note.** It may be emphasised that not all charities were joining in calling for payment of capital (see p. 45, letters C and D, post). A bequest of income in perpetuity to an individual in terms inconsistent with the donee's being entitled to call for capital, there being no charitable trust, is void as infringing the rule against perpetuities (see p. 50, letter G, post).

C As to unlimited gifts of income, see 34 Halsbury's Laws (2nd Edn.) 243-245, para. 295; and for cases on the subject, see 44 Digest 667-669, *5066-5094*.

As to a charity incorporated by royal charter, see 4 Halsbury's Laws (3rd Edn.) 396, 416, paras. 826, 867; and for cases on the subject, see 8 Digest (Repl.) 502, *2223*, *2224*.]

D Cases referred to:

Amos, Re, Carrier v. *Price*, [1891] 3 Ch. 159; 60 L.J.Ch. 570; 65 L.T. 69; 8 Digest (Repl.) 365, *465*.

Carne v. *Long*, (1860), 2 De G.F. & J. 75; 29 L.J.Ch. 503; 2 L.T. 552; 24 J.P. 676; 45 E.R. 550; 8 Digest (Repl.) 437, *1278*.

Clarke, Re, Clarke v. *Clarke*, [1901] 2 Ch. 110; 70 L.J.Ch. 631; 84 L.T. 811;
E 8 Digest (Repl.) 356, *352*.

Clark's Trusts, Re, (1875), 1 Ch.D. 497; 45 L.J.Ch. 194; 8 Digest (Repl.) 437, *1280*.

Lawes-Wittewronge, Re, Maurice v. *Bennett*, [1915] 1 Ch. 408; 84 L.J.Ch. 472; 112 L.T. 931; 44 Digest 694, *5349*.

Macaulay's Estate, Re, Macaulay v. *O'Donnell*, [1943] Ch. 435, n.; 8 Digest
F (Repl.) 438, *1287*.

Morgan, Re, Morgan v. *Morgan*, [1893] 3 Ch. 222; 62 L.J.Ch. 789; 69 L.T. 407; 44 Digest 540, *3577*.

Philipps v. *Chamberlaine*, (1798), 4 Ves. 51; 31 E.R. 27; 44 Digest 550, *3676*.

Swain, Re, Phillips v. *Poole*, (1908), 99 L.T. 604; 8 Digest (Repl.) 437, *1279*.

Wharton v. *Masterman*, [1895] A.C. 186; 64 L.J.Ch. 369; 72 L.T. 431; 8
G Digest (Repl.) 442, *1324*.

Appeal.

This was an appeal on behalf of Her Majesty's Attorney-General from an order of Danckwerts, J., dated June 16, 1959, whereby it was declared that on the true construction of the will of George Levy, deceased, each of the six charities to whom a share of the income of the residue of the estate of the testator
H was bequeathed by the said will was absolutely entitled to be paid that part of capital producing that share of income. The facts appear in the judgment of Lord Evershed, M.R., and are summarised in the headnote.

Denys B. Buckley for the eighth defendant, the Attorney-General.

M. W. Cockle for the plaintiff, the trustee.

I *Robert S. Lazarus, Q.C.*, and *Raymond Walton* for the first defendant, the Board of Guardians and Trustees for the Relief of the Jewish Poor.

R. W. Goff, Q.C., and *L. H. L. Cohen* for the second defendant, the Stepney Group Hospital Management Committee.

John Pennycuick, Q.C., and *Raymond Walton* for the third and fourth defendants, the Board of Governors of the London Hospital and of St. Thomas' Hospital.

Nigel Warren, Q.C., and *J. W. Mills* for the fifth and sixth defendants, the Jewish Orphanage and the Home and Hospital for Jewish Incurables.

L. J. M. Smith for the seventh defendant, King Edward's Hospital Fund for London.

Cur. adv. vult.

Nov. 20. The following judgments were read.

LORD EVERSHED, M.R. (read by Sellers, L.J.): By his will the above-named testator, George Levy, provided as follows for the disposition of his residuary or trust estate:

> "11: And I declare that my trustees shall stand possessed of the income of my trust estate upon trust to pay the said income to my said two brothers and my said sister in equal shares during their lives and after the death of the survivor of them my trustees shall stand possessed of the capital as well as the income of the residue of my estate upon trust to pay or transfer the same to the Official Trustees of Charitable Funds upon the trusts following relating thereto namely: The capital shall form a fund to be known as the 'Levy Family Charitable Trust' and the income thereof shall be divided into eight equal parts and shall be paid as follows: (a) As to two equal parts thereof to the London Jewish Hospital. (b) As to two further equal parts thereof to the London Hospital, Whitechapel Road. (c) As to one further equal part thereof to the Jewish Board of Guardians. (d) As to one further equal part thereof to the Jewish Hospital and Orphan Asylum at Norwood. (e) As to one further equal part thereof to the Jewish Home for Incurables at Tottenham. (f) As to the remaining one equal part thereof to St. Thomas' Hospital, London."

The testator also provided by cl. 15 of his will as follows:

> "I declare that no beneficiary taking any share or interest under this my will whether absolutely contingently or in reversion shall whether during the lifetime of my family trustees or after their death challenge call into question or interfere with anything that my trustees may have done or which they may have omitted to do in exercise of the very wide discretions given by me to my trustees by this my will in connexion with my estate and I declare that in the event of any such challenge calling into question or interference then the benefit taken by any such person or persons or charity or charities under this my will shall be forfeited and in the event that such challenge calling into question or interference shall be made by any one or more of the ultimate charity trustees or charity beneficiaries interested in the ultimate gift under this my will then the interest taken by any such ultimate charity trustee or charity beneficiary who shall make such challenge call into question or interfere shall be forfeited and the capital and income representing such interest shall pass to the trustees for King Edward's Hospital Fund."

The testator died on July 26, 1940, and the survivor of his brothers and sister died on Oct. 15, 1955. The question has now arisen whether these named charitable institutions (or in some cases their successors) are entitled individually or collectively to call for payment to them respectively of a proportionate share of the corpus of the trust estate. A further question was also raised on the originating summons on the validity of cl. 15. Danckwerts, J., decided that the clause was invalid and there has been no appeal from that decision: but counsel for the Attorney-General has said, and I think rightly, that it is legitimate to have regard to the language of cl. 15 for any light which it may throw on the proper construction of the testator's language and intention in cl. 11. I should add that King Edward's Hospital Fund for London (being the institution referred to in cl. 15) has been served with the present notice of appeal and has appeared before this court. Since, however, there has been no cross-appeal as regards cl. 15, it is plain, and was conceded by the learned counsel for the Hospital Fund, that that institution has now no interest on the first question which is now before us for decision.

Danckwerts, J., decided the first question adversely to the Attorney-General. He relied on the well-established proposition that an indefinite gift of income to an individual carries the right to corpus, and he held that there was, at any rate in the present case, no valid distinction in that respect between an individual and a charitable institution: he, therefore, concluded that since the gifts in favour of the charities were in his view merely indefinite gifts of income, it followed that the charities were entitled to call for distribution of the corpus.

It may be stated here that if indefinite shares of income are given to a number of individuals, they might also claim payment of the corpus on the ground that, being the only persons beneficially interested in the property, they could put an end in any event to the trusts. The question was raised during the argument in this court whether these charities might not, in like manner, claim to put an end to the trusts and on that basis require payment of the corpus. An answer to that suggestion, however, is that those representing the last two charities, namely, the Jewish Orphanage and the Home and Hospital for Jewish Incurables, had never joined, and would not now seek to join, with the other four charities in preferring such a claim. On their part counsel said that he was content to receive, as he suggested was the testator's intention, the proportionate two-eighths shares of the income in perpetuity, claiming only that if the other four charities were entitled to payment of their proportionate shares of corpus, then that his clients also should be similarly treated. It follows that there is no ground for supporting Danckwerts, J.'s judgment on the basis that all the charities interested were jointly claiming to put an end to the trusts.

On the appeal before us a number of cases was cited which had not been cited before the learned judge: and to some of these I shall presently allude. There was also a special point taken on behalf of the London Hospital that since it is a body corporate by virtue of a royal charter, it should in any event be treated as in pari materia in all respects with an individual donee, and so should be entitled to payment of two-eighths parts of corpus, whatever might be the answer as regards the remaining charities. As regards these remaining charities, there is some differentiation in constitution. For example, the first defendant (being the charity called in the will "the Jewish Board of Guardians") has a corporate trustee though the charity is itself unincorporated. The second defendant, the Stepney Group Hospital Management Committee, now stands in the place of the London Jewish Hospital (a corporate charity at the testator's death) by virtue of certain provisions, including particularly the National Health Service Act, 1946, s. 60 (1) (b). St. Thomas' Hospital is in a different case from the London Hospital, for it appears that the City of London, which was incorporated by royal charter in the 16th century, conducts under the charter the purposes of St. Thomas' Hospital so that the city may be regarded as holding any property given to the hospital for the charitable purposes of the hospital. I have already said that the Jewish Orphanage and the Home and Hospital for Jewish Incurables are unincorporated charities. In the event, however, I think that no relevant distinction can be drawn between any of the charities other than the London Hospital.

Counsel for the Attorney-General in his argument accepted, as he had to do, the rule in regard to indefinite shares of income given to individuals, but contended that such rule had no application, or no necessary application, to the case of charities. The rule as regards individuals is, according to counsel, based on the principle that a testator making an indefinite gift of income to an individual must intend that such individual should have the fullest enjoyment of the income: and that it followed accordingly that there could be no one else save the specified individual interested in the property; and, moreover, since the individual was not himself perpetual, the full enjoyment intended could only be achieved if the individual could call for the capital. If this view is right, then, according to the argument, it has no necessary application to a charity. True it A is that no one other than the charity has any interest in the property: but the charity is perpetual and enjoyment in perpetuity of the income does not require anticipation on the part of the charity. Further, a testator making a gift of income in perpetuity to a charity may fairly be held to intend a benefit to a varying class of persons from time to time. Counsel was able to produce authority clearly supporting the first part, at any rate, of his proposition as regards indi- B viduals, viz., the absence of any other right in anybody but the named individual to the fund—e.g. *Philipps* v. *Chamberlaine* (1). It seems true to say that there is no judicial statement in the books supporting the reasoning that an individual, not being perpetual, can only enjoy perpetual income by anticipation, i.e., by calling for capital. Yet I think that this second part of counsel's proposition must follow as a matter of logic from the first part. If I give the income of a C fund without qualification to A, then A is not, as a matter of construction of the gift, limited to the income accruing during the period of his own life. Equally there is no limitation as to the way in which he disposes of the income, either when he receives it or in advance. It follows that if true effect is to be given to my intention, as a matter of construction, A must have the right to command the corpus. But these considerations may not apply to a charity. As I have indicated, D a charity can effectively enjoy income as such in perpetuity and will in the natural course of things apply it for a varying class of beneficiaries. It is clear that if a testator so desires, he can effectively impose trusts limiting the way in which the income is applied, e.g., by saying that such income is to be applied for some special purpose of the charity and effect will be given to such direction. I think it also clear (although those appearing for the charities were not prepared E so to concede) that a testator can impose an effective trust of income in perpetuity for the general purposes of a charity, a view which is, in my judgment, supported by the authorities to which I shall refer.

It was argued that an individual to whom an indefinite gift of income was made was entitled to corpus as a rule or matter of law which took effect independently of and notwithstanding the wishes of the testator interpreted as a matter of F construction. I do not accept this view. No doubt in some cases the wishes of a testator, which will be defined as a matter of construction, will be overridden if their result is inconsistent with some principle of law. Thus a testator may direct in unmistakable terms an accumulation of income for fifty years: but the law will hold such provision ineffective. Similarly (and more to the present point) if a testator provides for perpetual trusts of income in a gift to a non-charitable G institution, the gift will be void because of the rule against perpetuities. The books contain many examples of such cases and to some of them I shall presently refer. But no such question arises here. If on the true construction of his will the testator intended to give to each of the charities a share of income (and no more) in perpetuity, and if he further intended that the income given to each charity was to be applied for the general purposes of the charity, then in my judgment H the question whether the charities can call for distribution of the corpus depends on the true interpretation of the scope and extent of the gift which the testator intended to confer. I repeat that, in my judgment, an indefinite gift of income to an individual requires that the individual is entitled to the corpus not by reason of some overriding rule of law, but because only by payment of the corpus can the individual get the full benefit and extent of the gift which, as a matter of I interpretation, the testator intended. A similar conclusion does not, I think, follow in the case of an indefinite gift of income to a charity for its general purposes, and if the testator here intended his gifts to be of that character, I see no reason why his dispositions should not be effective.

It seems to me, therefore, that the first question which must be answered is: What did the testator intend? More specifically, did he here intend to impose perpetual trusts of the income of his trust estate for the general purposes of the six charities which he named?

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(1) (1798), 4 Ves. 51.

I turn to the language of the will and I note first that the corpus of the estate is not left to the general trustees of the will (Barclays Bank, Ltd.) after the deaths of his brothers and sister, but is to be paid over to the Official Trustees of Charitable Funds to form a fund entitled the " Levy Family Charitable Trust ". It was stated in evidence, and it is a legitimate matter to take into account, that the testator and his brothers and sister all made wills in similar form: so that on the deaths of his brothers and sister, their estates also were paid to the Official Trustees of Charitable Funds and form part of the " Levy Family Charitable Trust ". This circumstance is, I think, emphasised by the reference in cl. 9 of the will to the fact that the testator and his brothers and sister had all their lives maintained their property " jointly in a state of community ". Obviously, therefore, it was a highly important feature of the testator's intended gift that the corpus of his estate should form part of this named family trust. It is not, I think, possible to doubt that he intended the trust to be perpetually maintained as a family memorial. It is true that the testator did not state that the shares of income which he then proceeded to give were to be applied in each case for the general purposes of the named charity: but in the light of what had gone before I cannot doubt as a matter of intention that that is what he meant. I would, therefore, read the gifts to the six charities as if there followed in each case words to the effect " to be applied to the general purposes of the Institution ".

Here I think some (though slight) support may be had from cl. 15. True, the challenge or interference mentioned in the clause seems to be in regard to the administration by his trustees before the final trust took effect in favour of the Official Trustees of Charitable Funds, so that if the clause does not fairly contemplate a challenge at a later date, it cannot so far be prayed in aid of an intention to create perpetual trusts of income. On the other hand, I observe that if one of the charities by a challenge were to forfeit its interest, then the testator provided that " the capital and income representing such interest " should go to the trustees for King Edward's Hospital Fund. In such an event the testator made it clear that King Edward's Hospital Fund took the capital and thereby seemed to show clearly a distinction between the nature of the contingent interest of that Hospital Fund and the interests of the six charities named in cl. 11.

If then I have correctly construed the testator's will and discovered his intention, is there any good reason why effect should not be given to it? With all respect to the learned judge, I think that there is not. I have said more than once that I do not accept the view that there is any rule of law which in such cases overrides intention, and I further do not think that an indefinite gift of income to a charity requires, in order to give effect to it as a matter of construction of the nature and extent of the gift, that the charity is entitled to call for the corpus.

I refer now to some of the cases. I have earlier mentioned *Philipps* v. *Chamberlaine* (2). In that case, unless the donee of income took the corpus, the result would have been an intestacy which SIR RICHARD ARDEN, M.R., was naturally concerned to avoid. The language of the judgment included the following (3):

> ". . . I should apprehend, that where the dividends and interest of the residue are given absolutely to the trustee and his heirs, upon trust to pay the interest and dividends to A. from time to time without any limitation of duration, it would carry the whole interest, even without the aid of the subsequent parts of this clause directing the shares to be paid at the age of twenty-one, with benefit of survivorship in case of the death of any of them before that age; from which I think, a fair inference arises. It is impossible to suppose such an absurdity, as would result from the contrary construction. An absurdity may be so great as to raise a necessary implication. A judge must divest himself of common sense to impute such an absurdity to a

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(2) (1798), 4 Ves. 51.

(3) (1798), 4 Ves. at p. 58.

> testator as to suppose, that he gives the interest to them for their respective lives only, and that if any one shall die under the age of twenty-one, then that share given for life only shall survive to the others; and so, if more than one die under that age; but if any of them should live to attain twenty-one, in that case it should not go over to the survivors, but be undisposed of. That part of the clause is perfectly satisfactory to show, that he did intend to give them the absolute interest."

I emphasise the last sentence: "He did intend to give them the absolute interest." The conclusion, in other words, is to my mind based, not on some prevalent rule of law, but on the extent of the gift as properly interpreted.

In Fearne's Contingent Remainders (1844 Edn.), Vol. 1, p. 465, it is stated:

> "Here we observe, that although only the dividends and payments of the stock and annuities and use of the furniture were devised for life to L.A.P. and not the stock, annuities or furniture themselves expressly; yet it was held to be the same thing: for as a devise of the rents and profits of land is tantamount to a devise of the land itself; so pari ratione, a devise of the dividends and payments of stock and annuities, and of the use of furniture, seems equivalent to a like limitation of the stock, annuities or furniture themselves; for such dividends, payments or use are the only immediate produce or value of the stock, annuities or furniture."

Note again that the result is arrived at because the devise of the rents and profits is "tantamount to the devise of the land" and that a similar principle is applicable in the case of personalty. It is, as a matter of construction of the gift, the same thing.

In *Re Lawes-Wittewronge, Maurice* v. *Bennett* (4), Warrington, J., based his decision that the individual to whom an indefinite gift of income had been given was entitled to corpus for the "obvious" reason that it would be absurd to say that the income arising from the fund was for all time (and I emphasise these three words) to be paid to one person, while the corpus was to belong to someone else. True, he introduced the relevant passage in his judgment by the words: "It is an undoubted rule of law", but he proceeded immediately to add the corrective "or rather perhaps of construction".

Danckwerts, J., regarded the case as covered by the two decisions of *Re Morgan, Morgan* v. *Morgan* (5) in this court, and *Wharton* v. *Masterman* (6). The testator in *Re Morgan* (5) had directed his trustees out of the interest and rents of his estate to pay certain annuities—in some cases to a named person or his or her descendants: and to pay the residue of the interests and rents to named charities. Stirling, J., held—but we have not the benefit of any report of his reasons—that the annuitants were intended to take for life only, the reference to descendants being by way of substitution of living descendants for an annuitant predeceasing the testator: but that the charities were entitled to corpus. There was no appeal on the second point, and on the first point this court upheld Stirling, J.'s conclusion. Lindley, L.J., no doubt said (7) that he thought that the indications were that the testator did not intend anyone to have the corpus "not even the charitable institutions", but the last words were in the circumstances pure dictum. The will may well have been construed or capable of being construed as not intending to impose any trusts on the income given to the charities. I do not, therefore, think that *Re Morgan* (5) assists the solution of the present case.

In *Wharton* v. *Masterman* (6) the testator had given certain annuities out of income and subject thereto he gave the residue of his estate to charities. Though the latter gift was expressed in unusual form, there was no doubt that it amounted to a gift of corpus; but enjoyment of corpus was, of course, postponed until the death of the last annuitant. The testator, however, further directed that during the lives of the annuitants the surplus income should be accumulated. The question was whether (since, as was held, the annuitants took no interest in the surplus income), the charities could stop the accumulations and receive surplus income until the death of the last annuitant; and the House of Lords, affirming the view of Stirling, J., and the Court of Appeal, held that they could—seeing that subject to the interests in income of the annuitants, they were absolutely entitled to the property. The present question did not, therefore, arise at all. Counsel for the charities in the present case relied, however, on certain language of Lord Macnaghten and Lord Davey. Lord Macnaghten, after saying that there could be no doubt if the residuary legatees were individuals that they could stop the accumulations, inquired whether it made any difference that the legatees were charities. He proceeded (8):

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(4) [1915] 1 Ch. at p. 412. (5) [1893] 3 Ch. 222. (6) [1895] A.C. 186.
(7) [1893] 3 Ch. at p. 227.

> " The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible. And they may legally apply what they take under the bequest either as capital or as income."

Having regard to the nature of the question before the House, the language of Lord Macnaghten cannot, in my judgment, be regarded as authority for the view as respects indefinite gifts of income to charitable institutions that they stand in all circumstances in exactly the same position as individuals. The language of Lord Davey was as follows (9):

> " And I think it unsound to make the application of a canon of construction as to the effect of particular words in a will dependent on circumstances affecting the quality or character of the donee. It will be observed that in the present case the gift is to each charity in a form which would enable the managers to spend the amount as income, or deal with it as they might think fit. We have not to deal with a fund to be created by accumulations and settled as a capital endowment at a future time, as to which different considerations would arise."

Again, the language must be interpreted in the context of the question before the House, though I observe the qualification in the last sentence quoted, and I observe too that Lord Davey treated the general question " as a canon of construction "—a view supporting that which I have ventured earlier to state.

If then I am right so far in thinking that the nature of the gifts to the charities depends on the true construction of the will, and if the will should be construed as though it imposed on the gifts of income trusts for the general purposes of the respective charities, there only remains the question whether none the less as a matter of interpretation of the gifts and their intended extent, the charities can call for the distribution of the corpus.

There are, as I have said, numerous and well-known instances in the books (from the first Penzance Library case, *Carne* v. *Long* (10) onwards) of gifts of income in favour of non-charitable bodies which have been held void as offending against the perpetuity rule. In *Re Clark's Trusts* (11), Hall, V.-C., held invalid on that ground a gift " to apply the dividends and income " of a sum of money in aid of the funds of a friendly society. It is true that the named friendly society, having been dissolved, no claim was made on its behalf or on behalf of its members to entitlement to the corpus; but Hall, V.-C.'s decision has been since quoted and followed many times as a matter of principle. It was, for instance, so quoted and approved in the Corps of Commissionaires case of *Re Clarke, Clarke* v. *Clarke* (12) by Byrne, J. In that case the gift was a gift of a share in certain property (not, be it observed, of the income of the property) in favour of the committee for the time being of the Corps to aid in the purchase of their barracks " or in any other way beneficial to that Corps ". Byrne, J., held that

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(8) [1895] A.C. at p. 194. (9) [1895] A.C. at p. 200.
(10) (1860), 2 De G.F. & J. 75. (11) (1875), 1 Ch.D. 497. (12) [1901] 2 Ch. 110.

BIBL. LONDIN UNIV.

the gift, in so far as any of its objects were not charitable, was a good gift, since on its true interpretation the committee could apply at once the whole capital sum for any purpose of their institution, so that no question of perpetuity arose. He said (13):

> " When once it [i.e. the capital sum] forms part of the funds of the corps, it may be dealt with by the governing body . . . in any way they may think best for the benefit of the corps."

On the other hand, in *Re Macaulay's Estate, Macaulay* v. *O'Donnell* (14), the House of Lords held that a gift of the testatrix' residuary estate to a Lodge of the Theosophical Society " absolutely for the maintenance and improvement " of the Lodge was bad as involving an indefinite trust of income in favour of a non-charitable institution and, therefore, offensive to the perpetuity rule. Lord Atkin and Lord Tomlin construed the words which I have quoted as intended to create an endowment to secure the continuance of the Lodge, i.e. (as I understand) as impressing the income of the residuary estate with a perpetual trust for the general purposes of the Lodge.

I cite last the later Penzance Library case of *Re Swain, Phillips* v. *Poole* (15) before Joyce, J. The testator in that case had given the income of his residuary estate on certain trusts in favour of the chess club at Penzance and subject thereto he gave " the same income to the Penzance Library ". The trusts in favour of the chess club having been held void, the question then arose as to the gift over of the income in favour of the Penzance Library. Mr. C. J. W. Farwell for the library argued that, according to the terms of the gift, the library committee could call for the corpus of the property and dispose of it as they thought fit; so that no question of perpetuity arose. But Joyce, J., rejected the argument. He said (16):

> " In the present case, all that is expressed in the will is a gift of income out of the estate to this society. Now, a definite gift of income ordinarily amounts to a gift of the corpus or capital, but that is only so where there is no intention express or implied that the donee is not to take more. In the present case, looking at the circumstances and reading the whole will, I am of opinion, on the terms of the will itself, that nothing more was intended to be given to this society than the annual rents, dividends, and profits. Therefore, in my opinion, that is a perpetuity or tends to perpetuity on the face of it, and the gift is void."

All the cases which I have recited relate to gifts in favour of non-charitable institutions. They establish in my judgment that if the true construction of the gift is inconsistent with an intention that the institution can call for capital, then the gift is avoided by the perpetuity rule and cannot be saved on the broad ground that an indefinite gift of income entitles the donee to call for the corpus and put an end to the trusts of income. It is true that no corresponding case has been cited to us relating to a gift in favour of a charitable institution—no doubt for the obvious reason that in such a case no question of invalidity could arise. Is there any ground for supposing that any different principle of construction can apply in the case of a gift of income in favour of a charitable institution? I think that there is not. If on the true interpretation of the gift a testator intends to create in favour of a charitable institution a perpetual trust of income, e.g., by stating that the income is to be applied for ever for the general purposes of the institution (in terms which, if the donee were non-charitable, would cause the gift to fail as offending against the perpetuity rule), is there any ground for saying that the charitable institution can determine the trusts and call for the corpus of the property (as the non-charitable institution, in order to save the validity of the gift, could not do)? I think that there is not. In other words, I think that there is no " canon of construction " (to use LORD DAVEY'S phrase (17)) which in such a case says that the intended extent of the gift entitles the charitable donee, if it is to enjoy that which is given as was intended, to call for corpus, and no authority which would support or justify such a conclusion.

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(13) [1901] 2 Ch. at p. 121.

(14) July 10, 1933, [1943] Ch. 435 n.

(15) (1908), 99 L.T. 604.

(16) (1908), 99 L.T. at p. 606.

I, therefore, think that (subject to the special point raised in its own case by the London Hospital) the court should give effect to the testator's intention as I have interpreted it. As regards the London Hospital, it is no doubt true that, being a corporation incorporated by royal charter, it has (according to the terms of the charter) the same capacity to do with its own as an individual. It may, therefore, not be subject to the same control as its co-defendant charities in regard to the application in fact of its property. But the corporation carries on the hospital activities known by its name, and, in my view, the gift of income to the London Hospital should be treated as having impressed on it (in the same way as the gifts in favour of the other institutions) the qualification " for the general purposes of the hospital ". I can see no ground, accordingly, for interpreting the gift in favour of the London Hospital differently from the gifts in favour of the other charitable institutions or for saying that the London Hospital has, according to the terms of the gift in its favour, any right quoad corpus which the other charities have not.

In the circumstances I think that counsel for the Attorney-General has made good his argument for allowing the appeal and that an order should be made, accordingly, in the terms prayed by the notice of appeal.

SELLERS, L.J.: The testator intended, as I would read his will, that the whole of the capital of his residuary estate should be kept perpetually intact in the hands of the Official Trustees of Charitable Funds to form the " Levy Charitable Trust " as a memorial to a family which had conserved money and nurtured charity and that the proceeds should be enjoyed with equality of income in each eighth share year by year.

All the named charities would be known to be, or would have been assumed by the testator to be, of a permanent character, who as far as could be envisaged would use year by year for their respective purposes such income as they could command. The nature of these institutions is not similar, but is in contrast to that of an individual whose life must end and who cannot enjoy an income beyond a limited span of years, and from this point of view I would not differentiate the London Hospital.

The beneficiaries, except the Jewish Orphanage and the Home and Hospital for Jewish Incurables, have not been content with what they were given in the way the testator intended to give it. No doubt in the belief that they could obtain greater benefit for their respective charities by having the capital in their own hands than in the hands of the appointed trustee, they have risked these proceedings. It seems that the risk was not great, for cl. 15 has been ignored by the learned judge and there is no appeal against the decision. I am inclined to think that the testator, far from intending to give the claimants a share of the capital of his residuary estate, intended to disinherit them and to benefit in their place, with the relative capital and interest, the King Edward's Hospital Fund, who, by wise anticipation, were his chosen alternative to those of his original beneficiaries who did not want his benefactions without disputing the manner or the extent of the giving. If this is heresy to those who breathe the air of Chancery, it is to me, who have not breathed the air so long, a comment which has remained after all the argument and consideration this case has received. According to the testator, if any institution was to have the capital, it was the King Edward's Hospital Fund.

It has been established that an indefinite gift of income to an individual (immediately or after a period of accumulation) would entitle the individual to the capital or fund from which the income was to be derived. I agree with the opinion of LORD EVERSHED, M.R., that this is so not by some overriding rule A of law, but because only by a payment of the capital could the individual get the full benefit of the gift which, as a matter of interpretation, the testator intended. A similar conclusion does not seem to me to follow in the case of an indefinite gift of income to a charity for its general purposes.

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(17) [1895] A.C. at p. 200.

The authorities reviewed by LORD EVERSHED, M.R., do not require, and no reason, social, practical or economic requires, in my opinion, the court to allow B the parties in this case to enjoy the benefactions of the testator while discarding the terms on which the benefactions were made.

I agree with the judgments of LORD EVERSHED, M.R., and HARMAN, L.J., and with deference to the experienced views of DANCKWERTS, J., I, too, would allow the appeal.

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HARMAN, L.J.: These proceedings are, on the face of them, concerned only with the affairs of one George Levy, who died in 1940, but are in fact likely to control not only his estate, but that of his two brothers, Abraham who died in 1943 and Maurice who died in 1955, and his sister Bertha, who died in the year 1954. The three brothers carried on for many years business together as retailers of footwear and clothing in the Midlands, and they and their sister Bertha appear D to have maintained the whole of their properties in common. All four of them left wills in terms which, for the present purposes, may be taken to have been identical, and the present question arose on the death of the last of them, Maurice, in October, 1955. The bank is executor and trustee of all the wills. The combined residue of the three brothers falls not far short of a quarter of a million pounds, the sister also left a large estate, and all four funds devolve in the same way. E

The testator's will was made on Aug. 12, 1936. His estate has been fully administered. The relevant parts of the will are in cl. 11, which has already been read. By cl. 15 the testator sought to forfeit the share of any charity challenging or calling in question the terms of his will and purported to give over the forfeited share or shares to King Edward's Hospital Fund. This clause, however, was declared by the learned judge to be void and on that point there is no appeal. F

The only other question before the judge arose out of the claim of some of the charities to have handed over to them absolutely for their several charitable purposes the share of corpus referable to the income bequeathed to them. The learned judge accepted this claim, holding in effect that the result of an indefinite gift of income by will in favour of a charity has the same effect as a like gift in favour of an individual, to wit, that the legatee may claim to have paid to him G that share of capital to which the income given is referable. The Attorney-General's contention is that this so-called rule is merely a rule of construction or, in other words, a guide to the construction of a will. Where the instrument makes no disposition expressly disposing beneficially of the corpus of a fund or share of which the income is given, but leaves the testator's further intention as to its disposition entirely a matter of inference, it has long been held that the court H may, and as a rule should, construe the gift of income with no temporal limit attached if it be to an individual as equivalent to a gift of the capital producing that income. The Attorney-General argues that this is only an inference to be drawn where no contrary intention appears in the instrument, and that in the present case it is perfectly clear that this was not the testator's intention. None the less it is argued by the legatees that there is a well-settled rule in the I case of a gift to individuals and no reason why charities, whether corporate or incorporate, should be treated differently.

The rule is an old one going back at least to the time of SIR RICHARD ARDEN, M.R., who so held in *Philipps* v. *Chamberlaine* (18) where the headnote reads:

> "The capital of the residue passed by implication; though the interest and dividends only were expressly disposed of."

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(18) (1798), 4 Ves. 51.

An explanation is afforded by WARRINGTON, J., in *Re Lawes-Wittewronge* (19) in the words which have already been read. The question is whether this principle applies to charities of which here there are three kinds, viz., unincorporated associations consisting of individuals holding charitable funds on specific charitable trusts, secondly, corporations under the Companies Acts whose objects are defined by their memoranda of association, and, thirdly, a corporation by charter, which of course can do anything which a natural person can do except in so far as the terms of the charter forbid it. Each of these three classes of persons, of course, hold their endowments on trusts to which the law allows an indefinite duration because they are charitable, and moneys given to them are devoted to their several charitable purposes whether the gift makes any mention of those purposes or no. It must, as it seems to me, be possible by proper words to add to those endowments and so create a trust of indefinite duration. Were it not so there would have been a short end to cases where the argument turned on whether the donee was intended to have the spending of the capital or no. A good instance is *Re Swain* (20), a case concerning a library at Penzance, from which the passage has already been cited by my Lord but as to which I would observe that the judge is misreported because the words used are "a definite gift of income" whereas clearly JOYCE, J., meant to say "an indefinite gift of income" and the reporter misunderstood him or misheard him. There was an earlier case about a gift to this same library, *Carne* v. *Long* (21). In that case the gift was of corpus in terms that might have been construed as an absolute gift to the members, but LORD CAMPBELL, L.C., looked at the constitution of the body and concluded that the donees could not under the rules dispose of the capital: he therefore held that this gift too tended to a perpetuity and was void. This case is authority for the proposition that a gift to a public body is a gift to it for its work or purposes. Similarly in *Re Clark's Trusts* (22) where HALL, V.-C., comes to the conclusion that a gift of income to a friendly society, not being a gift to a charity, was void as tending to a perpetuity. See also *Re Amos, Carrier* v. *Price* (23), a case of a gift to a trade union. The learned judge appears to have considered that the case was covered by *Wharton* v. *Masterman* (24). In my judgment that case is irrelevant. There was no doubt there that the gift to the charity was a gift of capital absolutely. What the testator wished to do was to defer the handing over of the capital for a period while the income accumulated, but it was held that a charity, no less than an individual, being absolutely entitled to corpus, may stop the accumulations and call for the corpus at once. This does not seem to me to govern a case where, on the face of the will, only income is given.

I do not find any reason to differentiate between the legatees according to their constitutions. It is quite clear that the testator intended them all to be treated alike. To each income is given which must, as a matter of construction, be treated as given for the purposes of the work carried on by each, and I cannot see that a difference in the constitution of the donee can make any difference to the quantum of the gift.

I would, therefore, concur in allowing this appeal.

Appeal allowed. Leave to appeal to the House of Lords refused.

Solicitors: *Treasury Solicitor; White & Leonard* (for the plaintiff); *Stephenson, Harwood & Tatham* (for the first defendant); *Birkbeck, Julius, Coburn & Broad* (for the second defendant); *Hanbury, Whitting & Ingle* (for the third defendant); *Pennington & Son* (for the fourth defendant); *Hyman Isaacs, Lewis & Mills* (for the fifth and sixth defendants); *E. F. Turner & Son* (for the seventh defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(19) [1915] 1 Ch. at p. 412. (20) (1908), 99 L.T. 604.
(21) (1860), 2 De G.F. & J. 75. (22) (1875), 1 Ch.D. 497. (23) [1891] 3 Ch. 159.
(24) [1895] A.C. 186.

LONGHURST *v.* GUILDFORD GODALMING & DISTRICT WATER BOARD

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), November 19, 20, 27, 1959.]

Factory—Definition—Pumping station occupied by water board—Water from springs filtered and chlorinated in filter house then put under pressure in pump house—Whether water " article "—Whether process of making water wholesome " the altering or cleaning " of water—Whether pump house a factory—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 151 (1) (*b*), (6).

The plaintiff was employed as an engine driver at the defendant water board's pumping station. Under the Water Act, 1945, Sch. 3, s. 31, the water board were under a duty to provide in their mains and communication pipes a supply of " wholesome water " for domestic purposes. The pumping station consisted of a fenced area of some sixty-four acres on which were two buildings, a filter house and a pump house. Water, collected from springs, was first passed through the filter house to extract any foreign matter and was then chlorinated, while being passed from the filter house into a tank which lay under the filter house and extended under part of the space between the filter house and the pump house. In the tank the chlorine solution used was disseminated in the water. By means of the pumps in the pump house the water was then pumped out of the tank, put under pressure and forced along the mains, either directly to the houses in the district, or to a reservoir from which the water fell by gravity to feed the houses. On the day of the accident it was the plaintiff's job to clean the machinery in the pump house and to clean the guard-rails of the machines. For this purpose he wore gauntlet gloves. He was in sole charge of the pumping station and alone in it on that day. In the evening the plaintiff was found lying with both arms over the top guard-rail of one of the machines, which was in motion, his right hand having been mangled by the bite of the machine; he was wearing a gauntlet glove on his left hand and the right-hand glove, which was lying under the machine's pulley, showed that it had been through the bite. The broad guard-rails of the machine were the same as those provided in other pumping stations throughout the country, and were horizontally, about thirteen inches from the edge of the pulley and, vertically, about six inches above the pulley. The plaintiff had no recollection of the accident and there was no clear evidence of how it happened. In an action by the plaintiff for damages for personal injuries based on breach of duty at common law and breach of statutory duty under the Factories Act, 1937, s. 13, to fence securely the machinery, the court found that no breach of duty at common law was established. By s. 151 (1) (b) of that Act " factory " means, inter alia, premises within the precincts of which persons are employed in manual labour in any process for or incidental to " the altering [or] . . . cleaning . . . of any articles ". By s. 151 (6), where a place, within the precincts forming a factory, is solely used for some purpose other than the processes carried on in the factory it is deemed not to form part of the factory for the purposes of the Act.

Held: (i) the pumping station was within the words of s. 151 (1) (b) of the Factories Act, 1937, because water could be, and in the present case was, an " article " for the purposes of the definition of " factory ", and the processes of filtration and chlorination carried on in the filter house constituted altering or cleaning the article within s. 151 (1) (b).

Dictum of SCOTT, L.J. in *Cox* v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.* ([1948] 2 All E.R. at p. 667) applied.

Wiltshire County Valuation Committee v. *London Co-operative Society, Ltd.* ([1950] 1 All E.R. 937) distinguished.

(ii) the pump house, however, being a place where the water was put under pressure but was not altered or cleaned, was a place used for purposes that were other than the processes carried on in the factory; therefore, by virtue of s. 151 (6) the pump house was not part of that factory within the Factories Act, 1937, and the plaintiff's claim for breach of statutory duty failed.

[As to the meaning of factory in the factory legislation, see 17 HALSBURY'S LAWS (3rd Edn.) 11-13, para. 13.

As to a master's duty to provide a safe place of work at common law, see 25 HALSBURY'S LAWS (3rd Edn.) 514, para. 981.

For the Factories Act, 1937, s. 151 (1), (6), see 9 HALSBURY'S STATUTES (2nd Edn.) 1113, 1115.]

Cases referred to:

Cox v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.*, [1948] 2 All E.R. 665; [1949] L.J.R. 294; 24 Digest (Repl.) 1022, *11*.

Ferens v. *O'Brien*, (1883), 11 Q.B.D. 21; 52 L.J.M.C. 70; 47 J.P. 472; 15 Digest (Repl.) 1085, *10,735*.

Sedgwick (*Camberwell Revenue Officer*) v. *Camberwell Assessment Committee & Watney, Combe, Reid & Co.*, [1931] All E.R. Rep. 242; [1931] A.C. 446; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

Thorogood v. *Van den Berghs & Jurgens, Ltd.*, [1951] 1 All E.R. 682; 115 J.P. 237; sub nom. *Thurogood* v. *Van den Berghs & Jurgens, Ltd.*, [1951] 2 K.B. 537; 24 Digest (Repl.) 1023, *13*.

Wiltshire County Valuation Committee v. *London Co-operative Society, Ltd.*, [1950] 1 All E.R. 937; 114 J.P. 266; 2nd Digest Supp.

Action.

In this action the plaintiff, Nicholas Alexander Irwin Longhurst, claimed damages for personal injuries, loss and expense suffered by reason of the negligence or, alternatively, breach of duty under the Factories Act, 1937, of the defendants, Guildford Godalming and District Water Board, his employers. At the time of the accident the plaintiff was employed as an engine driver at Vann Lane Pumping Station, Hambledon, Surrey. The pumping station consisted of a fenced area of about sixty-four acres in which water, collected from springs, was brought down by gravity to a filter house where it was passed through filters to extract foreign matter; from there the water was passed into a large concrete tank extending under the filter house and under part of the space intervening between the filter house and the other building on the station, the pump house. On its way from the filter house to the tank the water was chlorinated with a chlorine solution, the solution disseminating in the water, in the tank. In the filter house, apart from the filters and the chlorination plant, there was a small Petter engine used for cleaning the filters. In the pump house there was a large pump engine and two smaller pump engines. These engines pumped the water out of the tank, put it under pressure and forced it along the mains. Part of the pressurised water went into a reservoir at a higher level, from which it fell by gravity to feed the houses in the district, and part went direct, through the mains, to the houses. The floor of the pump house consisted of concrete and of quarry tiles around the pumps. The plaintiff had worked at this pumping station for seven years and at other stations since about 1932. On Saturday, Feb. 1, 1958, he was in charge of the station and was alone there; in the ordinary way, he would have gone home between 5 p.m. and 8 p.m. when he would have returned to the station to do the night shift. On Saturdays it was the plaintiff's job to clean the two small pumps in the pump house during the morning, while the large pump was in use; it was then his custom to put the large pump out of operation, at about 1 or 2 p.m., and to start up the two small pumps. It was also his job on Saturdays to clean the floor of the pump house and the guard-rails around the pumps. The plaintiff said that on Saturdays, for the purpose of cleaning up, he wore gauntlet gloves. At about 2 p.m. on Feb. 1 the plaintiff went across to the filter house and entered up certain records as was his custom;

he then returned to the pump house. At 4.30 p.m. the wife of the alternate engine driver, a Mrs. Hall, telephoned the station and got no reply; she telephoned again at 4.45 p.m., as she wanted the plaintiff to bring home her husband's shaving tackle, but again got no reply. At 8.15 p.m. she telephoned a third time and still getting no reply she contacted one of the defendants' superintendents who went down to the station. There he found the plaintiff, almost unconscious, in the pump house lying over some guard-rails by a machine; his right hand was completely mangled as if it had gone into the bite of the belt and pulley of the machine: he was wearing a gauntlet glove on his left hand and the glove which had been on the right hand was lying on the floor under the pulley showing marks of having been through the bite. There was blood on the floor. The bite of the machine by which the plaintiff was lying was between the pulley, which consisted of five rather sharp edges with grooves in between them, and the belt which was really four belts joined together and which ran in the grooves of the pulley. There were guard-rails about three feet high around the machine. At the position opposite the bite formed by the belt and pulley the top guard-rail was, horizontally, about thirteen inches from the edge or side of the pulley and, vertically, about six and a quarter inches above the pulley. When he was found, the plaintiff had both arms over the top guard-rail and was standing square to the pulley; his right arm was caught and kept, by the rotation of the pulley, between the side of the pulley and the bearing. The guard-rails provided at this pumping station were the same as provided in pumping stations throughout the country. The plaintiff had no reliable recollection of the accident. He thought that he must have slipped on the pump house floor while wiping down the guard-rails of the machine, but no marks were found on the floor to indicate a slip and he was wearing hob-nailed boots at the time of the accident. He might have been attempting to wipe the face of the pulley, using his right glove as a rag, and the glove got caught in the bite and dragged the hand with it, but this would be a highly dangerous thing to do when the machine was in motion and it was not suggested that the plaintiff was other than a careful man; further, he said in evidence that the only moving bit of machinery he ever cleaned was the flywheel on the engines, where there was no danger. As a result of the accident the plaintiff's right arm was amputated four inches from the shoulder.

By his statement of claim the plaintiff alleged that the defendants were negligent in that they caused or permitted the plaintiff to work in the pumping station without assistance; caused and permitted the floor of the premises in the vicinity of the machinery in question to be tilted and slippery, and failed to provide safe premises and a safe system of work for the plaintiff. The plaintiff also alleged breach of statutory duty by the defendants, namely, that contrary to s. 13 of the Factories Act, 1937, they failed securely to fence the machinery. By their defence the defendants denied negligence and breach of s. 13; further, they denied that the pumping station was a factory within the meaning of the Factories Act, 1937.

G. G. Blackledge, Q.C., and *P. Perrins* for the plaintiff.
F. W. Beney, Q.C., and *E. W. Eveleigh* for the defendants.

LORD PARKER, C.J., having referred to the facts (see pp. 55, 56), said that he was unable to make any finding as to the exact circumstances in which the accident occurred. He was satisfied that the plaintiff was unable to remember how the accident happened, there was no sufficient evidence to establish how it happened and the matter was one of conjecture. HIS LORDSHIP continued: That being the position in regard to the accident itself, what is the position in law? It is said, first of all, that as a matter of duty at common law the defendants ought to have done something more to fence these machines. It is said and urged strongly by counsel for the plaintiff that a prudent, reasonable employer ought to have been able to foresee that there was danger in that some man left in charge might inadvertently come in contact with the pulley and the belt. For

A my part, I can find here no breach of the common law duty. The evidence is that the broad guard-rails provided in this station were the same as are provided in pumping stations all over the country. As Mr. Bewsher, the expert called for the plaintiff, said, the lay-out is the same, and his words were that it would be very unusual to find anything in the nature of close fencing round these machines. There is no evidence of any previous accidents. Moreover, this is a job that a B man does on his own without any hurry—there is none of the bustle of a factory or works—where he has ample time to do his work. For my part, I am quite unable to say, to use the other test (1), that it was folly on the part of the defendants not to provide some close fencing which would have prevented, and which alone would have prevented, this accident.

The position does not end there, however, because there is the alternative C claim of breach of statutory duty under s. 13 of the Factories Act, 1937. The first question that arises is whether this pumping station or any part of it was a factory. As to that there is little authority and it is, perhaps, significant that there is no case in which a waterworks or a pumping station has been held to be a factory. Indeed, if I understand the evidence aright, it is the general view of all public authorities who carry out the duties of supplying water that such D premises as these are not factories. The relevant statutory provisions are s. 151, sub-ss. (1), (6) and (9) of the Act of 1937. I will refer first to sub-s. (9) in order to put it right out of the way; it provides that:

> " Any premises belonging to or in the occupation of [amongst others, a] public authority shall not be deemed not to be a factory . . . by reason only E that the work carried on thereat is not carried on by way of trade or for purposes of gain."

One therefore comes back to sub-s. (1) which provides that:

> " Subject to the provisions of this section, the expression ' factory ' means any premises in which, or within the close or curtilage or precincts of which, F persons are employed in manual labour in any process for or incidental to any of the following purposes, namely:—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of G trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control."

This being a public authority, by reason of sub-s. (9) I am not concerned with the question of trade or gain. It is also conceded that the plaintiff was engaged in manual labour. Accordingly, the only provision that I have to consider is whether in any part of the precincts there was a process for or incidental to " the altering " H or " cleaning . . . of any article " or " adapting for sale of any article ". Those are the only words which could possibly, I think, apply.

The first question, therefore, is whether water can come under the description of " article ". As I have said, it has apparently always been assumed that it does not. But, at the same time, I do not quite know what meaning one could fairly give to " article " which would cut out water. It is no good saying that water I is a natural element; there are clearly plenty of natural elements which undoubtedly would be articles. It has been held in *Ferens* v. *O'Brien* (2) that water may be the subject of a larceny at common law. Reference was also made to water in *Cox* v. *Cutler & Sons, Ltd. & Hampton Court Gas Co.* (3). What was there being considered was gas. SCOTT, L.J., in dealing with the question whether gas was an article, said this (4):

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(1) The test, it seems, formulated by LORD DUNEDIN in *Morton* v. *William Dixon, Ltd.*, 1909 S.C. at p. 809; the test is stated in a footnote to *Cavanagh* v. *Ulster Weaving Co., Ltd.*, [1959] 2 All E.R. at p. 746.

(2) (1883), 11 Q.B.D. 21.

(3) [1948] 2 All E.R. 665.

> " The word ' article ' is not defined either in [s. 151] or in s. 152, the general definition section. It must, therefore, be given its ordinary meaning in the English language . . ."

Then he refers to certain dictionary meanings. He continues, a little further down the page (4):

> " I can see no reason for not regarding all three substances, [the three gases that he was considering] whether in their solid, liquid or gaseous states, as ' articles '. So, too, with regard to water and steam. Aerated water is obviously an article. Steam under pressure can be supplied by appropriate pipes and sold. Coal gas is bought and sold."

The reference there to water is clearly obiter, but, at any rate, it is some support for the view that water, at any rate in some form, can be an article. For my part, I see no reason why it should not be, and I would hold that under s. 151 of the Factories Act, 1937, water can be an article.

The next question then is whether in any part of the precincts there was a process being carried on for the altering or cleaning of any article or the adapting for sale of any article. The difficulty in regard to adapting for sale is the question whether in the supply of water it can properly be said that there is a sale, but I put that out of consideration for a moment. What is said is that there was a duty which is to be found in the Water Act, 1945, Sch. 3, s. 31, which is to this effect:

> " The undertakers shall provide in their mains and communication pipes a supply of wholesome water sufficient for the domestic purposes of all owners and occupiers of premises within the limits of supply who under the special Act are entitled to demand a supply for those purposes."

Accordingly, what the defendants have to do is to make available a supply of wholesome water and for that purpose they take water as it comes from the springs; they put it through the filter to take away any extraneous matter, and they then purify it or disinfect it by means of chlorination. It is said that what goes out then is something different from what comes into the filter house: that wholesome water fit for drinking goes out; water which cannot be sold as wholesome water comes in, and that that process can fairly be said to be the altering or cleaning of an article. I have come to the conclusion that that argument should succeed. It is said that that is not really consistent with the decision of the Divisional Court in what is called the " milk " case, *Wiltshire County Valuation Committee* v. *London Co-operative Society, Ltd.* (5). The matter there under consideration was whether the hereditament in question fell to be de-rated. The definition of " factory " for the purposes of the de-rating Act (6) is the definition of " factory " in the Factory and Workshop Acts, 1901 to 1920 (7). It was there held that the process of cleaning and cooling the milk was not adapting an article for sale within the meaning of " factory " (8),

> " for nothing was done to turn an unfinished article into a finished one or anything analogous thereto, and, therefore, the premises were not a factory and so entitled to be de-rated as an industrial hereditament " (9).

Now be it observed that all that was done in *Wiltshire County Valuation Committee* v. *London Co-operative Society, Ltd.* (5) was to filter, or clean the milk and cool it. Those processes were not done for the direct purpose of sale but in order

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(4) [1948] 2 All E.R. at p. 667.

(5) [1950] 1 All E.R. 937.

(6) Viz., for the purposes of the Rating and Valuation (Apportionment) Act, 1928.

(7) See s. 3 (2) of the Rating and Valuation (Apportionment) Act, 1928, and s. 159 (3) of the Factories Act, 1937. By s. 149 (1) (c) (iii) of the Factory and Workshop Act, 1901, " factory " includes premises where manual labour is exercised, for trade or gain, in or incidental to the adapting for sale of an article.

(8) Viz., as defined in the Factory and Workshop Act, 1901; see footnote (7) supra.

(9) [1950] 1 All E.R. at p. 937.

A to enable the milk to be safely carried, that is, carried without deterioration, to another place where it was going to be pasteurized. Leaving out the question of removing any extraneous matter, the process was, and was really treated in the judgment as, the process of cooling. I do not see how it can be said that milk before and after cooling has been altered in any way or that the milk was adapted for sale by being cooled. The milk in that case was drinkable both before and B after it had been cooled. It seems to me that here something very much more is done by the chlorination and that something which is not drinkable in the proper sense before as wholesome water has been altered and has become wholesome water which it is the duty of the defendants to supply.

I was also referred to what is called the " beer " case, the case of *Sedgwick (Camberwell Revenue Officer)* v. *Camberwell Assessment Committee & Watney,* C *Combe, Reid & Co.* (10), but for the purposes of this case I get, I think, little help from that case because the question in that case was whether the process in question was or was not a mere prelude to distribution. It is clear that in that case beer which was undrinkable came into the premises and went out carbonised and bottled and labelled for sale, and, therefore, looked at in that way, it was clearly an adapting for sale. As I have said—although there is, I think, no direct D authority on this—I hold that there was here the altering or cleaning of an article. That being so, it is really unnecessary to consider whether there was an adapting for sale. There was clearly, I think, an adapting, but I find it unnecessary to decide whether the supply of water by a public authority can be said to create a contract of sale.

So far, therefore, I am with the plaintiff, but the next question that arises, E and I think the most difficult question, is the effect of sub-s. (6) of s. 151 of the Factories Act, 1937. Subsection (6) provides:

> " Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory F for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

What is said here on behalf of the defendants is this. Granted that the filter house, being part of the precincts, was a place where the processes of cleaning or altering or adapting were carried out, yet the pump house, which was also within the same precincts, was used for quite a different purpose and not a G purpose which of itself would make it a factory. The defendants say that any altering, cleaning or adapting which took place came to an end when the water was in the concrete tank: it had then been filtered and chlorinated, and that all that took place in the pump house was nothing to do with that altering or cleaning or adapting, but was merely putting the water under pressure in order to force it along to the houses that it had to supply. Again I find that there is little useful H authority on this. I have been referred to the well-known case of *Thorogood* v. *Van den Berghs & Jurgens, Ltd.* (11). That was quite a different case because in the engineering shop in that case a bit of machinery was being tested, which bit of machinery was clearly necessary for the making of margarine in the main factory and, as such, the testing there was incidental to the process of the making of margarine. It is said that here the pumping was in no way incidental to the I filtering or the cleaning; that had already been done, and the process being carried out in the pumping house was a separate and new process. As I understand it, counsel for the plaintiff's real case is that whether or not the pump house can be split, as it were, from the precincts under sub-s. (6), what is being done in that pump house is every bit as much a matter of alteration or adapting for sale as what is done in the filter house. As he puts it: the duty of a local authority is to provide wholesome water. Under Sch. 3, s. 31 to the Water Act, 1945, to which I have referred, the duty is to provide that supply in the mains and communication pipes. That, counsel says, as the Act of 1945 indeed contemplates, can only be done by putting pressure on the water, and what is being done in the pump house is again an alteration or an adapting for sale, namely, putting pressure on the water. I confess I find it very difficult to accept that argument. Granting that water is an article; granting that the making of wholesome water is the altering, cleaning or adapting of an article, it seems to me that all that is done in the pump house is to put pressure on to that article. Bearing in mind that s. 13 of the Act of 1937 is a penal provision (12), I find it almost impossible to say that water under pressure, that is, not aerated water or carbonised water, but just water being forced along a pipe, is any different from water and that there has been any altering or cleaning or adapting by putting pressure on it. It seems to me that the effect of the pressure is just a matter of transport: instead of having tankers to take the water from the concrete tank and deliver it to individual houses, it is forced through the mains to those individual houses. I cannot bring myself to think that the putting of water under pressure for that purpose is an altering of water or an adapting for sale of water. In those circumstances, I have come to the conclusion, rather reluctantly, because I am sorry for the plaintiff, that this action must fail. As I have said, I can find no breach at common law, and, so far as the Factories Act, 1937, is concerned, although I go with the plaintiff's argument a long way, I think that he fails by reason of sub-s. (6) in that what is being done in the pump house is something other than the processes for or incidental to what is carried on in the filter house. Accordingly, in my judgment, this action must fail and there must be judgment for the defendants.

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(10) [1931] All E.R. Rep. 242; [1931] A.C. 446.

(11) [1951] 1 All E.R. 682; sub nom. *Thurogood* v. *Van den Berghs & Jurgens, Ltd.* [1951] 2 K.B. 537.

I understand, however, that this matter may well go further and in case it does I would like to add this. If I had found any liability on the part of the defendants I should have found no contributory negligence on the part of the plaintiff. As I said earlier, it may be that he was doing a very stupid thing, but in the state of the evidence (13) and bearing in mind that the onus of proof of contributory negligence is on the defendants, I would have been unable to find any contributory negligence.

[HIS LORDSHIP added that had liability been established against the defendants he would have assessed the damages at £5,245, including special damage of £745. The plaintiff was now aged fifty-eight. As a result of the accident his arm was amputated some three and a quarter inches below the shoulder and he also had fractured ribs and a torn back muscle. He was in hospital from Feb. 1 to Mar. 10, 1958. He still suffered from pain in the phantom limb and in his shoulder and while pain in the phantom limb would disappear in time he would experience it for another year or so. With an amputation of this kind an artificial limb was useless although he could have a hook fixed on to it. In effect the plaintiff was a one-armed man; he could not dress himself and required help with his food. The only manual work he could do was a little sweeping; he was, however, a skilled man. The plaintiff had been kept on by the defendants and now worked as an inspector, but if he lost this job his continuing loss might be more serious than the £5 a week he was now losing.]

Judgment for the defendants.

Solicitors: *Darracotts* (for the plaintiff); *William Charles Crocker* (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(12) See s. 130 of the Factories Act, 1937.

(13) See p. 56, letter E, ante.

R. *v.* SHACTER.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery and Salmon, JJ.), December 7, 1959.]

Company—Officer—Auditor—Whether "officer" of company within criminal enactments—Whether "public officer" of company within such enactments—Auditor charged with fraud, fraudulent statements and falsifying books as officer of a company—Larceny Act, 1861 (24 *&* 25 *Vict. c.* 96), *s.* 83, *s.* 84 *—Companies Act,* 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 328 (1) (*j*), *s.* 330, *s.* 331, *s.* 455 (1).

The appellant, an auditor of the M.S. Co. and the W.N.M. Co., was charged, with one M.S., a director of the same companies, with publishing fraudulent statements and falsifying books of account contrary to s. 84 and s. 83 of the Larceny Act, 1861, with frauds and default by officers of a company contrary to s. 330 (a) and s. 331 of the Companies Act, 1948, and with making a false entry contrary to s. 328 (1) (j) of the Act of 1948. At the trial the judge directed the jury that in law, if the appellant was appointed auditor and was exercising the office of auditor, he was an officer of the company. The appellant was convicted and appealed against his conviction on the ground that the direction was a misdirection.

Held: the direction was correct in law because—

(i) an auditor appointed by a company to fill an office (as distinct from an auditor appointed for a particular purpose) was an officer of the company for the purpose of criminal liability under s. 328 (1) (j), s. 330 and s. 331 of the Companies Act, 1948, there being no distinction between the interpretation of the word "officer" in s. 333 (which was concerned with civil liability for misfeasance) and the interpretation of the word in the penal sections (*Re London & General Bank*, [1895] 2 Ch. 166) applied), and

(ii) so, too, an auditor so appointed was a "public officer" within s. 83 and s. 84 of the Larceny Act, 1861.

Appeal dismissed.

[As to the position of an auditor in a company, see 6 HALSBURY'S LAWS (3rd Edn.) 388, para. 752, especially note (e); and for cases on the subject, see 9 DIGEST (Repl.) 586, 587, *3875-3877*.

For the Companies Act, 1948, s. 328, s. 330, s. 331, s. 455, see 3 HALSBURY'S STATUTES (2nd Edn.) 710, 713, 788.

For the Larceny Act, 1861, s. 83, s. 84, see 5 HALSBURY'S STATUTES (2nd Edn.) 741, 742.]

Cases referred to:

Kingston Cotton Mill Co., Re, [1896] 1 Ch. 6; 65 L.J.Ch. 145; sub nom. *Re Kingston Cotton Mill Co., Ltd., Ex p. Pickering & Peasegood,* 73 L.T. 482; 9 Digest (Repl. 586, *3876*.

London & General Bank, Re, [1895] 2 Ch. 166; 72 L.T. 611; sub nom. *London & General Bank, Ltd., Theobald's Case,* 64 L.J.Ch. 866; *subsequent proceedings,* [1895] 2 Ch. 673; 9 Digest (Repl.) 586, *3875*.

Western Counties Steam Bakeries & Milling Co., Re, [1897] 1 Ch. 617; sub nom. *Re Western Counties Steam Bakeries & Milling Co., Parsons & Robjent's Case,* 66 L.J.Ch. 354; 76 L.T. 239; 9 Digest (Repl.) 586, *3877*.

Appeal.

The appellant, Norman Shacter, was convicted with Maurice Shalam at Manchester Assizes on Apr. 30, 1959, by THESIGER, J., on three counts of publishing fraudulent statements and falsifying books of account contrary to s. 84 and s. 83 of the Larceny Act, 1861, and on four counts of fraud and default by officers of a company contrary to s. 330 (a) and s. 331 of the Companies Act, 1948, and on a final count of making a false entry in a paper* relating to a company contrary to s. 328 (1) (j) of that Act. He was sentenced to nine months' imprisonment. He appealed against conviction on the ground, among others, that there had been misdirection in law in that the jury had been directed that if he had been appointed auditor and was exercising the office of auditor at the relevant time he was an officer of the companies for the purposes of the criminal enactments under which he was charged. The case is reported solely on the question whether an auditor is an officer of a company for the purposes of these enactments.

Christmas Humphreys, Q.C., and *A. K. Hollings* for the appellant.
Fenton Atkinson, Q.C., and *P. C. S. Kershaw* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: This appellant was convicted at Manchester Assizes together with one Shalam, who has not appealed, of publishing fraudulent statements and falsifying books of account contrary to s. 83 and s. 84 of the Larceny Act, 1861, and also of frauds and defaults by officers of a company contrary to s. 330 (a) and s. 331 of the Companies Act, 1948, and of making a false entry contrary to s. 328 (1) (j). He now appeals by leave of the court.

The short facts so far as they are necessary for this appeal are that in 1950 one Maurice Shalam formed a private company to carry on a family business, and the appellant was appointed auditor. He was also appointed auditor of another company formed by Mr. Shalam, the Wellington New Mills Company. He was appointed first on June 22, 1953, at an annual general meeting of the company, and his appointment was continued year by year after that. Apparently the companies, or one of them, got into financial difficulties and ultimately, with a view to obtaining an overdraft from a bank, certain figures were put before the bank including the stock position. These charges are made against the appellant in connexion with the putting forward of these figures to the bank. He was charged under some eight counts. Two were under s. 84 of the Larceny Act, 1861; one under s. 83 of that Act, three under s. 330 of the Companies Act, 1948, one under s. 328 (1) (j), and one under s. 331 of that Act. In all those counts the offences laid were offences said to have been committed by "an officer of the company". It is true that under the Larceny Act, 1861, the words are "being a public officer of a public company", but no one suggests that in this case at any rate the word "public" adds anything.

The learned judge directed the jury in the course of his summing-up in these terms:

> "There is no dispute that Mr. Maurice Shalam was director of the company and I direct you as a matter of law that if Mr. Shacter was appointed auditor, and was exercising the office of auditor in 1953—and that fact does not seem to be in dispute—then he would be an officer of the company. That is a point of law on which I have to take the responsibility of deciding."

Accordingly, the first and main question which arises in this appeal is whether the appellant was at the material time an officer of the company. The argument for the appellant can be summarised as follows: An auditor, it is said, prima facie is not an officer. His duty is to safeguard the shareholders and not to help the directors, and he is not concerned with the day-to-day running or internal management of the company. It would be surprising, so runs the argument, to find him treated by the legislation as an officer, and great stress is laid on the definition clause in the Companies Act, 1948, s. 455 (1), where an officer is defined in these terms: "'officer', in relation to a body corporate,

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* The document referred to in the relevant count of the indictment was the trading profit and loss account of Maurice Shalam & Co., Ltd., for the year ending Mar. 31, 1953, the entry being an entry of value of stock.

includes a director, manager or secretary ". Observe, it is said, that no reference is made to " auditor ". That section, however, is a section of inclusive definition, and it is necessary to look more closely at the sections of the Act.

The first and perhaps most relevant section is s. 159. Subsection (1) provides:

> " Every company shall at each annual general meeting appoint an auditor or auditors to hold office from the conclusion of that, until the conclusion of the next, annual general meeting ";

In sub-s. (5) and sub-s. (6) of that section reference is again made to auditors appointed to hold office and to the office of auditor. Pausing there, it can well be asked to what office an auditor is being appointed unless it is an office in the company, and what officer he becomes unless it be an officer of the company?

Turning to s. 161, it is provided, so far as it is relevant, by sub-s. (2):

> " None of the following persons shall be qualified for appointment as auditor of a company—(a) an officer or servant of the company . . . References in this subsection to an officer or servant shall be construed as not including references to an auditor."

It follows from that, first, that an auditor becomes, or at any rate may become on his appointment an officer of the company, otherwise the last sentence to which I have referred is unnecessary. Secondly, if he does become an officer of the company, it can only be by reason of being an auditor, for if he became an officer for any other reason he would under the subsection be disqualified. Further, in various sections of the Act, in particular s. 167 (5), s. 205 and s. 448 (1) reference is made to an auditor " whether an officer of the company or not ". Those passages again show that an auditor may be an officer of the company, and this can, as I have already said, only be by reason of his appointment as auditor. Clearly, therefore, the Act contemplates that an auditor may at any rate be an officer by reason of his appointment under s. 159.

The authorities concerned are all under the misfeasance section in earlier Acts dealing with civil liability, but they clearly show this, that an auditor appointed to fill an office is an officer, whereas an auditor appointed ad hoc for a limited purpose is not. The first case to which we were referred was *Re London & General Bank* (1). In that case an auditor had been appointed by a banking company pursuant to s. 7 of the Companies Act, 1879. That section provided, so far as is relevant, by sub-s. (1):

> " Once at the least in every year the accounts of every banking company . . . shall be examined by an auditor or auditors, who shall be elected annually by the company in general meeting."

Then, by sub-s. (2):

> " A director or officer of the company shall not be capable of being elected auditor of such company."

The court, consisting of LINDLEY, LOPES and KAY, L.JJ., were of the opinion that the auditor was an officer of the company within the relevant misfeasance section. It is true that in that case the articles of the bank in fact defined auditors and the secretary as meaning those respective " officers " from time to time of the company. In other words, the articles, unlike the present case, were treating auditors as officers, but if one examines the judgments it is quite clear that in all three cases they are based on the appointment although the opinions expressed were confirmed or fortified by a reference to the articles. Again, in *Re Kingston Cotton Mill Co.* (2), the court, again the Court of Appeal, followed *Re London & General Bank* (1), and they did that despite the fact that there was nothing in the articles in that case corresponding to the articles

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(1) [1895] 2 Ch. 166.

(2) [1896] 1 Ch. 6.

in *Re London & General Bank* (3). Finally, in *Re Western Counties Steam* A
Bakeries & Milling Co. (4), the same distinction was drawn, namely, a distinction between somebody appointed to an office who would be an officer of the company, and an auditor who was merely appointed ad hoc for some limited purpose.

It is true, as I have said, that those three cases were all dealing with questions of civil liability, but this court sees no reason to draw any distinction in a criminal
case. Section 333, which is the present misfeasance section, must be taken to B
have been passed, and passed in virtually the same words as in earlier Acts, with full knowledge of the decisions in those cases to which I have referred. It is a section which follows closely on the sections creating criminal offences, and this court sees no reason to give any different interpretation to the word "officer" in the penal sections to that given to it in s. 333.

Counsel for the appellant urged that under the present legislation there is no C
power to appoint an auditor except under s. 159 (1) of the Act. If that be so, the words "whether an officer of the company or not", which appear in the various sections to which I have referred, are meaningless but, without deciding the matter, it seems to this court that the scheme of the present legislation is really to perpetuate the distinctions drawn in the cases referred to, and that it
would still be possible under this legislation for the directors as opposed to the D
shareholders in annual general meeting to appoint, for instance, somebody as auditor for a limited purpose, it may be for a private audit. Looked at in that way, it becomes clear at once why no reference to "auditor" is specifically put in the definition section. This court has come to the clear opinion that the appellant in this case was at the relevant time an officer of the company, and
that the judge's direction to the jury was correct in law. E

[His Lordship then referred to other points raised on behalf of the appellant, and found that they did not justify interfering with the conviction.]

Appeal dismissed.

Solicitors: *A. L. Hamwee & Co.*, Manchester (for the appellant); *Registrar, Court of Criminal Appeal* (for the Crown).

[*Reported by* N. P. Metcalfe, Esq., *Barrister-at-Law.*]

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(3) [1895] 2 Ch. 166.

(4) [1897] 1 Ch. 617.

BELFAST CORPORATION *v.* O.D. CARS, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), November 11, 12, 16, 17, 18, 19, December 14, 1959.]

Northern Ireland—Town and Country Planning—Compensation—Refusal of permission to develop—Statutory exclusion of right to compensation—Constitutional invalidity of law made to take any property without compensation—Validity of exclusion of right to compensation—Government of Ireland Act, 1920 (10 *&* 11 *Geo.* 5 *c.* 67), *s.* 5 (1)—*Planning and Housing Act* (*Northern Ireland*), 1931 (21 *&* 22 *Geo.* 5 *c.* 12), *s.* 10 (2)—*Planning* (*Interim Development*) *Act* (*Northern Ireland*), 1944 (7 *&* 8 *Geo.* 6 *c.* 3), *s.* 2, *s.* 6 (4).

Northern Ireland—Town and Country Planning—Evidence—Evidence of Ministry's view as to reasonableness of restrictive provisions in a planning scheme—Adequacy of oral evidence.

A limited company, registered in Belfast, owned land in fee farm. In February, 1954, they applied under the Planning (Interim Development) Act (Northern Ireland), 1944, s. 2, to Belfast Corporation (as the interim development authority) for permission to erect industrial and commercial buildings comprising shops and factories or warehouses. In March, 1954, the corporation refused the application on the grounds (a) as to the shops, that the height and character of the development would not be in accordance with their requirements for the site, viz., that development was to be in shops with dwellings over, of a minimum height of twenty-five feet, and (b) as to the industrial or commercial use of the remainder of the site, that the site was zoned as residential, with which zoning the proposed development was incompatible. In view of the refusal of permission, the company claimed compensation for injurious affection under s. 6 (4)* of the Act of 1944. On the question whether the arbitrator to whom the matter of compensation was referred was entitled to award compensation to the company for injurious affection of the land,

Held: the arbitrator was not entitled to award compensation (provided that he was satisfied by proper evidence that the Ministry considered the provisions reasonable in accordance with s. 10 (2)† of the Planning and Housing Act (Northern Ireland), 1931) for the following reasons:

(i) section 6 (4) of the Act of 1944 incorporated s. 10 (2) of the Act of 1931 by which property was not to be deemed to be injuriously affected by provisions in a planning scheme prescribing (among other things) the height or character or user of the buildings.

(ii) section 10 (2) of the Act of 1931 was constitutionally valid and did not contravene s. 5 (1) of the Government of Ireland Act, 1920, because s. 10 (2) of the former Act was a regulatory measure and not confiscatory and was not a law made " so as . . . to . . . take any property without compensation " within s. 5 (1) of the Act of 1920.

Held: further, that the view of the Ministry on the question whether the provisions in the relevant planning scheme were " reasonable for the purpose " within s. 10 (2) of the Act of 1931 ought not to be proved by oral evidence of an officer of the Ministry, but by a certificate to the required effect under the Minister's seal and duly authenticated.

Appeal allowed.

[As to limitations on the legislative powers of the Northern Ireland Parliament, see 7 HALSBURY'S LAWS (3rd Edn.) 448, para. 940.

For the Government of Ireland Act, 1920, s. 5, see 17 HALSBURY'S STATUTES (2nd Edn.) 62.]

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* This subsection is printed at p. 67, letter G, post.

† This subsection is printed at p. 67, letter C, post.

Cases referred to: A

Central Control Board (Liquor Traffic) v. *Cannon Brewery Co., Ltd.*, [1919] A.C. 744; 88 L.J.Ch. 464; 121 L.T. 361; 83 J.P. 261; 42 Digest 705, *1217*.

Gallagher v. *Lynn*, [1937] 3 All E.R. 598; [1937] A.C. 863; 106 L.J.P.C. 161; 157 L.T. 374; 8 Digest (Repl.) 699, *78*.

Minister of State for the Army v. *Dalziel*, (1944), 68 C.L.R. 261. B

O'Neill v. *Northern Ireland Road Transport Board*, [1938] N.I. 104.

Pennsylvania Coal Co. v. *Mahon*, (1922), 260 U.S. 393.

Slattery v. *Naylor*, (1888), 13 App. Cas. 446; 57 L.J.P.C. 73; 59 L.T. 41; 13 Digest (Repl.) 239, *640*.

Appeal.

Appeal by special leave by Belfast Corporation from an order of the Court of C Appeal in Northern Ireland (LORD MACDERMOTT, C.J., and BLACK, L.J.), dated Mar. 26, 1959, allowing an appeal by the respondents, O.D. Cars, Ltd., from an order of the Northern Ireland Queen's Bench Divisional Court (CURRAN, L.J., and SHEILL, J.), dated June 26, 1957, made on a Case Stated by an arbitrator pursuant to the Acquisition of Land (Assessment of Compensation) Act, 1919, dated Feb. 10, 1955. The facts are set out in the opinion of VISCOUNT D SIMONDS.

F. A. L. Harrison, Q.C., *Maurice W. Gibson, Q.C.*, and *J. L. McQuitty* (all of the Bar of Northern Ireland) for the appellants.

W. F. Patton, Q.C., *R. L. E. Lowry, Q.C.*, and *R. W. B. McConnell* (all of the Bar of Northern Ireland) for the respondents. E

The Attorney-General for Northern Ireland (*W. B. Maginess, Q.C.*), *C. A. Nicholson, Q.C.*, and *J. K. Pringe* (all of the Bar of Northern Ireland) as amici curiae.

Their Lordships took time for consideration.

Dec. 14. The following opinions were read.

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VISCOUNT SIMONDS: My Lords, the facts in this case, which give rise to some difficult questions, can be shortly stated. The respondents, a limited company registered in Belfast, own in fee farm certain land at Alexandra Park, Belfast. On buildings erected on that land, they have for many years carried on the business of garage proprietors and general motor engineers. On Feb. 9, 1954, they made an application to the appellants, the Belfast Corporation, for G permission to erect on the land further industrial and commercial premises, viz., lock-up shops on Antrim Road and factories or warehouses on the back portion. The application was made pursuant to the provisions of s. 2 of the Planning (Interim Development) Act (Northern Ireland), 1944, to the appellants as the interim development authority. Such an application is known as an interim development application. I will refer later to this Act. On Mar. 2, H 1954, the appellants refused the application on the ground (a) as to the lock-up shops, that the height and character of the proposed development would not be in accordance with their requirements for the site, namely, development to be in shops with dwellings over—minimum height twenty-five feet, and (b) as to the industrial or commercial use of remainder of site, that the site was zoned as residential and that the character and user of the proposed development would be I incompatible with such zoning. This refusal led to a claim for compensation for injurious affection under the Act which, in accordance with its provisions, was referred to the official arbitrator appointed thereunder. Before I narrate the proceedings which led to this appeal, I must refer to the relevant statutory provisions of the Planning and Housing Act (Northern Ireland), 1931, and the Planning (Interim Development) Act (Northern Ireland), 1944, which I will call the Act of 1931 and the Act of 1944. The former Act, after providing for the making of planning schemes to be prepared and adopted by local authorities

A and to be approved by the Minister and sundry other relevant matters, by s. 9 (1) enacted that any person whose property is injuriously affected by the coming into operation of a planning scheme shall, if he makes a claim for the purpose within the time therein mentioned, be entitled to obtain compensation in respect thereof from the responsible authority. But this right is subject to the limitation contained in s. 10, which provides, by sub-s. (1), that where property is alleged B to be injuriously affected by reason of any provisions contained in a planning scheme, no compensation shall be paid in respect thereof if or so far as the provisions are also contained in any public, general or local Act in force in the area or otherwise as therein mentioned and, by sub-s. (2) (which is the subsection relevant to this appeal and must be set out verbatim), as follows:

> C " Property shall not be deemed to be injuriously affected by reason of the coming into operation of any provisions inserted in a planning scheme, which prescribe the space about buildings or limit the number of buildings to be erected, or prescribe the height or character or user of buildings, or prescribe a standard of net annual value for buildings, and which the Ministry, having regard to the nature and situation of the land affected by the provisions, considers reasonable for the purpose:"

D Development under the Act of 1931 made slow progress and was in due course supplemented by the Act of 1944. Section 1 (1) of that Act deems all land which was not the subject of a planning scheme under the earlier Act, or of a resolution to prepare and adopt such a scheme, to be subject to a resolution to prepare a planning scheme under the Act. Section 2 directs the Ministry to E make a general interim development order with respect to land to which such a resolution applies, and provides that such an order may empower any local authority specified therein to permit the development of land in accordance with the provisions thereof. In accordance with the duty thus placed on it, the Ministry, on July 10, 1944, made the Planning (General Interim Development) Order (Northern Ireland), 1944 (S.R. & O. 1944 No. 58), which empowered F the appellants to grant permission for the development of land within the county borough of Belfast. I need refer no more to the Act of 1944 except to set out the section, i.e., s. 6, under which, as I have alread said, the respondents made the claim for compensation now under review. That section provided, by sub-s. (4), so far as material, as follows:

> " Where . . . an interim development application is refused . . . then, G the applicant . . . shall, if he makes a claim for the purpose be entitled to obtain from the local authority such compensation in respect of any injurious affection of his property by reason of the aforesaid decision as he would be entitled to obtain under the principal Act [the Act of 1931] if such injurious affection had been suffered as a consequence of the coming into operation of a planning scheme . . ."

H The claim for compensation having been made and refused on the grounds that I have stated, a number of questions were raised before the arbitrator which led him without proceeding to an award to state a consultative case for the opinion of the court in which he posed two questions as follows:

> " (i) Whether I am entitled to award compensation to the claimant for injurious affection of the said land.
>
> I " (ii) Whether the evidence of Mr. A. P. Fitzgerald is sufficient to satisfy the requirements of s. 10 (2) of the Planning and Housing Act (Northern Ireland), 1931."

The second question must appear at the present stage of my narrative somewhat cryptic. It is, in my opinion, of a formal character, and I will defer consideration of it until I have disposed of the important matters that arise under the first question. These are, first, a question arising on the construction of the Act of 1944, viz., whether s. 6 (4) of that Act incorporates a reference to s. 10 (2)

A of the Act of 1931 as well as to the compensatory provisions of s. 9, and, secondly, whether s. 10 (2) is a valid enactment having regard to the provisions of s. 5 of the Government of Ireland Act, 1920. The far-reaching importance of the second question is obvious.

My Lords, on the first of these questions I entertain no doubt, and I cannot state the answer to it in a manner more clear and comprehensive than the learned Lord Chief Justice (LORD MACDERMOTT) has done. B Section 6 (4) of the later Act does incorporate s. 10 (2) of the earlier Act. I will not occupy your Lordships' time by further reference to it.

On the second question, viz., the constitutional validity of s. 10 (2) of the Act of 1931, I must say something more. For, though I agree with much that the Lord Chief Justice has said on this topic, there comes a point at which I must with great respect diverge from him. C The issue turns on the true meaning and effect of s. 5 of the Government of Ireland Act, 1920. Subsection (1) of that section is as follows:

> " In the exercise of their power to make laws under this Act neither the Parliament of Southern Ireland nor the Parliament of Northern Ireland shall make a law so as either directly or indirectly to establish or endow D any religion, or prohibit or restrict the free exercise thereof, or give a preference, privilege, or advantage, or impose any disability or disadvantage, on account of religious belief or religious or ecclesiastical status, or make any religious belief or religious ceremony a condition of the validity of any marriage, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at that E school, or alter the constitution of any religious body except where the alteration is approved on behalf of the religious body by the governing body thereof, or divert from any religious denomination the fabric of cathedral churches, or, except for the purpose of roads, railways, lighting, water, or drainage works, or other works of public utility upon payment of compensation, any other property, or take any property without F compensation.
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> " Any law made in contravention of the restrictions imposed by this subsection shall, so far as it contravenes those restrictions, be void."

It was first urged on behalf of the appellants that the last five words of the first paragraph of this subsection referred only to the property of religious G bodies or institutions. This point was decided against them twenty years ago in *O'Neill* v. *Northern Ireland Road Transport Board* (1), and I do not doubt that that case was rightly decided. An argument founded on the historical genesis of these words, which was in any case of little weight, could not prevail against their plain meaning. Next, I must refer to an argument (though I am not clear which side could be assisted by it) that the words " either directly or H indirectly " do not govern the last five words. But grammatically they clearly do, and I see no reason for not allowing grammatical laws to prevail. In any view, it is of no importance to this case.

I come then to the substantial questions: What is the meaning of the word " take "? What is the meaning of the word " property "? What is the scope of the phrase " take any property without compensation "? My Lords, I I would declare my indebtedness not only to the counsel for the parties but also to the Attorney-General for Northern Ireland and those assisting him for the help that they have given the House in the consideration of these questions. With their aid, your Lordships have explored the federal constitutions of the United States of America, of Canada and of Australia in which are to be found words similar, but, perhaps, not very similar, to the words now under review. But, my Lords, I doubt whether at the end of that journey the path is brightly illuminated. I should like, however, before I venture on it, to consider for a moment the simple language of the Constitutional Act with which we are concerned. I hope that I do not over-simplify the problem, if I ask whether anyone using the English language in its ordinary signification would say of a local authority which imposed some restriction on the user of property by its owner that that authority had " taken " that owner's " property ". He would not make any fine distinction between " take ", " take over " or " take away ". He would agree that " property " is a word of very wide import, including intangible and tangible property. But he would surely deny that any one of those rights, which in the aggregate constitute ownership of property, could itself and by itself aptly be called " property " and, to come to the instant case, he would deny that the right to use property in a particular way was itself property and that the restriction or denial of that right by a local authority was a " taking ", " taking away " or " taking over " of " property ".

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(1) [1938] N.I. 104.

I do not seek to qualify in any way what has been said in such cases as *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ltd.* (2). I have no right to do so. It is no doubt the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms. But this principle, on which learned counsel for the respondents so vigorously insisted, seems to me to have no bearing on the question what is the meaning of the phrase " take property without compensation " in a constitutional instrument such as the Government of Ireland Act. If, indeed, I must have recourse to any broad principle of law for the construction of these few simple words, I should remind myself that from the earliest times the owner of property, and in particular of land, has been restricted in his free enjoyment of it not only by the common law maxim sic utere tuo ut alienum non laedas, but by positive enactments limiting his user or even imposing burdens on him. I do not, therefore, approach this question of construction with any predisposition to enlarge the scope of the vital words. For, my Lords, I would here point out that, if such restrictions as the Acts of 1931 and 1944 impose cannot be enforced without the payment of compensation, the practical effect must be to deprive the Parliament of Northern Ireland of the power to legislate not only in this particular field in a manner recognised as necessary to its proper fulfilment in Great Britain but in numerous other fields also in which it has been widely realised that the rights of the individual must be subordinate to the general interest. Learned counsel for the respondents were constrained to admit that their success in this argument might lead to the invalidation of numerous Acts whose validity has been hitherto unchallenged. It would not be easy to reconcile this result with the power accorded to the Parliament by s. 4 of the Act to make laws for the peace, order and good government of Northern Ireland. It is right, however, that, in the interpretation of constitutional instruments, guidance should be sought from those courts whose constant duty it has been to construe similar instruments, if only because, as it appears to me, a flexibility of construction is admissible in regard to such instruments which might be rejected in construing ordinary statutes or inter partes documents. The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges among the English-speaking peoples overseas have dealt with kindred problems. I do not think that any better examples can be found than in the passages cited by the Lord Chief Justice from the judgments of HOLMES, J., and BRANDEIS, J. Thus, when BRANDEIS, J., says in the passage quoted by the Lord Chief Justice from his judgment in *Pennsylvania Coal Co.* v. *Mahon* (3):

> " Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without

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(2) [1919] A.C. 744.

(3) (1922), 260 U.S. 393 at p. 417.

> making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use ", A

that very learned judge indicates in clear terms the distinction which should guide us in determining whether or not legislation which diminishes the owner's free enjoyment of his own property is a " taking " of that property. It is clear that such a diminution of rights can be effected without a cry being raised that B Magna Carta is dethroned or a sacred principle of liberty infringed. I will say only one thing more about the American cases. The day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of HOLMES, J., in the case already cited (4):

> " The general rule at least is, that while property may be regulated to a C certain extent, if regulation goes too far it will be recognised as a taking."

If the question is one of degree, I am clearly of opinion that the day did not arrive with s. 10 (2) of the Act of 1931.

My Lords, the distinction drawn between " regulating " and " taking " or " regulatory " and " confiscatory " will at once bring to mind the controversy to which placitum (xxxi) of s. 51 of the Australian Constitution has given rise. D On decisions of the High Court of Australia on this placitum the respondents strongly relied. At one stage, learned counsel said he was prepared to rest his case on *Minister of State for the Army* v. *Dalziel* (5), the facts in which case were widely different from those we have now to consider. No doubt the language there under review " the acquisition of property on just terms " was not dissimilar to that in our constitutional Act, and these words have led to much the E same controversy as have the Fifth and Fourteenth Amendments in the United States of America. Nor do I doubt that the same considerations are relevant to the determination of their meaning. Nor would I cast the least doubt on the decision in *Dalziel's* case (5) or anything that was said by the learned judges who decided it. But, having said so much and fully recognising the distinction that may exist between measures that are regulatory and measures that are confiscatory, F and that a measure which is ex facie regulatory may in substance be confiscatory, I must add that if, as I suppose it is, the question is one of degree and the dividing line is difficult to draw, yet I have no doubt that such an enactment as the Act of 1931 and, in particular, s. 10 (2) falls well on the regulatory side of it. The respondents get no help from Australia.

I have used the expression " in substance confiscatory " and that takes me G to Canada. In the consideration of the constitutional validity of legislation of the Federal or (as the case might be) of Provincial Parliaments the expression " pith and substance " came to be commonly used in order to determine whether an enactment was truly within the legislative power of the one Parliament or the other under the British North America Act. It is an expression that has had its uses, not only in Canada—see *Gallagher* v. *Lynn* (6), but I think that it can H give little assistance to your Lordships in considering the meaning of our five words, to which I now return. For there is one aspect of the case which deserves particular attention, since, by it, the Lord Chief Justice was influenced to consider the section invalid. Having held (and, as I think, rightly held) that much that is entirely reasonable may be done under the powers conferred by s. 10 (2) and that those powers are capable of being exercised reasonably, the learned judge says: I

> " But, if such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably."

And after giving examples of unreasonable exercise he concludes:

> " If, then, a planning authority exercises any of the powers to which s. 10 (2) relates in a manner which fails to satisfy what I have called the

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(4) (1922), 260 U.S. at p. 415.

(5) (1944), 68 C.L.R. 261.

(6) [1937] 3 All E.R. 598; [1937] A.C. 863.

> second test by being unreasonable and thereby causes loss or damage which constitutes a taking and to meet which no right to compensation is available, there will, in my opinion, be a breach of s. 5 (1) [i.e. of the Government of Ireland Act, 1920]."

My Lords, it appears to me that the short answer to this contention (and I hope that its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases. It is not for the " planning authority " but for the Ministry to determine whether a proposed exercise of the powers is reasonable. That is an administrative duty, to be exercised not arbitrarily but for the purposes of the Act. If it is not so exercised, it is open to challenge and there is no need for express provision for its challenge in the statute. If I understand the learned Lord Chief Justice, he would not consider the section invalid if the duty of deciding on the reasonableness of the exercise of a power was given not to the Ministry but to the judiciary. But I find it difficult to suppose it to be the purpose or theory of any constitution that a purely administrative function of this character should be given to the judiciary rather than to the executive. Matters of policy which are determined by the government and carried out in detail by the aid of an experienced administrative staff cannot be confided to the judiciary. Their function begins if and when for any reason administrative action lays itself open to challenge. The measure itself is not open to such challenge unless it is plainly and on the face of it within the prohibition. That condition is not satisfied merely because the powers it confers on the executive may be exercised unreasonably. I am, therefore, of opinion that the ground on which specifically the Lord Chief Justice held the section to be invalid was not sound.

I would answer the first question posed by the arbitrator: No, provided that the arbitrator is satisfied by proper evidence that the Ministry considers the provisions reasonable.

I must now turn to the second question on which the arbitrator asked the opinion of the court, viz., whether the evidence of Mr. A. P. Fitzgerald was sufficient to satisfy the requirements of the relevant section, i.e., that " the Ministry, having regard to the nature and character of the land affected by the provisions, considers reasonable for the purpose " the provisions inserted in the planning scheme to which the subsection refers. The relevant facts appear to be that a Mr. Ronald Green, Assistant Secretary to the Ministry of Health and Local Government, by letter of Jan. 3, 1955, told the solicitor of the appellants that Mr. A. P. Fitzgerald would attend the hearing of the claim before the arbitrator and would be prepared to state that

> " the decision on the application of [the respondents], made by the [appellants] . . . was reasonable and was based on considerations which, if included in a scheme formulated under the above-mentioned Acts, would be approved by the Ministry."

Mr. Fitzgerald duly attended the hearing. He proved that he was authorised by the Ministry to give evidence on its behalf, that he had no personal knowledge of the facts of the case, that he was not present at discussions which he said had taken place in the Ministry with regard to the matter, but that he was authorised by the Ministry to state, and did state, that, as a result of such discussions, the Ministry considered that the decision of the appellants on the application of the respondents was reasonable and was based on considerations which, if included in a scheme formulated under the relevant Acts, would be approved by the Ministry. The question is whether this evidence satisfied the statutory requirement. I think that there are really two questions here, one of substance, the other of form. On the question of substance, I find no legitimate ground of criticism. It appears to me that, since s. 6 (4) of the Act of 1944 is designed to meet precisely the case where no planning scheme has yet been prepared and submitted for approval, the Ministry satisfies the conditions of s. 10 (2) of the earlier Act if it considers provisions to be reasonable which it would consider reasonable having regard to the nature and situation of the land thereby affected if a scheme had been made embracing that land. It is not possible to be more specific than the situation envisaged by the later Act admits. The question of form, however, remains. In a matter of this importance, strict adherence to form is requisite. It is not to my mind satisfactory that, if oral evidence is necessary, it should be given by a witness who, admittedly knowing nothing about it, speaks on instructions. I should, therefore, without meaning any disrespect to Mr. Fitzgerald, say that his evidence should be disregarded. But this does not end the matter. I do not think that it was necessary or indeed proper for the appellants to prove that the Ministry thought the provisions in question reasonable by the introduction of an officer of the Ministry to give oral evidence. It is not a matter for cross-examination of this or that official of the Ministry or of the Minister himself. Nevertheless, the statutory fact must be strictly proved and it appears to me that the proper course is that a certificate should be issued to the required effect under the Minister's seal and duly authenticated. Such a certificate when tendered would prove itself under s. 3 (1) of the Ministries of Northern Ireland Act, 1921.

I answer the second question posed by the arbitrator in the negative. With these answers, the case will go back to him for his further determination and answer.

My noble and learned friend, **LORD COHEN,** who is unable to be here this morning has asked me to say that he concurs in the opinion that I have just given, and with that which my noble and learned friend, Lord Radcliffe, will shortly give.

LORD RADCLIFFE: My Lords, I am in full agreement with what has been said by my noble and learned friend on the Woolsack. That being so, I do not think that it would serve any useful purpose if I travelled again over the same ground. It is no disrespect to the learning and weight of the judgment of the Lord Chief Justice (Lord MacDermott) in the Court of Appeal in Northern Ireland if I say that my principal reason for disagreeing with his conclusion is that I do not believe that the present case raises the issues that he has dealt with quite in the form in which he considers them. The fundamental question, as I see it, is whether the prohibition of taking any property without compensation contained in s. 5 (1) of the Government of Ireland Act, 1920, bars the enactment by law of such restrictions on the user or development of property as are referred to in s. 10 (2) of the Planning and Housing Act (Northern Ireland), 1931, unless compensation is provided. In my opinion, it does not, because it seems to me that the word " taking ", when used in this context, does not extend to cover the act of imposing restrictions of that kind.

I do not see how you can give a meaning to this phrase, " taking without compensation ", except by reference to the general treatment of the subject in the law of England and Ireland before 1920. A survey would, I think, discern two divergent lines of approach. On the one hand, there would be the general principle, accepted by the legislature and scrupulously defended by the courts, that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was " taking ". Aspects of this principle are found in the rules of statutory interpretation devised by the courts which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both. Side by side with this, however, and developing with increasing range and authority during the second half of the nineteenth century, came the great movement for the regulation of life in cities and towns in the interests of public health and amenity. It is not an adequate description of the powers involved, so far at any rate as the United Kingdom is concerned, to speak of them as "police powers". They went far beyond that. Their chief sphere was in the delegated legislation conceded to local authorities, though in some cases they arose from the direct legislation of Parliament itself. Achieved by one means or the other, there is no doubt at all that the effect of them was to impose obligations and restrictions on the owner of town land which impaired his right of development, prohibited or restricted his rights of user and in some cases imposed monetary charges on him or compelled him to expend money on altering his property. Generally speaking, though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property. A perusal of the Public Health Act, 1875, will be sufficient to make the point. It shows how extensive interference could be, even at that date. Only in a few special cases is compensation provided for the consequence of interference. No one, so far as I know, spoke of this as a "taking of property" or treated the general principle of "no taking without compensation" as applicable to the case. For instance, bye-laws, which have to be "reasonable", i.e., not manifestly unjust, if the courts are to sustain them, were upheld, even though seriously restricting the user of property without affording any compensation for the restriction (see *Slattery* v. *Naylor* (7), a case from Australia).

When town planning legislation came in eo nomine in 1909, the emphasis had, no doubt, shifted from considerations of public health to the wider and more debatable ground of public amenity. It may possibly have been for this reason, I do not know, that the Act of 1909 included a comprehensive, though not exhaustive, "injurious affection" section, the effect of which was to give property owners whose rights were interfered with in the cause of town planning a right to compensation for any damage that they suffered, subject to counterclaims for betterment and certain exclusions. This "injurious affection" embraced an altogether wider category of injury than the "injurious affection" that had been the subject of compensation under the Lands Clauses Consolidation Act, 1845. In fact, as we know, s. 59 (2) of the Housing, Town Planning, etc. Act, 1909 (which did not itself extend to Ireland), excluded compensation for injurious affection in respect of several of the same heads of restriction as those which are found in s. 10 (2) of the Act of 1931 in Northern Ireland. I do not think that this last circumstance has any bearing on the present issue; the Westminster legislature with its full sovereignty might be able to exclude compensation in cases where the Northern Ireland Parliament under its constitutional limitations could not. What is important, I think, is to recognise that, though interference with rights of development and user had come to be a recognised element of the regulation and planning of towns in the interest of public health and amenity, the consequent control, impairment or diminution of those rights was not treated as a "taking" of property nor, when compensation was provided, was it provided on the basis that property or property rights had been "taken" but on the basis that property, itself retained, had been injuriously affected.

These considerations lead me to the following conclusions: (i) The taking of property referred to in s. 5 (1) of the Government of Ireland Act, 1920, ought not to be treated as applying to the imposition of restrictions on user and development under town-planning powers. (ii) It is within the competence of the Parliament of Northern Ireland to decide on what occasions and to what extent compensation is to be afforded for injury suffered under such restrictions. (iii) Section 10 (2) of the Act of 1931 is, accordingly, a valid enactment.

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(7) (1888), 13 App. Cas. 446.

Viewing the matter from this aspect, I do not think that the requirement that compensation can only be excluded if the Ministry concerned passes the restrictions as reasonable for the purpose raises any relevant issue. If compensation could validly be excluded anyway in such cases, the legislative power cannot have been less validly exercised because the town-planning authority's liberty to exclude compensation has been limited by such a provision. It may be in itself a very salutary limitation; but that is not a matter for the court. It follows, too, that the question whether the provision " ousts the jurisdiction of the court " in any relevant sense—a question to which the learned Lord Chief Justice gave much attention in the later passages of his judgment and on which he ultimately founded his decision of the appeal—does not, in my opinion, arise.

I do not imply by what I have said that I regard it as out of the question that, on a particular occasion, there might not be a restriction of user so extreme that in substance, though not in form, it amounted to a " taking " of the land affected for the benefit of the public. It is not very easy to imagine such a restriction being imposed by a responsible authority or surviving the test of the Ministry's approval, the more so as the Act deals separately with open spaces as a subject of acquisition, not without compensation. But given that such a case might hypothetically occur, the question for us is whether that possibility in itself is sufficient to invalidate s. 10 (2), the natural subject of which is restrictions and not " takings ". I do not think that it is. It seems to me the wrong way to treat the constitutional provision. To my mind, it does more justice to its intent if a restriction which is in substance a taking, should one ever occur, is attacked ad hoc as not within the true meaning and scope of s. 10 (2) than that the whole subsection should be thrown on the scrap-heap as constitutionally an outlaw.

The second question raised by the Official Arbitrator's Case Stated relates to formalities only, except so far as it may incidentally throw light on the question whether s. 10 (2) of the Planning and Housing Act (Northern Ireland), 1931, is introduced into interim development by s. 6 (4) of the Planning (Interim Development) Act (Northern Ireland), 1944. The Case Stated is accepted by both sides as a consultative case; therefore, if it is right to conclude that the evidence given by Mr. A. P. Fitzgerald is insufficient to prove the consent of the Ministry of Health and Local Government, the hearing before the arbitrator must be continued and the necessary evidence called for or tendered.

This question of the form of evidence required is not an easy one, but, on the whole, I take the same view as that which has been taken in the Divisional Court and the Court of Appeal in Northern Ireland on this issue, if not for quite the same reasons. What has to be before the tribunal, if effect is to be given to s. 10 (2), is the view or judgment of " the Ministry " that certain planning provisions are reasonable for the purpose. The Ministry itself is an impersonal legal entity and it is only by some use of metaphor that such mental processes as views can be attributed to it. The question is not how they can be or why they have been formed but how they can be proved so that a tribunal can act on them. For this purpose, I do not think that one should look for the Minister himself or some senior official to attend in person so as to satisfy the court by oral testimony that " the Ministry " in fact holds the required opinion. Indeed, I should not regard cross-examination as open on the issue whether the Ministry should hold such an opinion, given that it declares that it does. The natural and, I think, the proper way to record the view of the Ministry in such a context is to bring into existence a certificate over the Ministry's proper seal, authenticated as the statute requires, and to tender that before the arbitrator. If so tendered, it will prove itself by virtue of s. 3 (1) of the Ministries of Northern Ireland Act, 1921 (N.I.), " unless the contrary is shown ".

It was one aspect of the respondents' argument that, until a planning scheme in the proper sense had come into operation, no such Ministry view as that required by s. 10 (2) of the Act of 1931 could be formed or expressed. I do not agree with this, if one once arrives at the conclusion, as I believe that all your Lordships do, that s. 6 (4) of the Act of 1944 necessarily involves the hypothesis that the provisions of s. 10 (2) are adapted to the situation where a projected development has been restricted under interim development control. A certificate given under those conditions in the present case would be to the effect that the Ministry considered that the provisions prescribing height, character and user of buildings and sites, which, by virtue of the Planning Acts (Northern Ireland), 1931 and 1944, and the Planning (General Interim Development) Order (Northern Ireland), 1944, and the refusal by the appellants of the respondents' application to proceed with development had been imposed on the respondents' land, were, having regard to the nature and situation of the land affected, reasonable for the purpose. I do not think that the evidence actually tendered by Mr. Fitzgerald ought to be treated as adequate to prove the Ministry's view. It is true that he was introduced by a letter from Mr. Green, an Assistant Secretary; but the letter itself is neither a certificate nor evidence of the essential fact to be proved, since its purport was to say that the necessary evidence would be afforded by Mr. Fitzgerald when he appeared. What Mr. Fitzgerald said, when he did appear, was to the effect that he had no personal knowledge of the facts of the case and had taken no part in the Ministry's discussions, but was sent to report what the Ministry's view was. No one can be expected to be altogether satisfied with this. His evidence of the relevant fact is only hearsay, and his own status is reduced to that of a messenger. I do not mean to imply any disrespect to him in the situation in which he was placed, but it seems to me that, if his Ministry does wish to communicate its opinion through a messenger, he ought to be allowed to carry with him a formal warrant of its view over the proper seal.

LORD KEITH OF AVONHOLM: My Lords, I agree.

Appeal allowed. The respondents to pay the appellants three-quarters of their costs in the courts below; no order as to costs in the House of Lords.

Solicitors: *Lees & Co.*, agents for *John A. Young*, Belfast (for the appellants); *Simpson, Palmer & Winder*, agents for *N. & F. Tughan & Walmsley*, Belfast (for the respondents); *Linklaters & Paines*, agents for *Chief Crown Solicitor*, Royal Courts of Justice (Ulster), Belfast (for amici curiae).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

HAMILTON *v.* NATIONAL COAL BOARD.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Jenkins), November 25, 26, December 15, 1959.]

Coal Mining—Statutory duty—Breach—Maintenance of machinery—Winch operated by hand—Absence of stells to steady winch—Whether winch "properly maintained"—Absolute obligation—Mines and Quarries Act, 1954 (2 *&* 3 *Eliz.* 2 *c.* 70), *s.* 81 (1).

The appellant, a miner, was employed by the respondents at one of their collieries. It was his duty to tighten a main haulage rope at the mine whenever it became slack, and for this purpose the respondents provided a hand-operated winch contained in a metal frame which rested on the ground but was not bolted to it. The appellant averred that as he was winding the winch, he placed his hand on the frame to steady it and that the whole winch suddenly tipped forward pinning his left hand between the raised back portion of the framework and a roof girder, thereby injuring it. He averred that this was due to the fact that there were no stells in position to steady the winch. By the Mines and Quarries Act, 1954, s. 81 (1), it is provided that all parts and working gear, whether fixed or movable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine shall be properly maintained. The appellant averred that this statutory obligation was an absolute obligation and if the stells were not there, even though their absence was unexplained, the statutory obligation properly to maintain the winch had not been observed.

Held: the obligation imposed by s. 81 (1) of the Mines and Quarries Act, 1954, was absolute.

Dicta of LORD ATKIN and LORD RUSSELL OF KILLOWEN in *Smith* v. *Cammell Laird & Co., Ltd.* ([1939] 4 All E.R. at pp. 390, 393) applied.

Appeal allowed.

[As to the maintenance of machinery and apparatus in a coal mine, see 26 HALSBURY'S LAWS (3rd Edn.) 691, para. 1316.

For the Mines and Quarries Act, 1954, s. 81, see 34 HALSBURY'S STATUTES (2nd Edn.) 578.]

Cases referred to:

Cole v. *Blackstone & Co., Ltd.*, [1943] K.B. 615; 112 L.J.K.B. 510; 107 J.P. 209; 24 Digest (Repl.) 1064, *263*.

Galashiels Gas Co., Ltd. v. *O'Donnell or Millar*, [1949] 1 All E.R. 319; [1949] A.C. 275; [1949] L.J.R. 540; 113 J.P. 144; 24 Digest (Repl.) 1061, *247*.

Latimer v. *A.E.C., Ltd.*, [1953] 2 All E.R. 449; [1953] A.C. 643; 117 J.P. 387; [1953] 3 W.L.R. 259; 24 Digest (Repl.) 1065, *267*.

M'Neil v. *Dickson and Mann*, 1957 S.C. 345.

Smith v. *Cammell Laird & Co., Ltd.*, [1939] 4 All E.R. 381; [1940] A.C. 242; 109 L.J.K.B. 134; 163 L.T. 9; 104 J.P. 51; 24 Digest (Repl.) 1087, *396*.

Summers (John) & Sons, Ltd. v. *Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 827; 24 Digest (Repl.) 1055, *217*.

Appeal.

Appeal by John Hamilton against an interlocutor of the Second Division of the Court of Session (the Lord Justice-Clerk (LORD THOMSON), LORD PATRICK and LORD MACKINTOSH), dated Nov. 27, 1958, dismissing the appellant's case as irrelevant and upholding an interlocutor of the Sheriff-Substitute of the Lothians and Peebles (WILLIAM GARRETT, Q.C.), dated July 31, 1958. The facts are set out in the opinion of VISCOUNT SIMONDS.

Manuel Kissen, Q.C., and *A. M. G. Russell* (both of the Scottish Bar) for the appellant.

A *J. O. M. Hunter, Q.C.*, and *A. J. Mackenzie Stuart* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

Dec. 15. The following opinions were read.

VISCOUNT SIMONDS: My Lords, s. 81 (1) of the Mines and Quarries B Act, 1954, enacts that

> " All parts and working gear, whether fixed or movable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine . . . shall be of good construction, suitable material, adequate strength and free from patent defect, and shall be properly maintained."

C The only question on this appeal—and it is an important one—is what is the meaning of these last five words.

The appellant, a miner in the employment of the respondents at Whitrigg Colliery, West Lothian, in August, 1957, suffered an injury in the course of his employment. It was his duty to tighten a main haulage rope at the mine D whenever it became slack. For that purpose, there was provided by the respondents a hand-operated winch contained in a metal frame which rested on the ground but was not bolted to it. The appellant averred that, as he was winding the winch, he placed his hand on the frame to steady it and that the whole winch suddenly tipped forward pinning his left hand between the raised back portion of the framework and a roof girder. This, he averred was due to the fact that E there were no stells in position to steady the winch. Thus, the respondents failed to maintain properly the winch, which was part of their statutory duty. It mattered not that the absence of stells was unexplained; it might have been due to the act of a third party or to the development of a latent defect. Nevertheless, the respondents were in breach. If the stells were not there, the statutory obligation properly to maintain the winch had not been observed. This is what is F sometimes called an absolute obligation. My Lords, this view of the statutory obligation did not commend itself to the learned Sheriff-Substitute of the Lothians and Peebles (William Garrett, Q.C.) nor to the majority of the Second Division of the Court of Session. The appellant's claim was dismissed; it was held that he had not made a relevant case that the equipment was not properly maintained. It is clear that all turns on the meaning in their context of G those two words.

My Lords, it is impossible to approach this case uninfluenced by previous decisions on this and other Acts, and I find more assistance in the construction which has been put on that simple word " maintain " in the context of machinery and works of all kinds, whether under the Factories Acts or the Mines Act or regulations made thereunder, than I do in the words which have been supposed H to qualify or define that word. Therefore, I go first to a case in this House, *Smith* v. *Cammell Laird & Co., Ltd.* (1). There the question was as to the meaning of the word " maintain " in reg. 13 of the Shipbuilding Regulations, 1931, made under the Factory and Workshop Act, 1901. There was nothing in the context to expand or limit it except a statement of the object to which I refer later. It was held to impose an absolute obligation. I need cite only the words of Lord I Russell of Killowen (2):

> " The duty being, as I think it is, effectively cast upon the respondents, is it an absolute duty, or can they excuse themselves by saying that, by competent inspection at regular and frequent intervals, they have done everything possible to discharge their duty? I think that the duty is an absolute one. The wording is too strong to justify the milder view. The

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(1) [1939] 4 All E.R. 381; [1940] A.C. 242.

(2) [1939] 4 All E.R. at p. 393; [1940] A.C. at p. 263.

> words ‘ all staging shall . . . be maintained ’ point, in my opinion, to an absolute, and not to a qualified, obligation.”

The word “ absolute ” in this connexion has become part of the dictionary of the law. Sometimes the word “ continuing ” is substituted for it. Either word means that, in effect, the employer warrants that the machine or other equipment which he is obliged to maintain will never be out of order. It is, no doubt, a difficult conception, but the employer has his refuge in the escape section of the relevant Act, so far as it applies.

I turn next to *Galashiels Gas Co., Ltd.* v. *O’Donnell or Millar* (3). For it is, I think, on that case, or rather on certain observations of the noble and learned Lords who took part in its decision, that the judgments in the Scottish courts have been largely founded and that the respondents now rely. In that case, the question arose on the Factories Act, 1937. The words “ properly maintain ” are contained in s. 22 (1) of the Act, but, in addition, in s. 152 (1) (a definition section), “ maintained ” is defined as meaning “ maintained in an efficient state, in efficient working order, and in good repair ”. I have read with great care, and more than once, the speeches in the House in that case, and I think that it is fair to say that the determining factor with at least the majority of their Lordships was the presence of the definition clause. LORD MACDERMOTT, for instance, with whose speech, if I may respectfully say so, I have great sympathy, pointed out (4) that the word “ maintain ” may be used to indicate the continuance of a particular state or in reference to the acts done to continue or perpetuate that state, and he was guided to the former interpretation by the definition. But though this may be so, it is another thing to say that, in the absence of the definition, they would have come to a different conclusion. Could they have adopted the second meaning suggested by LORD MACDERMOTT, the “ servicing ” meaning as it has been called, consistently with the decision in *Smith*’s case (5)? I find great difficulty in thinking that they could. In *Smith*’s case (5) there was no definition clause, and I see nothing to differentiate it from the present case except that here we have not a statement of the object for which the plant is required to be maintained but have the qualifying adverb “ properly ”. This word was said by LORD PATRICK to be quite inapposite to the former meaning, i.e., the continuance of a certain state, and by LORD MACKINTOSH to be more appropriate to the latter. I cannot give the same weight to the word. If “ maintained ” simpliciter can properly refer to the continued state of the thing required to be maintained, I see no reason why “ properly maintained ” cannot make the same reference. Can it be anything more than a negligible indication of the one meaning or the other? It would not, I think, be wise in this area of legislation to found on such refinements of language. It is difficult to suppose that the legislature, knowing from *Smith*’s case (5) what meaning must be attributed to the word “ maintain ” alone, thought to give it a different meaning by adding the word “ properly ”.

I need refer to no other case than *Latimer* v. *A.E.C., Ltd.* (6). In that case, s. 25 (1) of the Factories Act, 1937, was under review. There again the definition section played its part, and again had its influence on the decision of some of those who took part in it. But it was otherwise with the late LORD ASQUITH OF BISHOPSTONE, who expressed the view (7) (which coming from such a source I do not easily reject) that the same result should be reached without the definition clause. I need say no more about this case than that it provides neither binding nor persuasive authority for distinguishing cases in which “ properly ” qualifies “ maintain ” from those where it does not or cases where there is a definition clause from those where it is absent.

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(3) [1949] 1 All E.R. 319; [1949] A.C. 275.
(4) [1949] 1 All E.R. at p. 324; [1949] A.C. at p. 286.
(5) [1939] 4 All E.R. 381; [1940] A.C. 242.
(6) [1953] 2 All E.R. 449; [1953] A.C. 643.
(7) [1953] 2 All E.R. at p. 456; [1953] A.C. at p. 660.

It is in deference to the careful examination of the whole Act by counsel that I make some observations on it. It is undoubtedly the fact that the words " maintain " and " maintenance " are used on a great number of occasions in the Act and in the regulations made under it, sometimes with, sometimes without, qualification; sometimes followed by an expression of the object which is to be secured, sometimes without such a following. It is, no doubt, desirable that the same meaning should be given to the same word wherever it is used in a statute, though a long experience of statutes has left me with some scepticism on that principle. So, too, it is reasonable that variations of language should be supposed to intend some difference of meaning. But I cannot find in the fact that in one statute there is a definition clause and in another there is not, a sufficient reason for departing from a meaning that has already been given to the word that is defined unless the definition itself compels me to do so. Nor does the fact that the word " maintain " is followed as in *Smith's* case (8) by words indicating the object of maintaining, e.g., to ensure the safety of the workman, make any difference. I should in any case assume in such a context that that was the object. I must conclude, therefore, by saying that, in my opinion, it would be right to follow the course laid out in *Smith's* case (8) and *Millar's* case (9), and declare that the obligation under s. 81 (1) of the Mines and Quarries Act, 1954, is absolute. I do not think that either of the conflicting principles of construction, the one resting on the penal consequences of failure to perform an obligation, the other on the basic purpose of the Act to protect the workman, can usefully be invoked.

The appeal should be allowed with costs here and below.

My noble and learned friend, **LORD RADCLIFFE,** who is unable to be here, has asked me to say that he concurs in my opinion.

LORD COHEN: My Lords, the question before your Lordships turns on the meaning to be given to the concluding words " properly maintained " in sub-s. (1) of s. 81 of the Mines and Quarries Act, 1954. That subsection is in the following terms:

> " All parts and working gear, whether fixed or movable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine, and all foundations in or to which any such appliances are anchored or fixed shall be of good construction, suitable material, adequate strength and free from patent defect, and shall be properly maintained."

This appeal comes before your Lordships on relevancy, and it is not disputed that, if the appellant is right in contending that the words " properly maintained " impose on the respondents an absolute and continuing obligation to keep the winch (the article of equipment in question in this case) in a proper and efficient state, the appellant had averred a relevant case of the respondents being in breach of their statutory duty. On the other hand, if, as the respondents argue, these words merely impose on the respondents the duty of properly servicing the winch, the appellant would not have stated a relevant case.

There appears to be no reported decision on the meaning of the words " properly maintained " where used in the Mines and Quarries Act, 1954, but very similar provisions in the Factories Act, 1937, have been the subject of judicial decision in your Lordships' House. In applying these decisions to the case now before your Lordships, it has to be borne in mind that the Factories Act, 1937, in s. 152 (1), contained a definition of the word " maintained " in the following terms:

> " ' Maintained ' means maintained in an efficient state, in efficient working order, and in good repair "

and that this definition is not repeated in the Mines and Quarries Act, 1954.

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(8) [1939] 4 All E.R. 381; [1940] A.C. 242.
(9) [1949] 1 All E.R. 319; [1949] A.C. 275.

The first of such cases to which I shall refer is *Galashiels Gas Co., Ltd.* v. *O'Donnell or Millar* (10). In that case, the question arose under s. 22 (1) of the Factories Act, 1937, which provides that every hoist or lift shall be of good mechanical construction, sound material and adequate strength and be properly maintained. It was held that s. 22 (1) imposed an absolute and continuing obligation and that the respondent was entitled to recover even though, as the Lord Ordinary (Lord Blades) found, all reasonable steps had been taken to provide a suitable lift and to maintain it properly. The wording of s. 22 (1) is very similar to that of s. 81 (1) of the Act now under consideration, but all their Lordships referred to the definition and based their decision on the combined effect of s. 22 (1) and the definition. The speech of Lord Morton of Henryton is, I think, open to the construction that he might have reached the same conclusion without the definition, but it cannot be said to contain a dictum in favour of the appellant in the present case. Lord MacDermott pointed out the two possible meanings of " maintain " to which I have referred, and added (11):

> " My Lords, had the legislature thought fit not to define ' maintained ' the submission of [Mr. Guest] on this aspect of the case would have encountered less difficulty, but when the terms of the definition are regarded the meaning for which he has contended [that ' maintained ' means serviced or looked after or attended to] is, in my opinion, at once displaced."

Counsel for the respondents invited us to read Lord MacDermott's speech as indicating that, without the definition, Lord MacDermott would have accepted Mr. Guest's argument. I do not think this inference is justified. The most that can be said is that Lord MacDermott's neutrality to the argument was more benevolent than that of Lord Morton of Henryton.

The next case to which I wish to refer is *Latimer* v. *A.E.C., Ltd.* (12), where the question arose as to the extent of the employers' duty under s. 25 of the Factories Act, 1937, to see that the floors were " of sound construction and properly maintained ". The decision was in favour of the employers on the ground that even though in view of the definition in s. 152 the obligation must be regarded as absolute it did not apply, to use the language of Lord Porter (13), " to a transient and exceptional condition ". Two of their Lordships in the course of their judgments made some observations as to what the extent of the obligation under s. 25 would have been in the absence of the definition. Lord Porter said (14): " Section 25 (1), were it not for the definition, would seem merely to provide for sound construction and a proper state of repair." Lord Asquith of Bishopstone said (15) of the words in s. 25:

> " If these words stood alone and there were no definition of the word ' maintain ' in the statute, for myself, I should be in little doubt as to their interpretation. I should take them to mean that, at the time of its construction or installation, the floor should possess the structural qualities which a floor ought to possess . . . and that from that time on the owner of the factory should keep up, prolong or perpetuate that structural condition."

My Lords, I find myself more in agreement with Lord Asquith than with Lord Porter, but before stating my conclusion I would refer to one other decision of this House—*Smith* v. *Cammell Laird & Co., Ltd.* (16).

In that case, the statutory provision in question was contained in the Shipbuilding Regulations, 1931, made under s. 79 of the Factory and Workshop Act, 1901, the material provision (17) being as follows:

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(10) [1949] 1 All E.R. 319; [1949] A.C. 275.
(11) [1949] 1 All E.R. at p. 324; [1949] A.C. at p. 287.
(12) [1953] 2 All E.R. 449; [1953] A.C. 643.
(13) [1953] 2 All E.R. at p. 452; [1953] A.C. at p. 654.
(14) [1953] 2 All E.R. at p. 451; [1953] A.C. at p. 653.
(15) [1953] 2 All E.R. at p. 455; [1953] A.C. at p. 660.
(16) [1939] 4 All E.R. 381; [1940] A.C. 242.
(17) Regulation 11 (b).

> " All staging shall (i) be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed; (ii) be inspected at regular and frequent intervals by a competent person."

The appellant had been injured as a result of a defect in the staging, and their Lordships held that he was entitled to recover damages on the footing that the obligation imposed by the regulation was an absolute one. Neither the Act nor the regulations contained a definition of " maintained " corresponding to that in s. 152 of the Factories Act, 1937, but the regulation (18) did contain a particular direction " to ensure the safety of all persons employed ". Their Lordships do not, however, appear to have placed much reliance on those words in arriving at their conclusion that the duty was absolute. I would refer, in particular, to passages in the judgments of LORD ATKIN, LORD RUSSELL OF KILLOWEN and LORD WRIGHT. LORD ATKIN (19) asks the question whether the duty imposed by the regulation is absolute, and continues: " or is it to be construed as limited to a duty to take reasonable care to maintain? ", and continues:

> " I can see no reason for not giving the words their ordinary meaning. Indeed, so far as I can see, all the judges in the courts below were of opinion that, upon whomsoever the duty lay, there was in fact a breach. The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well-known feature of this class of legislation. It is to be found passim in such Acts as the Coal Mines Acts, and in the Factory Acts themselves."

LORD RUSSELL OF KILLOWEN poses the same question (20) and answers it by saying:

> " I think the duty is an absolute one; The wording is too strong to justify the milder view. The words ' all staging shall . . . be maintained ' point, in my opinion, to an absolute, and not to a qualified, obligation."

LORD WRIGHT says (21):

> " The liabilities imposed by the Factory Act [in that case the Act of 1901] . . . create a duty, being intended to secure the health and safety of the workpeople. They are absolute, and do not depend on negligence."

My Lords, the passages that I have cited from the judgments in *Smith* v. *Cammell Laird & Co., Ltd.* (22), lead me to the conclusion that, unless there is something in the context to exclude such a construction, a direction such as is found in s. 81 (1), contained in an Act, one manifest purpose of which is the protection of workmen, imposes an absolute obligation and not a mere duty to take reasonable care.

Counsel for the respondents raised two other points to which I should briefly refer. First, he said that the omission of the definition was a strong point in his favour. I should prefer to adopt the language of LORD MACDERMOTT and say that it merely removes one difficulty from his way. For the reasons which I have given, I think that, even without the definition, the word " maintained " in s. 81 (1) imposes an absolute obligation. Secondly, he relied on the word " properly ", saying that, if LORD ASQUITH's contention of a similar provision in *Latimer* v. *A.E.C., Ltd.* (23) were correct, the word " so " should be substituted for the word " properly ", and he argued that, if s. 81 (1) imposes an absolute obligation, no meaning can be given to the word " properly ". It may be that " so " would have been better English, but " properly " makes quite good sense on either construction, and, like LORD REID (see *Latimer's* case (24)), I see little difference between maintaining a floor or a piece of equipment " properly " and maintaining it " in an efficient state " as required by the definition.

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(18) Regulation 11 (b). (19) [1939] 4 All E.R. at p. 390; [1940] A.C. at p. 258.
(20) [1939] 4 All E.R. at p. 393; [1940] A.C. at p. 263.
(21) [1939] 4 All E.R. at p. 394; [1940] A.C. at p. 264.
(22) [1939] 4 All E.R. 381; [1940] A.C. 242.
(23) [1953] 2 All E.R. at p. 456; [1953] A.C. at p. 660.
(24) [1953] 2 All E.R. at p. 454; [1953] A.C. at p. 658.

In the result, I find myself in agreement with the reasoning of the Lord Justice-Clerk (Lord Thomson) in the Inner House, and I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, the appellant is pursuer in an action of damages brought in the Sheriff Court at Edinburgh against the National Coal Board in respect of injuries received while in their employment in Whitrigg Colliery. The action is based solely on alleged breach of statutory obligation. The Sheriff-Substitute dismissed the action as irrelevant, and the Second Division of the Court of Session (the Lord Justice-Clerk (Lord Thomson) dissenting) have refused an appeal against his interlocutor. Against this judgment an appeal has been taken to this House. As the judgments proceeded solely on construction of the statutory obligation in question, it is unnecessary to set out the appellant's averments further than is necessary to understand the point in issue. The appellant avers that, while he was operating a winch in a haulage way in the respondents' colliery, the winch tipped forward, pinning the appellant's hand between part of the framework of the winch and a roof girder. The appellant says this was owing to the absence of stells, or supports, which would have kept the winch in position. The statutory obligation on which he relies is contained in s. 81 of the Mines and Quarries Act, 1954, sub-s. (1) of which is as follows:

> " All parts and working gear, whether fixed or movable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine, and all foundations in or to which any such appliances are anchored or fixed shall be of good construction, suitable material, adequate strength and free from patent defect, and shall be properly maintained."

The appellant avers that his accident was caused by the respondents' breach of this statutory duty. The averment proceeds:

> " The said winch formed part of the equipment of the said mine at the said colliery. It was accordingly the [respondents'] duty to maintain the said winch properly and in performance of the said duty to maintain the said winch securely with stells fitted between the back end of the under-pinned beams and the roof. In this duty they failed and so caused the accident. At the time of the accident there were no stells set in position between the back end of the under-pinned beams and the roof. But for the [respondents'] failure in their statutory duty the accident would not have occurred."

The appellant would read the words " shall be properly maintained " as imposing a continuous obligation to have the equipment at all times conform to the standards previously laid down by the subsection. With reference to the winch this means, he says, to have it at all times in proper and efficient working order. The respondents, on the other hand, would read the words as imposing an obligation merely to attend to, or look after, the equipment, an obligation which, with reference to the winch, would cover repairing or servicing it when necessary. This is the issue between the parties. The alternative constructions are very fully and clearly dealt with and developed by the learned Sheriff-Substitute and by their Lordships of the Second Division. The Sheriff-Substitute and, on appeal, Lord Patrick and Lord Mackintosh, upheld the respondents' construction. The Lord Justice-Clerk upheld the appellant's construction. The language used to express the conflicting views may be said to stem from observations and illustrations by Lord MacDermott in this House in *Galashiels Gas Co., Ltd.* v. *O'Donnell or Millar* (25), a case decided under the Factories Act, 1937, a closely analogous statute, with, however, at least one not unimportant difference, which I shall have to deal with later.

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(25) [1949] 1 All E.R. 319; [1949] A.C. 275.

"Maintain" may be a word of ambiguous import, but ambiguity may disappear in the context in which the word is used. Looking to what is one, if not the main, object of this legislation, namely, to safeguard the workman in the performance of his duties, and having regard to the context in which the words "shall be properly maintained" appear in s. 81, I think they should be construed as meaning to keep in proper order by acts of maintenance before the thing to be maintained falls out of condition. To construe the words as covering the restoration of the thing to be maintained to a proper condition by acts of maintenance after it has fallen out of condition would greatly lessen the protection afforded to the workman. Further, the employer is under an absolute obligation of sufficiency in respect of the provision of the things to be properly maintained, and keeping them in that condition is but a continuation of his initial obligation. A point that moved both LORD PATRICK and LORD MACKINTOSH was that, to give effect to the appellant's contention, the section should have run "and shall be so maintained". But that might be too restrictive. I can conceive of cases where machinery might answer the primary requirements desiderated by the statute and yet, by lack of proper attention, might be in a dangerous or unsafe condition. That is a possibility which the legislature may have thought it wise to anticipate. The fact that s. 81 (2) provides for regulations for, inter alia, maintenance of machinery or apparatus in no way detracts from this view. The subsection is expressed to be in addition to sub-s. (1), and covers construction and installation as well as other things.

To read the statute as imposing an obligation merely to attend to, repair, or service would, I think, introduce difficulties, if that meant something more than the common law duty to take reasonable care to keep the machinery, etc., in safe condition. How much more care and what kind of care? If, on the other hand, it adds nothing to the common law duty of reasonable care, the question arises why Parliament should trouble to tack on an existing common law obligation to a number of specific absolute statutory obligations. To do so would be out of line with the general policy of this type of legislation. There was no need to make maintenance a statutory obligation in order to exclude the defence of common employment for that had disappeared by the time when the Act was passed. Lastly, such a limitation of the words "shall be properly maintained" would be out of line with similar legislation in which the safety of workmen is, one cannot say less but certainly no more important than that of workers in mines and quarries. Factory legislation is a case in point. True, there was a definition of "maintained" in the Factories Act, 1937 (26), as meaning "maintained in an efficient state, in efficient working order, and in good repair", which is absent from the Mines and Quarries Act, 1954, a fact much relied on by the judges of the majority in the Court of Session and by the learned Sheriff-Substitute. But too much importance can, I think, be attached to this difference between the two Acts.

There is a close correspondence between many of the safety provisions of the Factory Acts and those of the Mines and Quarries Act. The expressions "shall be maintained" and "shall be properly maintained" occur repeatedly in numerous sections in both Acts. To illustrate, the provisions in s. 22 of the Factories Act, 1937, with reference to hoists and lifts, and in s. 24 with reference to all parts and working gear, including anchoring and fixing appliances, of every lifting machine, are closely comparable with s. 81 of the Mines and Quarries Act, 1954, here in question, and with other sections, such as s. 28, which provides that winding and haulage apparatus shall be properly maintained. It is difficult to see why, in comparable circumstances, where the peril to the workman in life or limb from a breakdown of lifting or haulage apparatus is no less in one case than the other, the respective Acts should call for a different construction of the words "and shall be properly maintained".

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(26) In s. 152 (1).

The judicial outlook on cases of this kind has frequently been emphasised. In *Smith* v. *Cammell Laird & Co., Ltd.* (27), the statutory regulation was (28):

> " All staging shall (i) be securely constructed of sound and substantial material and shall be maintained in such condition as to ensure the safety of all persons employed; (ii) be inspected at regular and frequent intervals by a competent person."

The facts are not material. I cite the case only for the observations made on the nature and effect of the obligation. There was no definition of " maintained " in the Factory and Workshop Act, 1901, under which the regulations were made; or in the regulations. The regulation, it will be observed, states the purpose for which all staging had to be maintained, viz., to ensure the safety of all persons employed, but that may indeed be taken generally to be the purpose of obligations imposed on employers under the Factories and Mines Acts, and no particular emphasis was placed on that express purpose in the speeches in this House. Lord Atkin poses these questions with reference to the occupiers of the staging (29):

> " . . . is the duty so imposed an absolute one, or is it to be construed as limited to a duty to take reasonable care to maintain, or to maintain only while they are themselves using the staging? "

For present purposes this last question may be ignored. Lord Atkin proceeded:

> " The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well-known feature of this class of legislation. It is to be found passim in such Acts as the Coal Mines Acts, and in the Factory Acts themselves. A striking example, as was pointed out by counsel for the appellant in his powerful reply, is to be found in the obligation to fence dangerous machinery which, in the Act of 1901, is to be found in s. 10. It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another."

Lord Russell of Killowen said (30):

> " The duty being, as I think it is, effectively cast upon the respondents, is it an absolute duty, or can they excuse themselves by saying that, by competent inspection at regular and frequent intervals, they have done everything possible to discharge their duty? I think that the duty is an absolute one. The wording is too strong to justify the milder view. The words ' all staging shall . . . be maintained ' point, in my opinion, to an absolute, and not to a qualified, obligation."

Lord Wright, with reference to liabilities generally, imposed by the Factory Act, said (31): " They are absolute, and do not depend on negligence."

Most of the cases to which your Lordships have been referred were cases under the Factories Acts, 1937 and 1948, which contain the definition of " maintained ". When the question of the meaning of " shall be properly maintained " or similar expressions arose, the definition was naturally relied on both in argument and judgment, but, on occasions, some of their Lordships in this House have ventured on observations on the meaning of these words apart from the definition. In *Latimer* v. *A.E.C., Ltd.* (32), Lord Asquith of Bishopstone, with reference to s. 25 of the Act of 1937 requiring that " All floors . . . shall be of sound construction and properly maintained " said:

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(27) [1939] 4 All E.R. 381; [1940] A.C. 242.
(28) The Shipbuilding Regulations, 1931, reg. 11 (b).
(29) [1939] 4 All E.R. at p. 390; [1940] A.C. at p. 258.
(30) [1939] 4 All E.R. at p. 393; [1940] A.C. at p. 263.
(31) [1939] 4 All E.R. at p. 394; [1940] A.C. at p. 264.
(32) [1953] 2 All E.R. at p. 455; [1953] A.C. at p. 660.

> " If these words stood alone and there were no definition of the word ' maintain ' in the statute, for myself, I should be in little doubt as to their interpretation. I should take them to mean that, at the time of its construction or installation, the floor should possess the structural qualities which a floor ought to possess, e.g., a level surface and sufficient strength to bear the stresses to which it is liable to be subjected, and that from that time on the owner of the factory should keep up, prolong or perpetuate that structural condition."

LORD REID in the same case said (33):

> " ' Maintained ' is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor ' properly ' as required by s. 25 (1) and maintaining it ' in an efficient state ' as required by the definition."

Galashiels Gas Co., Ltd. v. *O'Donnell or Millar* (34) was much relied on by the respondents, as proceeding on the definition of " maintained " in the Factories Act, 1937. That, I think, was clearly so. It was a factor in the case which could not be overlooked. But when one finds such a striking similarity, if not identity, of language used in two statutes having the same general purpose to protect the workmen in occupations involving the same types of risk, the conclusion, in my opinion, should be, if the matter is in doubt, that Parliament intended them to have the same meaning, unless some compelling reason in the structure of the particular enactment or context of the prohibition or obligation requires an opposite construction. In this case, I would read the words " and shall be properly maintained " in s. 81 (1) of the Act of 1954 as imposing an absolute obligation to keep the equipment in question at all times in a sound state of repair and fit for use. I would make one reservation. This obligation may not involve a higher measure of obligation than would be involved in the initial obligation of providing the parts of the machinery and apparatus referred to in the section. I say this in view of some observations by LORD PATRICK in the Court of Session on the development of latent defects. If a latent defect developed so that it became patent, it may be said that the apparatus was not being properly maintained so long as the defect continued to be patent. If the apparatus collapsed suddenly from a latent defect which had never disclosed itself before the accident, the position might be otherwise. I consider it unnecessary to express any opinion on the implications arising from the reference to " free from patent defect " in s. 81 (1) of the Act of 1954. The matter may come up for consideration in some other case. The section of the Factories Act, 1937, under consideration in the *Galashiels Gas Co.'s* case (34) contained no reference to patent defect, though such a reference does exist in some other sections of the Factories Act and was considered in one case in the Outer House by LORD WHEATLEY in *M'Neil* v. *Dickson and Mann* (35).

In my opinion, the Lord Justice-Clerk came to the right conclusion on the construction of the statute, and I would allow the appeal.

LORD JENKINS: My Lords, I agree. This case turns wholly on the meaning of the words " properly maintained " in s. 81 (1) of the Mines and Quarries Act, 1954. That subsection is in these terms:

> " All parts and working gear, whether fixed or movable, including the anchoring and fixing appliances, of all machinery and apparatus used as, or forming, part of the equipment of a mine, and all foundations in or to which any such appliances are anchored or fixed shall be of good construction, suitable material, adequate strength and free from patent defect, and shall be properly maintained."

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(33) [1953] 2 All E.R. at p. 454; [1953] A.C. at p. 658.

(34) [1949] 1 All E.R. 319; [1949] A.C. 275.

(35) 1957 S.C. 345.

The question is whether the injunction that the machinery and apparatus to which this provision relates " shall be properly maintained " means, as the appellant workman contends, that it shall be kept in a state of good repair and safe condition, or, as so far successfully contended by the respondent board, means that it shall be properly serviced and looked after. The former view imports a continuing and unqualified obligation as to the state of the machinery or apparatus which is broken whenever it is not in fact in good repair and safe condition, no matter from what cause; while the latter view imports an obligation to look after and " service " the machinery or apparatus, to establish a breach of which obligation it is necessary to prove not merely that the machinery or apparatus is not in fact in good repair and safe condition but that its defective state is due to something done or omitted in the performance of the duty of servicing and looking after it.

Requirements as to the maintenance of plant, machinery and so forth expressed in injunctions that the things in question shall be properly maintained, or in comparable terms, were and had for many years been current in cognate protective legislation at the time when the Act of 1954 became law. Thus, by s. 10 (1) (d) of the Factory and Workshop Act, 1901, it was provided that the fencing of dangerous parts of machinery

> " must be constantly maintained in an efficient state while the parts required to be fenced are in motion,"

and s. 11 of the same Act relating to steam boilers, required (by sub-s. (2)) that " every such boiler . . . must be maintained in proper condition." Passing to the Factories Act, 1937, one finds that, by s. 16,

> " All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be . . . constantly maintained . . . while the parts required to be fenced or safeguarded are in motion or in use . . ."

Section 22 (1) of the Act of 1937 provides that

> " Every hoist or lift shall be of good mechanical construction, sound material and adequate strength, and be properly maintained."

Section 24 of the Act of 1937 provides (by sub-s. (1)) that

> " All parts and working gear . . . of every lifting machine shall be of good construction, sound material, adequate strength and free from patent defect, and shall be properly maintained."

It will be seen that the requirements here with respect to cranes and lifts are identical with those in s. 81 (1) of the Act of 1954 with respect to machinery and apparatus, except that s. 81 (1) has " suitable material ", whereas s. 24 (1) of the Act of 1937 has " sound material ". Section 25 of the Act of 1937 provides (by sub-s. (1)) that " All flooring . . . shall be of sound construction and properly maintained ", and (by sub-s. (4)) that " All ladders shall be soundly constructed and properly maintained ". Subsection (1) of s. 152 of the Act of 1937 defines " maintained " as meaning " maintained in an efficient state, in efficient working order, and in good repair ". The Act of 1954 contains no such definition.

It appears that there has been no previous decision on the meaning of the words " properly maintained " in s. 81 (1) or elsewhere in the Act of 1954, which contains many other instances of the use of the word " maintained " in conjunction with the word " properly " or otherwise. There are, however, several cases in which the meaning of the words " properly maintained " in the various provisions of the Act of 1937 to which I have alluded have been considered. These cases, which include the case in your Lordships' House of *Galashiels Gas Co., Ltd.* v. *O'Donnell or Millar* (36), all accept the meaning of the words " properly maintained " contended for by the appellant in the present case, that

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(36) [1949] 1 All E.R. 319; [1949] A.C. 275.

A is to say, they hold (in effect) that the injunction in the particular provision that the thing in question " shall be properly maintained " imposes an absolute and continuing obligation to keep it in a state of good repair and safe condition.

Were it not for the presence in the Act of 1937 of the definition of the word " maintained " quoted above, which has no counterpart in the Act of 1954, I would have no hesitation in regarding *Galashiels Gas Co., Ltd.* v. *O'Donnell or* B *Millar* (37) as sufficient to conclude the present question in the appellant's favour. The process of construing one statute by reference to another and treating decisions on the meaning of the latter as determining the construction of the former is a process which should be applied with caution. But, in the present case, the language, the subject-matter and the intent of (for example) s. 24 (1) of the Act of 1937 and s. 81 (1) of the Act of 1954 are so closely allied C that (apart from the ground of distinction afforded by the omission from the Act of 1954 of the definition contained in the Act of 1937, whatever it may be worth) it would, to my mind, be clearly wrong to give the words " properly maintained " in s. 81 (1) a different meaning from that which has been authoritatively assigned to precisely the same words in comparable provisions of the Act of 1937. I confess I would not willingly attribute this to my mind untoward D effect to the absence from the Act of 1954 of the definition in the Act of 1937. It would, as I think, be manifestly absurd if the same statutory language applied to two precisely similar machines with precisely similar defects contracted in precisely similar circumstances should give rise to a breach of statutory duty with respect to one of them but not with respect to the other merely because the locus in quo was in the one case a mine and the other a factory.

E Turning now to the authorities, I should begin with a reference to *Smith* v. *Cammell Laird & Co., Ltd.* (38), where it was held that the requirement of reg. 11 (b) in Part 2 of the Shipbuilding Regulations, 1931, that

> " All staging shall (i) be securely constructed . . . and shall be maintained in such condition as to ensure the safety of all persons employed "

imposed an absolute statutory obligation. LORD ATKIN said this (39):
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> " If, then, the duty is imposed upon the only occupiers of this shipbuilding yard, namely, the respondents, is the duty so imposed an absolute one, or is it to be construed as limited to a duty to take reasonable care to maintain, or to maintain only while they are themselves using the staging? I can see no reason for not giving the words their ordinary meaning. Indeed, G so far as I can see, all the judges in the courts below were of opinion that, upon whomsoever the duty lay, there was in fact a breach. The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well-known feature of this class of legislation. It is to be found passim in such Acts as the Coal Mines Acts, and in the Factory Acts themselves. A striking example, as was pointed out by counsel H for the appellant in his powerful reply, is to be found in the obligation to fence dangerous machinery, which, in the Act of 1901, is to be found in s. 10."

The language of the requirement in that case was, of course, different from the language of s. 81 (1) of the Act of 1954 which your Lordships now have to construe; but the passage I have quoted is useful for its recognition of the well-settled principle that, in protective legislation such as the Acts of 1937 and 1954, I a requirement in unqualified terms that a given thing shall or shall not be done, or that a given state of affairs shall be produced, preserved or prevented imposes an absolute statutory obligation to do or forbear from doing the act in question or to produce, preserve or prevent the state of affairs in question. The statute may, of course, use language modifying this result, but, if it does not, qualifying words such as " so far as practicable " are not to be read into it. In this connexion,

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(37) [1949] 1 All E.R. 319; [1949] A.C. 275.
(38) [1939] 4 All E.R. 381; [1940] A.C. 242.
(39) [1939] 4 All E.R. at p. 390; [1940] A.C. at p. 258.

A I would also refer to the case in your Lordships' House of *John Summers & Sons, Ltd.* v. *Frost* (40), and in particular to the observations of my noble and learned friend, LORD SIMONDS.

Reference should next be made to *Cole* v. *Blackstone & Co., Ltd.* (41), where an accident happened through the breaking of a rung of a ladder, and the question was whether the ladder had been properly maintained as required by s. 25 (4) of B the Act of 1937, and MACNAGHTEN, J., held that it had not, and that the obligation imposed by s. 25 (4) was absolute. It is clear, however, that the learned judge proceeded wholly on the ground that s. 25 (4), read in conjunction with the definition, required the ladder to be maintained "in an efficient state" and "in good repair", and expressed no view as to the effect which the words "properly maintained" might have had apart from the definition.

C I may next refer to the *Galashiels Gas Co.'s* case (42). That case concerned a claim under s. 22 (1) of the Act of 1937 in respect of the failure of a lift, and their Lordships reached a similar conclusion to that of MACNAGHTEN, J., in *Cole* v. *Blackstone & Co., Ltd.* (41), which was cited with approval. Their Lordships, as of course was to be expected, decided the case on the nature and extent of the duty imposed by the words "properly maintained", as explained by the D definition, and it was not necessary for them to consider what the position might have been if the definition had not been there. But, looking at the judgments as a whole, I find nothing to indicate that they might not have reached the same conclusion if no definition of "properly maintained" had been given in the Act of 1937, though I hasten to add that I do not hazard the opinion that they would necessarily have done so. The competing views as to the construction of E the words "properly maintained" (of course in that case read in conjunction with the definition) are well described in this passage from the judgment of LORD MACDERMOTT (43):

> "My Lords, the word 'maintain', when used in relation to the state or condition of things, is not always used in the same sense. It may be used to indicate the continuance of a particular state or condition, as when one says F of someone that 'he maintains his buildings just as they were', but on occasion it takes colour from the work of maintenance and is used in reference to the acts done or requisite to be done in the course of maintenance, as when one says of another that 'he maintains his buildings methodically'. This latter use gives the word 'maintained' in relation to machinery rather the meaning of 'serviced' or 'looked after' or 'attended to'—I doubt if there is an exact G synonym—and it was in this sense, according to the appellants' argument, that the word ought to be read in s. 22 (1). If that argument prevails the appeal should succeed, as the Lord Ordinary has found that the appellants took 'every practical step to ensure that the lift mechanism worked properly and was safe to use', [and, again, that] 'the failure of the brake was one which, apparently, nobody could have anticipated or, after the event, explain'. H My Lords, had the legislature thought fit not to define 'maintained' the submission of [Mr. Guest] on this aspect of the case would have encountered less difficulty."

It may be noted that LORD MACDERMOTT does not say that, apart from the definition, Mr. Guest's argument would have succeeded, but only that it would have encountered less difficulty. I

The only other case to which I can usefully refer is the case in your Lordships' House of *Latimer* v. *A.E.C., Ltd.* (44). In that case, the floors of a factory became covered with flood waters mixed with oil by which they were made slippery, and a workman who had slipped on one of these floors and injured his ankle sued his

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(40) [1955] 1 All E.R. 870 at p. 872; [1955] A.C. 740 at p. 751.
(41) [1943] K.B. 615.
(42) [1949] 1 All E.R. 319; [1949] A.C. 275.
(43) [1949] 1 All E.R. at p. 324; [1949] A.C. at p. 286.
(44) [1953] 2 All E.R. 449; [1953] A.C. 643.

A employers for breach of their statutory duty under s. 25 (1) of the Act of 1937, and their Lordships, reading s. 25 (1) in conjunction with the definition of "maintained" in s. 152 (1), held that the employers were not in breach of s. 25 (1) by reason of the presence of the oily flood water on the floor which, apart from the fortuitous incursion of this source of danger, was soundly constructed and in an efficient state. My noble and learned friend, LORD REID observed (45):

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> "But I do not think that there is really any ambiguity here. The requirement of the definition is not that the floor shall be in an efficient state: it is that the floor shall be maintained in an efficient state. 'Maintained' is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor 'properly' as required by s. 25 (1) and maintaining it 'in an efficient state' as required by the definition. I have already said that I do not think that maintaining a floor includes keeping dangerous things away from it."

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LORD ASQUITH OF BISHOPSTONE, after reading s. 25 (1) of the Act of 1937, observed (46):

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> "If these words stood alone and there were no definition of the word 'maintain' in the statute, for myself, I should be in little doubt as to their interpretation. I should take them to mean that, at the time of its construction or installation, the floor should possess the structural qualities which a floor ought to possess, e.g., a level surface and sufficient strength to bear the stresses to which it is liable to be subjected, and that from that time on the owner of the factory should keep up, prolong or perpetuate that structural condition."

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In this state of the authorities, it is clear that the presence in the Act of 1937 and absence from the Act of 1954 of the definition of the word "maintained" prevents the *Galashiels Gas Co., Ltd.'s* case (47) from amounting to a decision on the meaning of the words "properly maintained" simpliciter, by which your F Lordships should consider yourselves bound to decide the present case in the appellant's favour, and the matter is to that extent at large. It is, therefore, necessary to consider de novo but with due regard to their legislative history what meaning should be attributed to the words "properly maintained" in s. 81 (1) of the Act of 1954, bearing in mind that the manifest object of that subsection is to protect workmen from being injured by defective plant. The G question is not capable of any great elaboration. In my view, the primary meaning as ordinary English words of the words "properly maintained" when applied to machinery is "to keep up or preserve in a proper state". It is true that the word "maintain" is sometimes used in relation to machinery, apparatus, etc., to denote the performance on it of acts of maintenance, that is to say, acts calculated to keep it up or preserve it, but I would regard this as a secondary H meaning. As for the expression "servicing", which has been used to describe the latter meaning of the word "maintain", I take it to be a neologism.

Such being, in my view, the prima facie meaning of the words "properly maintained", I may legitimately test it by reference to the use of these words in earlier enactments dealing with comparable subject-matter. Turning again to the Act of 1901, I find that, under s. 10 (1) (d), "All fencing must be constantly I maintained in an efficient state" and that, under s. 11 (2), "every such boiler . . . must be maintained in proper condition". In both these instances the word "maintain" is, I think, clearly used in the sense of kept up, kept, or preserved. Moreover, I find it difficult to distinguish between the "maintained in proper condition" of s. 11 (2) of the Act of 1901 and the "properly maintained" of s. 81 (1) of the Act of 1954. I would here call in aid the observation of LORD REID in *Latimer* v. *A.E.C., Ltd.* (48) to which I have already alluded, with respect to s. 25 of the Act of 1937: A

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(45) [1953] 2 All E.R. at p. 454; [1953] A.C. at p. 657.
(46) [1953] 2 All E.R. at p. 455; [1953] A.C. at p. 660.
(47) [1949] 1 All E.R. 319; [1949] A.C. 275.

> " I see little difference between maintaining a floor ' properly ' as required by s. 25 (1) and maintaining it ' in an efficient state ' as required by the definition."

I would also refer again to the observations of LORD ASQUITH in the same case (49) regarding the meaning of the word " maintained ". B

There is no doubt that the respondents' construction of the words " properly maintained " in s. 81 (1) would make the protection from injury due to defective plant which the subsection is designed to provide for workmen substantially less effective than it would be on the construction contended for by the appellant. That is always a relevant consideration in cases of this kind, though anxiety to make the protection of the workmen effective should not be allowed to strain against the employer the provisions of a penal enactment (see per LORD PORTER in *Latimer* v. *A.E.C., Ltd.* (50)). I have found it impossible to formulate with any degree of certainty or precision the nature and scope of the duty laid on the respondents on the construction of the words " properly maintained " for which they contend; and this surely is, in itself, a reason for preferring the other construction. C D

I have already expressed my reluctance to adopt, unless constrained to do so, a construction of s. 81 (1) which would make the duty under that subsection different from the duty under the closely comparable provisions of the Act of 1937. In this connexion, it should be borne in mind that the question whether given premises fall within the category of mines or within that of factories, or partly in one and partly in the other, may well be the subject of considerable doubt and difficulty. E

Other things being equal, I think a construction which produces uniformity between the two enactments is clearly to be preferred to a construction which produces anomalies between them. Whatever the intention of the legislature may have been when the definition of " maintained " was omitted from the Act of 1954, it was surely never intended to set it at variance with the Act of 1937. I am reluctant to differ from the carefully reasoned opinions of the Sheriff-Substitute and LORD PATRICK and LORD MACKINTOSH, but, having considered them with care, I have formed a decided preference for the opinion of the Lord Justice-Clerk, whose views as therein expressed substantially accord with my own. F G

For these reasons, I would allow this appeal.

Appeal allowed.

Solicitors: *O. H. Parsons*, agent for *Simpson & Marwick*, Edinburgh (for the appellant); *D. H. Haslam*, agent for *G. F. Grosset*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(48) [1953] 2 All E.R. at p. 454; [1953] A.C. at p. 658.
(49) [1953] 2 All E.R. at p. 455; [1953] A.C. at p. 660.
(50) [1953] 2 All E.R. at p. 452; [1953] A.C. at p. 654.

HALL *v.* HALL.

[LEEDS ASSIZES (Wrangham, J.), December 1, 2, 11, 1959.]

Divorce—Desertion—Consensual separation—Period of separation indefinite—Maintenance agreement signed reciting agreement to live separately—Husband's request to wife to return rejected—Whether wife in desertion.

The husband left the wife on June 4, 1952, and on July 3, 1952, both of them signed an agreement providing for maintenance and other matters and reciting that it was no longer possible for them to reside together as man and wife and that they had agreed that they would live separately. Subsequently the husband by letter and in conversation asked the wife for a reconciliation but she steadfastly refused to live with him again. The husband continued to pay under the agreement as he regarded it as his moral duty to provide for his wife. The husband petitioned for divorce on the ground of desertion.

Held: the agreement to live separately was for an indefinite period and therefore was terminable on the will of either party; the husband had made it clear by his letter and subsequent conversations that he was putting an end to the agreement and from the date of the wife's refusal of his offer of reconciliation (which was a genuine offer) she had been in desertion.

Bosley v. *Bosley* ([1958] 2 All E.R. 167) applied; dictum of SIR WILFRID GREENE, M.R., in *Pardy* v. *Pardy* ([1939] 3 All E.R. at p. 783) considered.

[As to a consensual separation being changed into a state of desertion, see 12 HALSBURY'S LAWS (3rd Edn.) 251, para. 467; and for cases on the subject of requests to resume cohabitation, see 27 DIGEST (Repl.) 348-350, *2882-2895*.]

Cases referred to:

Bosley v. *Bosley*, [1958] 2 All E.R. 167; [1958] 1 W.L.R. 645; 3rd Digest Supp.

Pardy v. *Pardy*, [1939] 3 All E.R. 779; [1939] P. 288; 108 L.J.P. 145; 161 L.T. 210; 27 Digest (Repl.) 354, *2932*.

Petition.

By his petition the husband prayed for dissolution of his marriage on the ground that his wife had treated him with cruelty and deserted him. The wife denied both cruelty and desertion and asserted that her husband had treated her with cruelty and deserted her. At the outset, however, the husband abandoned his case of cruelty and relied on desertion only. In his judgment WRANGHAM, J., held that the wife's case of cruelty failed and the case is reported only on the issue of desertion. The parties were married on July 15, 1922, and there were four children: Jean, Malcolm, Mollie and Alastair (known as Sandy). On June 4, 1952, there occurred a violent scene which ended the marriage and after which the husband left the wife. The subsequent facts relevant to the issue of desertion are set out in the judgment.

E. Lyons for the husband.
H. G. Bennett for the wife.

Cur. adv. vult.

Dec. 11. **WRANGHAM, J.,** reading his judgment, dealt with the matrimonial history up to the separation on June 4, 1952, held that the wife's case of cruelty failed and continued: Soon after the parting the parties were in contact through solicitors and in July, 1952, they signed an agreement providing for maintenance and certain other matters. This agreement (1) recited that the parties were agreed that it was no longer possible for them to reside together as man and wife and they had agreed that they should live separately. However, by a letter dated Apr. 3, 1953, the husband wrote asking the wife for a reconciliation. The wife replied, not reproaching him for past cruelty or asking for assurances of reform in the future, but saying that "I am me and nothing will alter me". Thereafter the husband repeatedly visited the wife for week-ends and holidays and asked her for a reconciliation, but the wife steadfastly refused to live with him again. She set out her reasons in a letter on Nov. 1, 1953, in which she said: "I do not honestly think it would work—we are so incompatible in our natures". I am inclined to think that she was right. Moreover she had tasted independence, as appears in that letter, and was living with Jean and her son-in-law who admired her greatly, Mollie and Sandy in a contented home.

Eventually by a letter dated Feb. 11, 1958, the husband told the wife that he had decided to start divorce proceedings. The wife, not unreasonably, pointed out that they had, in her words, agreed to be good friends even if they could not be husband and wife and that she had in no way defaulted on that bargain. The husband's contention before me, however, was that the existence of the oral separation agreement recited in the written maintenance agreement did not prevent his wife's refusal of an offer of reconciliation from constituting desertion. I am satisfied that on many occasions from April, 1953, onwards the husband made genuine offers of reconciliation and that these were refused by the wife. I do not think that there has been proved against the husband any such misconduct as to justify the wife in refusing that offer; the law does not regard mere incompatibility of temperament as good ground for refusing a genuine offer of reconciliation. The question remains whether in view of the oral separation agreement the wife was under any duty to accept the offer of reconciliation.

In para. 134 on p. 162 of Rayden on Divorce (7th Edn.) it is stated that:

> "A separation which begins by being consensual may be changed into desertion without a previous resumption of cohabitation, but it must lose its consensual element on both sides."

That statement of law is based on a passage in the judgment of Sir Wilfrid Greene, M.R., in *Pardy* v. *Pardy* (2). In that case, however, the parties had executed a separation deed "couched in the ordinary terms" (3), which presumably provided for a separation during the joint lives of the parties. The question was in what circumstances an agreement to separate for a defined period could become ineffective during that period; and it was held that a repudiation of the agreement by one party, acquiesced in by the other, produced that result. In *Bosley* v. *Bosley* (4) the Court of Appeal held that where the agreement to live separately was for an indefinite period it did not prevent the refusal of a genuine offer of reconciliation from constituting desertion. This, I think, implies that an agreement to live separately for an indefinite period is terminable on the will of either party either immediately (as in the case of tenancy at will) or, perhaps, on reasonable notice if the other terms of a particular agreement are such as to lead to the inference that such a term should be implied. To that extent the statement of the law in Rayden (7th Edn.), p. 162, para. 134, is misleading.

In the present case the agreement to live separately recited in the written maintenance agreement was, in my judgment, an agreement for an indefinite period; had it been for the joint lives of the parties, or any other defined period, the recital would have said so. It follows that it was terminable on the will of

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(1) This agreement was signed on July 3, 1952, and was in the following terms: "Minute of Agreement between Harry Richard Hall, Engineer, 2 Summerfield Villas, Edinburgh (hereinafter referred to as 'the first party') and Mrs. Ruth Hall, wife of the said Harry Richard Hall and residing at 365 Lanark Road, Edinburgh (hereinafter referred to as 'the second party').

"Whereas the first party and the second party are agreed that it is no longer possible for them to reside together as man and wife; and whereas they have agreed that they should live separately; and whereas certain matters require to be regulated between them; now therefore the parties agree as follows:—

"1. The first party agrees to pay the second party by monthly instalments a maintenance allowance at the rate of not less than Three hundred pounds per annum under deduction of income tax at the full standard rate for life or until the parties are divorced . . . ". Then followed provision for other matters including property and access to one of the children.

(2) [1939] 3 All E.R. 779, see particularly at p. 783, letter E; [1939] P. 288 at p. 303.

(3) See the judgment of Langton, J., [1939] 2 All E.R. at p. 259, letter H.

(4) [1958] 2 All E.R. 167.

either party, there being nothing to show that notice was required. By his letter in April, 1953, and his subsequent conversations the husband made it clear that he was putting an end to the agreement. It is true that he continued to pay under the maintenance agreement which was based on the separation agreement; but I am satisfied from the evidence that he regarded it as his moral duty to provide as generously for his wife as he could, and it would be unreasonable to hold that his failure to stop payments of maintenance was inconsistent with his termination of the separation agreement. Had there been any benefits under the maintenance agreement which he continued to take the position might have been different. The separation agreement being out of the way the wife had no legal right to refuse her husband's genuine offer of reconciliation, and from the date of her refusal has been in desertion. There must therefore be a decree nisi on the petition and the prayer of the answer for dissolution rejected.

Decree nisi.

Solicitors: *Lionel Altman*, Leeds (for the husband); *Morrish & Co.*, Leeds (for the wife).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

PARKER AND ANOTHER *v.* CLARK AND ANOTHER.

[EXETER ASSIZES (Devlin, J.), November 10, 11, 26, 1959.]

Contract—Intention to create legal relationship—Sharing home—Agreement by plaintiffs, a married couple, to give up their own home and share home of defendants, an elderly couple—Agreement by defendants to make will leaving their house to female plaintiff and her relatives—Whether intention to make an agreement binding in law—Duration of contract to share home.

Contract—Writing—Memorandum—Offer—Letter containing all terms of agreement and offer to contract—Sufficiency—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 40 (1).

The defendants, Mr. and Mrs. C., were an elderly couple (seventy-seven and seventy-eight years old) who lived alone in a commodious house of their own at Torquay. They were on very friendly terms with the plaintiffs, Cmdr. and Mrs. P., who were some twenty years younger, and who lived in their own cottage in Sussex. Mrs. P. was a niece of Mrs. C. On Sept. 18, 1955, after the plaintiffs had been visiting the defendants in Torquay, C. proposed to P. that the plaintiffs should come to live with the defendants. P. said that he would consider the matter, and a few days later he wrote to C. saying that, if the plaintiffs came to live with the defendants, they would have to get rid of their own cottage. On Sept. 25, 1955, C. wrote to P., saying: " The major difficulty re what is to happen to [the plaintiffs' cottage] can be solved by our leaving [the defendants' house] and its major contents . . . to [Mrs. P., her sister and her daughter] when we both pass away and if you cannot maintain it they can sell out ". The letter went on to give details of (a) the cost of maintaining the defendants' house (which amounted to £203 4s. 8d. annually), and (b) the defendants' income and assets, and continued: " If we go fifty-fifty on maintenance of house it would cost you half of the £200 odd as set out and half the running expense of food, drinks, etc. but I think it would be fair if your share of the £200 was the same as you now pay at the [plaintiffs' cottage] if it is less than £200. I would pay for a daily woman four mornings a week, have a T.V. and a new car. You could sell out and pay off your mortgage and invest proceeds to increase your income. I hope your family vote for or against this will be unanimous ". On Sept. 30 P. wrote accepting C.'s offer and said that he would dispose of his own cottage. The plaintiffs then proceeded to act on the arrangement. On selling their cottage, they used part of the proceeds to pay off a secured advance and lent part to their daughter to buy a flat; and P. told C. what they had done. On Mar. 1, 1956, the plaintiffs moved to the defendants' house, taking some of their furniture with them. C. had in the meanwhile engaged a daily woman and bought a television set, as promised in the letter of Sept. 25, 1955, and he bought a car some time later. He also made a will leaving the house to the beneficiaries named in the letter. All the household expenses, except the rates, were shared. Mrs. P. did the greater part of the household work; P. did most of the gardening; and both the plaintiffs did the shopping. By the autumn of 1957, C. apparently began to regret the arrangement and told the plaintiffs that they would have to find some other place to live in. P. protested to C. Eventually, on Dec. 9, 1957, after continued unpleasantness on the part of C., the plaintiffs left the defendants' house, as an alternative, in their view, to being evicted. In an action against the defendants for damages for breach of contract,

Held: (i) there was a legal contract between the parties because in the circumstances it was shown that an arrangement binding in law was intended on both sides (principle in *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. at p. 78 applied), the letter of Sept. 25, 1955, was an offer and it indicated sufficiently that the duration of the agreement that the plaintiffs should live with the defendants should be the duration of the defendants' lives.

(ii) the letter of Sept. 25, 1955, was a sufficient memorandum or note of the contract for the purposes of s. 40 (1)* of the Law of Property Act, 1925, because a written offer was capable of being a good memorandum, within the meaning of s. 40 (1), although the agreement could not come into existence until after the offer had been accepted.

Smith v. *Neale* ((1857), 2 C.B.N.S. 67) and *Reuss* v. *Picksley* ((1866), L.R. 1 Exch. 342) applied.

Dictum of Fry, J., in *Munday* v. *Asprey* ((1880), 13 Ch.D. at p. 857) not followed.

(iii) the plaintiffs were, therefore, entitled to damages against the defendants for breach of contract; these damages were of two categories, viz., (a) damages in favour of the plaintiffs' jointly in respect of the value to them of living, rent-free, in part of the defendants' house, with the use of a car and a television set, and (b) damages in favour of Mrs. P. separately in respect of the value to her of her prospects of inheriting the defendants' house at their death (i.e., a third of the present value of the house, less certain deductions).

[As to the requirement that, in order to constitute a contract, the agreement was intended to be enforceable at law, see 8 Halsbury's Laws (3rd Edn.) 54, para. 90, and note (a); and for cases on the subject, see 12 Digest (Repl.) 21, 22, *2-6*.

As to what constitutes a memorandum of a contract, see 8 Halsbury's Laws (3rd Edn.) 94, para. 166; and for cases on the subject, see 12 Digest (Repl.) 148, *931-942*.

For the Law of Property Act, 1925, s. 40 (1), see 20 Halsbury's Statutes (2nd Edn.) 500.]

Cases referred to:

Balfour v. *Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 12 Digest (Repl.) 21, *3*.

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*Section 40 (1) reads: "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

Hammersley v. *De Biel*, (1845), 12 Cl. & Fin. 45; 8 E.R. 1312; 12 Digest (Repl.) 146, *918*.

Munday v. *Asprey*, (1880), 13 Ch.D. 855; 49 L.J.Ch. 216; 42 L.T. 143; 12 Digest (Repl.) 146, *922*.

Reuss v. *Picksley*, (1866), L.R. 1 Exch. 342; 4 H. & C. 588; 35 L.J.Ex. 218; 15 L.T. 25; 12 Digest (Repl.) 173, *1129*.

Smith v. *Neale*, (1857), 2 C.B.N.S. 67; 26 L.J.C.P. 143; 29 L.T.O.S. 93; 140 E.R. 337; 12 Digest (Repl.) 137, *851*.

Synge v. *Synge*, [1894] 1 Q.B. 466; 63 L.J.Q.B. 202; 70 L.T. 221; 58 J.P. 396; 12 Digest (Repl.) 388, *3017*.

Action.

In this action the plaintiffs, Dudley Alfred Parker and his wife Madeline Kate Parker, claimed damages against the defendants, Herbert Thomas Clark and his wife Jane Edith Constance Clark, for breach of a contract made between the parties in or about September, 1955.

By their statement of claim the plaintiffs alleged:

> " 1. In or about the month of September, 1955, it was agreed between the parties: (1) that the plaintiffs . . . should cease to occupy and should dispose of their interest in a dwelling-house known as ' The Thimble ', Mayfield, in the county of Sussex; (2) that the plaintiffs . . . should occupy jointly with the defendants and reside at a dwelling-house owned by the defendants, known as ' Cramond ' Torquay in the county of Devon (hereinafter called ' the premises ') for the period of the lifetime of the survivor of the defendants; (3) that the parties should share between them the running costs of the said premises; (4) that the defendants should purchase a television set and a new car for the joint use of the parties; (5) that the defendants should make a valid and binding testamentary disposition giving the said premises and the contents thereof jointly to the female plaintiff, her daughter and sister.
>
> " 2. Acting in pursuance of the said agreement and not otherwise the plaintiffs did in fact cease to occupy ' The Thimble ' aforesaid and disposed of their interest therein for the sum of £3,900 and performed the obligations referred to in para. 1 (2) and (3) hereof and the defendants performed the obligations set out in para. 1 (4) hereof.
>
> " 3. In or about the month of October, 1957, the defendants . . . repudiated the said agreement by wrongfully and in breach of the said agreement giving the plaintiffs . . . notice to quit the said premises and determining the same and by failing and refusing to comply with the terms of para. 1 (5) hereof.
>
> " 4. The said repudiation was accepted by the plaintiffs on or about Dec. 9, 1957, by removing from the said premises; alternatively by a letter from the plaintiffs' solicitors to the defendants dated Aug. 20, 1958.
>
> " 5. By reason of the matters complained of, the plaintiffs . . . have suffered loss damage and expense and in particular have lost the value of the said premises ' Cramond ' and the contents thereof."

By their amended defence, the defendants denied that they had made the alleged agreement, or any agreement with the plaintiffs, and, except for admitting that the plaintiffs resided at " Cramond " between March, 1956, and December, 1957, they denied all the plaintiffs' allegations and pleaded that the alleged damage was too remote to be recoverable at law. Further or in the alternative, they pleaded, in para. 4, that the alleged agreement was not in writing nor was there any or any sufficient note or memorandum in writing of the alleged agreement, as required by s. 40 (1) of the Law of Property Act, 1925. By para. 5 of the amended defence, they alleged that if, which was denied, they made the alleged agreement, the same was determined either by the plaintiffs, or, alternatively, pursuant to an express or implied agreement (to be implied from all the circumstances) made in or about October, 1957, at "Cramond" between the first plaintiff and the first defendant. A

The action came on for trial before DEVLIN, J., at Exeter Assizes, on Nov. 10 and 11, 1959, and HIS LORDSHIP delivered his reserved judgment at Bristol Assizes on Nov. 26, 1959. The facts are stated in the judgment.

C. L. Hawser, Q.C., and *Peter Lewis* for the plaintiffs.

H. E. Park for the defendants. B

Cur. adv. vult.

Nov. 26. **DEVLIN, J.**, read the following judgment: The plaintiffs in this case are suing on an unusual sort of contract. They are a married couple and they are suing another married couple on an allegation that the defendants repudiated a contract whereunder the two couples were to share the running C costs of the defendants' house and whereunder the defendants' house was to be left by will in a manner that benefited the plaintiffs and their relatives. Such contracts are not easily proved in fact, and, when proved, are likely to run into legal difficulties such as those that are created by s. 40 of the Law of Property Act, 1925. This is the case here. Fortunately the facts are clear. There is not much conflict of evidence and, where there is, I have no hesitation D in preferring that of the plaintiffs and their witnesses. The defendants are very old and are not very reliable. The plaintiffs gave their evidence very satisfactorily. In all relevant matters they told the truth carefully, not only when they were narrating facts but also when they were giving evidence about their own states of mind.

Mr. Clark, the male defendant, is a retired civil servant who owns a house E called "Cramond" in Torquay where he lives with his wife. In 1955 he was aged seventy-seven and his wife was seventy-eight years old. They have no children and live there alone. Mrs. Parker, the female plaintiff, is Mrs. Clark's niece. The Clarks have known her since she was a child and they have known Commander Parker, the male plaintiff, since the plaintiffs' marriage in 1925. Commander Parker has retired from the Navy and in 1955 the Parkers were F living in a cottage called "The Thimble" at Mayfield in Sussex. They were on very friendly terms with the Clarks and visited them from time to time. Sometimes the invitations to visit the Clarks were in the nature of an S.O.S., for they were not in very good health and they had little or no domestic service. Cramond is a commodious house for a married couple. There is a hall, a large lounge, about thirty-five feet by twenty feet, a dining room, a very large kitchen, four G bedrooms, a bathroom and a lavatory and a garage for two cars.

On Sept. 18, 1955, the Parkers were leaving Cramond after a visit which had lasted for two or three weeks. As they were departing, Mr. Clark made a sudden proposal to Commander Parker. He proposed that the Parkers should join forces and live with them. Commander Parker said that it was a big thing and required much study. Mr. Clark told him to think it over and he agreed that H he would. Commander Parker assumed, although the word "permanent" was not used, that that was what was meant; the words used were: "Come and live with us". The Parkers thought it over and clearly liked the idea. Commander Parker was satisfied that it meant selling his cottage, The Thimble, which he owned; he was not prepared to let it and try to run the tenancy from Torquay. Accordingly, a very few days after the Parkers' return, Commander I Parker wrote to Mr. Clark, in a letter which has not been preserved, pointing out the difficulty and saying that, if they came to live in Torquay, they would have to get rid of The Thimble. In reply, he received from Mr. Clark a letter, dated Sept. 25, which is of sufficient importance to set out in full:

> "My dear Dudley,
>
> Many thanks for your letter. The major difficulty re what is to happen to the 'Thimble' can be solved by our leaving 'Cramond' and its major

contents (insured for £3,000 & £3,000) to Madeline, Mavis and Pamela when we both pass away and if you cannot maintain it they can sell out. Its present value is £9,000 to £12,000 without contents. Maintenance at present costs

Elect.	50	£203—4—8
Tele.	10	
Coal	21	
Rates	113–13–4	
Water	8–11–4	

My pension is £700 per annum and Connie has an annuity of £300 p.a. If I pass away Connie gets £300 widow's pension. This all disappears as we pass away. But I have some war loan out of which I pay income tax and eventually death duties.

The war loan goes to my surviving brother and sisters. If we go fifty-fifty on maintenance of house it would cost you half of the £200 odd as set out and half the running expense of food, drinks, etc. but I think it would be fair if your share of the £200 was the same as you now pay at the ' Thimble ' if it is less than £200. I would pay for a daily woman four mornings a week, have a T.V. and a new car.

You could sell out and pay off your mortgage and invest proceeds to increase your income.

I hope your family vote for or against this will be unanimous.

B. & C."

The Madeline who is referred to in this letter is the female plaintiff, Mavis is her sister and therefore also a niece of Mrs. Clark, and Pamela is the plaintiffs' daughter. Connie is Mrs. Clark.

On Sept. 30, 1955, Commander Parker replied in a letter which again has not been preserved; he wrote that he accepted Mr. Clark's generous offer. Adopting the words of Mr. Clark's final sentence, he said that the family vote was unanimously in favour; and he said that he would dispose of The Thimble. The Parkers then proceeded to act on the arrangement. They put The Thimble up for sale and on Feb. 10, 1956, entered into a contract whereunder they sold the property for the sum of £3,900. £945 of this was used to pay off a secured advance to the bank, and out of the balance £2,000 was lent to their daughter Pamela in order to enable her to buy a flat at Amersham. Commander Parker told Mr. Clark what he had done. As he put it, he could not call in the loan without dispossessing his daughter. So it was or should have been apparent to Mr. Clark that by these transactions the Parkers had burnt their boats.

On Mar. 1, 1956, the Parkers moved to Cramond. They took with them enough furniture for the bedroom which they were to occupy and also a few other pieces; the rest was stored. They found when they got there that Mr. Clark had engaged a daily woman as he had promised and also had bought a television set. Shortly after their arrival, Mrs. Clark told Mrs. Parker that they had decided not to charge the Parkers with their share of the rates. Apart from this, all the household expenses were shared. Mrs. Clark, when she was able to do so, and Mrs. Parker ordered the food, and Commander Parker kept the household accounts, which he has produced. The daily maid came four or five times a week for four or five hours daily; otherwise the household work was done by Mrs. Clark and Mrs. Parker, I should imagine principally by Mrs. Parker. Although nothing had been said, the Parkers had assumed from the first, because they knew that the Clarks were not strong, that they would be expected to help them out; and I think it likely that they shouldered most of the work that had to be done. Every morning they served Mr. and Mrs. Clark with their breakfast. They did the shopping and paid the bills. Inside the house, Commander Parker was the handyman; he did interior painting, mended drains, painted the outside windows. Mrs. Parker did the sewing for some new curtains that were made up.

There was a garden of about half an acre and the Clarks had a man one day a week. Most of the rest of the gardening was done by Commander Parker, though Mr. Clark did a little.

By the time the Parkers arrived, Mr. Clark had not, as promised in the letter of Sept. 25, 1955, bought a new car. Within a week of their arrival he was taken ill. But when he was better he bought a new Hillman Minx. Neither of the Clarks drove, so that all the driving was done by Commander Parker. There were many journeys to the hospital when one or other of the Clarks was ill. Mr. Clark paid all the running expenses of the car except that when the Parkers used it for their own purposes they paid for the petrol.

About the time when he bought the car, Mr. Clark told Commander Parker that he would give the Parkers each £400 in order to save death duties on £800, but nothing came of this. Between June and August, 1956, Mr. Clark was ill again, and after his illness he told Commander Parker that the Hillman Minx was a luxury and that he proposed to lay it up and then sell it. Commander Parker said that this was unreasonable and reminded him of what he had said in the letter of Sept. 25.

At Christmas, 1956, a Miss Bainbridge, a distant relative of the Clarks, came to stay and her visit lasted for about three months until Easter. About this time Mr. Clark made a will. He did not go to a solicitor but made it out on a form which he bought. He says that he had never made a will before, though his intention had been to leave Cramond, after his wife died, to relatives on his own side of the family. But he made the will, he says, in accordance with his letter of Sept. 25, 1955, and left Cramond to the three beneficiaries there named, including Mrs. Parker. For some reason he destroyed this will but shortly after made another similar will. Commander Parker heard about this from Miss Bainbridge and told Mr. Clark that he thought that it was unsatisfactory that the will was made on a purchased form and without legal guidance and was not kept in a place of safety. Mr. Clark, in accordance with what appears to be his usual habit when remonstrances are addressed to him, said nothing; he is a man who does not like being involved in argument that might lead to unpleasantness.

In July, 1957, Mr. Clark told Commander Parker that he was considering selling Cramond. Commander Parker said that that would mean that they, the Parkers, would be without a home. Mr. Clark said nothing. It is clear that, at the latest, by the autumn of 1957, Mr. Clark had begun to regret the arrangement whereunder he had taken the Parkers into his home. He never gave any specific reason for this; but some time later, when Mrs. Parker questioned Mrs. Clark, she said that her husband felt that the house did not belong to him. I have no doubt that it was some general feeling of this sort, rather than any specific ground for complaint, that caused the attitude of the Clarks to change. When Mrs. Parker put the same question to Mr. Clark, he replied: " You have been enjoying yourselves and living rent free ".

Matters first came to a head on Oct. 24, 1957, when, after another discussion about the car, Mr. Clark told Commander Parker that he thought that the partnership was not working and that the Parkers would have to find some other place to live in. I have no doubt at all that this came as a terrible shock to the Parkers and caused them great distress. Commander Parker protested strongly. What about the letter, he said; and what had they done to deserve such treatment? How could they leave Cramond; they had no home. To all of this Mr. Clark said nothing. Commander Parker was sufficiently disturbed to consult a solicitor. He did this on Nov. 1, 1957, and, as the result of the advice which he received, he asked Mr. Clark to put on paper that he had told them to leave Cramond. Mr. Clark replied that Cramond was not a common lodging house.

As the result of Mr. Clark's remark that the Parkers were enjoying themselves and living rent free, Commander Parker decided that he would make his contribution to the rates. He worked out that, if he paid the full half share, it would

A bring his total contribution up to more than he had been paying at The Thimble, which Mr. Clark had said in his letter of Sept. 25, 1955, was to be the limit of their contribution. Commander Parker calculated that the sum of £41 5s. 4d. would bring their contribution up to the limit and on Nov. 4, 1957, he tendered a cheque for that amount to Mr. Clark which Mr. Clark refused.

About the middle of November, 1957, Mr. Clark asked Commander Parker B when they intended to leave. Commander Parker replied that they had no intention of leaving and that he would have to have them evicted. Mr. Clark said: " There are other ways of getting you out ". About this time, Mr. Clark offered to pay the Parkers their expenses incurred in leaving Cramond and finding another place to live in and said that for this purpose he would set aside £150. Commander Parker told Mr. Clark that he did not trust him and would not accept C his offer. A little later Mr. Clark offered that, in addition to the £150, he would pay for the expenses which the Parkers had incurred in moving their furniture to Cramond as well as the expenses for taking it away, and Commander Parker refused that.

Commander Parker had spoken too rashly when he said that the Clarks would have to evict them. By the beginning of December, 1957, the Parkers found D the atmosphere unbearable and they decided that they would have to leave. Commander Parker told Mrs. Clark that they would accept Mr. Clark's last offer. She gave them a cheque, apparently out of her own money, for £150, and he handed to her the bill which he had received for the furniture removal from Mayfield to Torquay and said that he would send the other bill when it arrived. On Dec. 9, 1957, the Parkers left Cramond. Although the atmosphere had been E very strained at the end, they left in a friendly way. On Jan. 7, 1958, Commander Parker wrote a friendly letter to Mrs. Clark in which he sent the further bill for the furniture. There was no talk of any legal action, though Commander Parker described their situation as " anything but pleasant " and said that they felt very bitter over the loss of their cottage. The bills for the furniture removals were not discharged by the Clarks.

F No further action was taken by the plaintiffs until Aug. 20, 1958, when a solicitor's letter was sent to the defendants putting forward a claim substantially in the terms of the statement of claim in this action. No reply was received to it and on Nov. 13, 1958, the writ was issued. The plaintiffs were naturally questioned about this delay. They said that for some time after they left Cramond they felt too sick about the whole business to take any action. I believe this, G and I gained the impression that they were genuinely distressed about these proceedings.

The relief claimed by the plaintiffs falls into two categories. It is accepted by both sides that, if there has been a breach of contract, the measure of damage is the value of that which the plaintiffs have lost by reason of the breach. The particulars of special damage set out in the statement of claim do not assist H much in the assessment, for they specify chiefly costs incurred by the plaintiffs as the result of entering into the contract and as the result of its breach. The two categories are, first, the value to the plaintiffs of such benefits as are attributable to living at Cramond, and secondly, the value to the female plaintiff of the prospects of inheriting Cramond when the two defendants are dead. In the first category, the plaintiffs do not allege and have not proved that their I share of the joint living expenses at Cramond was any less than their living expenses independently would have been. They do not rely on Mr. Clark's statement that he would not charge them rates as being contractually binding; and accordingly, as I have already said, the cost of their living at The Thimble was the ceiling over their contribution to the Cramond expenses. What they have lost consists, therefore, of the benefit of living at Cramond rent free and the value to them of the use of a car and a television set specially provided by Mr. Clark. The appropriate sum to cover these items is claimed by them as joint contractors.

In the second category the claim is for the estimated value of Cramond and its contents which is put in the statement of claim at £12,000. In fact, for the purposes of this action the value has been agreed as £13,000. But the whole of this amount cannot properly be claimed in the present action. By the terms of the letter of Sept. 25, 1955, the house and contents were to be left jointly to Mrs. Parker, her sister and her daughter (1). It may be that, if the plaintiffs were claiming as trustees and if they could establish that Mr. Clark's promised bequest was intended for the benefit of the sister and the daughter as well as an inducement to the Parkers, they could obtain judgment for the full value. But counsel for the plaintiffs eventually abandoned the argument that, on the pleadings as they stood, he could recover sums for the benefit of the sister and daughter. It follows, therefore, that the damages in this category cannot exceed one-third of the value of the house and contents. This is the figure which, less certain deductions which I shall consider later, is claimed by Mrs. Parker in her own right.

The contract relied on by the plaintiffs is said to be contained in the defendants' letter of Sept. 25 and Commander Parker's acceptance thereof. In this part of the case, since Mr. Clark and Commander Parker were the contractual protagonists, it is convenient to refer to them simply as plaintiff and defendant. The defendant's first submission in answer to the claim is that the letters, construed in the light of the surrounding circumstances, show no intention to enter into a legal relationship or to make a binding contract. No doubt a proposal between relatives to share a house and a promise to make a bequest of it may very well amount to no more than a family arrangement of the type considered in *Balfour* v. *Balfour* (2) which the courts will not enforce. But there is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in a will, can be the subject of a binding contract. The letter proposal has been considered chiefly in relation to marriage contracts. In *Synge* v. *Synge* (3) it was held that the defendant, who promised in writing, as part of the terms of the marriage, to leave a house and land to the plaintiff, had thereby entered into a binding contract. KAY, L.J., delivering the judgment of the Court of Appeal, quoted (4) the dictum of LORD LYNDHURST, L.C., in *Hammersley* v. *De Biel* (5), which is as follows:

> ". . . the principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal."

That is the principle which I apply here; and, indeed, a contract of marriage is not dissimilar to an agreement by two families to live together for the rest of their joint lives.

The question must, of course, depend on the intention of the parties to be inferred from the language which they use and from the circumstances in which they use it. On the plaintiff's side, I accept his evidence that he considered that he was making a binding contract. An important factor in this was that he disposed of his own residence. It does not matter for this purpose whether it was or was not a term of the contract that he should sell The Thimble; the important thing is that the contract required him to give up his occupation of The Thimble and that he was always quite clear, and made it quite clear, that he would not give up occupation unless he also gave up the ownership and parted with the property. He would not have done that, he says (and I believe it), unless he thought that he was securing another permanent home. There is,

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(1) See pp. 96, 97, ante. (2) [1919] 2 K.B. 571. (3) [1894] 1 Q.B. 466.
(4) [1894] 1 Q.B. at p. 469. **(5) (1845), 12 Cl. & Fin. at p. 78.**

A undoubtedly, in the arrangement a lack of formality on which counsel for the defendants greatly relies. This, I think, is largely explained by the relationship between the parties; it is easier to demand formal documents from a stranger than it is from a relative and friend. It is clear that the plaintiff constantly relied on the letter of Sept. 25, 1955, as a sort of title to his rights; he kept it and referred to it whenever his rights were called in question. When, on Oct. 24, B 1957, they were seriously threatened, he went forthwith and consulted a solicitor (6). He is not, in my judgment, the sort of man who would "think up" a legal action as an afterthought when he found that he was not getting what he wanted.

The plaintiff is not a moneyed man. On the strength of the defendant's promise he, so to speak, put down £672 10s. That is the figure which is agreed as the expense which he incurred in giving up The Thimble, on the assumption C that he could re-purchase The Thimble or a cottage like it. In addition to that, he tied up £2,000, so that he has never since been in a position to buy another property like The Thimble and has never in fact bought one. The defendant knew this and had plenty of time to reflect on it between Sept. 25, 1955, when he wrote his letter, and Mar. 1, 1956, when the plaintiffs arrived. If he had thought that all that his letter involved was an amicable arrangement D terminable at will, I cannot believe that he would not have enlightened the plaintiff and, as a cautious man himself, have warned him against the folly of what he was doing. I cannot believe either that the defendant really thought that the law would leave him at liberty, if he so chose, to tell the plaintiffs when they arrived that he had changed his mind, that they could take their furniture away and that he was indifferent whether they found anywhere else to live or not. E Yet this is what the defence means. The defendant gave several answers which show that this was not really his state of mind. He said that the object of the letter was to induce the plaintiffs to come to Cramond; and he agreed also that he made the will in fulfilment of the promise. I am satisfied that an arrangement binding in law was intended by both sides.

The defendants' second submission is that the agreement is not sufficiently F clear in its terms to be capable of constituting a legal contract. No doubt, if the letter had been drafted by a lawyer, he would have gone into much more detail and would, for example, have specified how the running expenses were to be determined and matters of that sort. An agreement of this kind, made in general terms, requires good will and co-operation from both sides if it is to be successfully worked. But it was, in fact, made to work for more than a year and G a half, and the defendants fulfilled all its terms even to the point of the making of a will to the required effect. Counsel for the defendants has not argued that the contract was too imprecise in detail to be enforceable; but he contended that two of the terms pleaded in the statement of claim were not sufficiently clearly set out in the letter of Sept. 25, 1955. The former of these is the first pleaded term which alleges that the plaintiffs should cease to occupy and should dispose of H their interest in The Thimble (7). Counsel for the defendants argues that there is nothing express or to be implied in the letter which requires the plaintiffs to sell The Thimble. Counsel for the plaintiffs accepts this and agrees that the only term to be implied from the letter about The Thimble is that the plaintiffs should cease to occupy it. But the elimination of part of the term pleaded does not affect the relief for which the plaintiffs are asking. The main consideration I for the defendants' promise was that the plaintiffs should come and live at Cramond. This they have done. It may be that the request was also dependent on The Thimble being sold; but, if it was, they have done that also.

The second point raised by counsel for the defendants is on the second term pleaded (8), and he submits that there is nothing in the letter specifying the period for which Cramond was to be shared and, therefore, nothing which justifies the contention in the statement of claim that it was " the period of the lifetime of the survivor of the defendants ". On this view, no time being mentioned, the duration of the agreement would be subject to reasonable notice on either side. It is clear, I think, that it was intended as a long-term arrangement. But an agreement to last for life must be exceptional and would certainly be improbable in the case of two young couples. Here, however, the circumstances are unusual. The defendants were both nearly eighty years old, and, describing their condition in September, 1955, Mr. Clark said:

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(6) See p. 98, letter I, ante.

(7) See para. 1 (1) of the statement of claim at p. 95, letter D, ante.

(8) See para. 1 (2) of the statement of claim at p. 95, letter D, ante.

> " Both of us were in very bad health and neither of us thought we had much chance to live long."

Because the terms of the defendants' offer were generous, one must not overlook the benefits which they were receiving from the arrangement. It is not easy nowadays to secure domestic assistance, especially in times of illness; and for the defendants to have living with them permanently a couple twenty years younger, whom they believed to be congenial and who were obviously willing to help, was a great advantage and one for which at market rates they might have had to pay a great deal. I have already instanced the sort of things which the plaintiffs did. While there was no bargain about it, I am sure that the defendants expected this sort of help and that the plaintiffs thought it natural and right to give it. The defendants obviously wanted comfort and security for the rest of their lives which they believed to be short. It would not have been much of a bargain to them if it had left the plaintiffs free to give notice before the end; it might be then that the need for their help would be most great. In these circumstances there is, I think, sufficient in the language of the letter to indicate that the agreement was to be for the duration of the defendants' lives. In offering the bequest of Cramond to the three women the letter says (9): ". . . if you cannot maintain it they can sell out ". This shows, I think, that the defendants expected that at the time of their deaths the plaintiffs would still be in residence.

The third submission of counsel for the defendants is that s. 40 (1) of the Law of Property Act, 1925, has not been complied with, since the agreement was not in writing, nor was there any sufficient note or memorandum of it in writing. In fact, the whole agreement, which consists of the letter of Sept. 25, 1955, and of Commander Parker's reply to it, was originally in writing. Counsel for the plaintiffs submitted that oral evidence of a written acceptance would be sufficient to satisfy the requirements of the statute. But he did not pursue this argument, preferring to rely on a contention that a written offer which contained all the terms of the contract was a sufficient note or memorandum of it for the purposes of the statute and that the acceptance of the offer could be proved orally. Counsel for the defendants submitted that the memorandum was not a good one unless the agreement was in existence before it was signed. For this proposition he relied on *Munday* v. *Asprey* (10). In that case the purchaser's solicitors sent the engrossment of a conveyance to the vendor's solicitors together with a letter in which they sought an appointment for completion. Those documents were held not to be a sufficient memorandum, since they were only a statement of an expectation of a future contract. Counsel particularly relied on the following dictum of FRY, J. (11):

> " The statute requires that a concluded agreement existing at the time when the memorandum is signed should be proved by the plaintiff, whereas the document, as I have said, shows no actual existing agreement."

I think with great respect that, whether the case was rightly or wrongly decided, this dictum cannot be supported. It is contrary to a number of

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(9) See p. 97, letter A, ante.
(10) (1880), 13 Ch.D. 855.
(11) (1880), 13 Ch.D. at p. 857.

A authorities—two of which, *Smith* v. *Neale* (12) and *Reuss* v. *Picksley* (13) were
cited by counsel for the plaintiffs—which show that a written offer is capable
of being a good memorandum although the agreement cannot come into existence
until after the offer has been accepted. I agree that a document which contains
no more than a statement of all the terms of a proposed agreement would not
be enough; and it may be that that is the way in which an engrossment of a
B contract ought to be regarded. The memorandum must not only contain a
statement of all the terms but its language must be such as to show an intention
to contract. Counsel for the defendants submitted that the letter of Sept. 25,
1955, was not an offer but merely a statement of terms proposed for consideration.
But I think that the letter was an offer and expressed as such; the concluding
sentence of the letter satisfies me of that.

C The amended defence raises the plea that the plaintiffs themselves determined
the agreement. This was not pursued by counsel for the defendants in argument
and is contrary to the evidence which I have accepted. The plaintiffs did agree
to leave the house—presumably, in their view, as an alternative to being evicted
—in exchange for £150 and the promise of further payments for furniture
removal. They maintain that by so doing they did not intend to prejudice their
D rights, and it has not been alleged that they did. In any event the further
payments were never made.

Accordingly I am satisfied that there has been a breach of contract and that
the plaintiffs are entitled to damages under the two heads which I have already
particularised (14). Cramond is obviously a desirable and well-appointed
house, since with its contents it is valued at £13,000, and I assess the benefit of
E living in part of it rent free together with the use of a car and a television set at
£300 a year. I shall take a multiplier of four as representing the value as in
December, 1957, of that sum. This multiplier is based on what cannot be much
more than a guess about the expectation of life of the two defendants. But it
need not be more than approximate since a discounting figure, also based on
the same expectation of life, must be applied in order to value Mrs. Parker's
F prospects under the will. The value of those prospects must also be discounted
by the fact that Mrs. Parker might have had to find a sum to pay death duties,
and I must also allow for contingencies, such as that the house might be
destroyed before the will took effect. Mr. Clark apparently contemplated finding
the death duties from some other source and the house was in fact insured. But
counsel for the plaintiffs admits that there was no legal obligation on Mr. Clark
G to do either of these things and that his doing them cannot be put higher than
an expectation. Taking these matters into account, I value Mrs. Parker's
prospects under the will as at today at £3,400. There will therefore be judgment
for both plaintiffs jointly for £1,200 and costs, and for Mrs. Parker separately
for £3,400.

Judgment for the plaintiffs.

Solicitors: *Shelton, Cobb & Co.* (for the plaintiffs); *Pennington & Son*, agents for *Hooper & Wollen*, Torquay (for the defendants).

[*Reported by* DEIRDRE MCKINNEY, *Barrister-at-Law.*]

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(12) (1857), 2 C.B.N.S. 67.
(13) (1866), L.R. 1 Exch. 342.
(14) See p. 99, letter H, ante.

QUINTAS *v.* NATIONAL SMELTING CO., LTD.

[BRISTOL ASSIZES (Devlin, J.), November 17, 18, 26, 1959.]

Factory—Dangerous machinery—Duty to fence—Overhead travelling cable-way used for transporting materials from one part of factory to another—Large buckets suspended from cables and constantly in motion—Bottom of buckets passing four feet above flat roof of factory building—Access to part of factory obtained from flat roof—Injury to workman standing on roof—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 14 (1).

The plaintiff was employed by the defendants in their factory. For the purpose of transporting material from one part of the factory to another, the defendants operated an overhead travelling cable-way, supported by stanchions, on each side of which ran a cable from which large buckets were suspended. The two cables moved in opposite directions and the buckets, which were spaced at intervals of 110 feet, were constantly in motion, travelling at a maximum speed of three miles an hour. The cable-way was high above the ground, but, for part of its route, it passed above the flat roof of a crushing plant and the bottom of the buckets were only four feet above the roof. Part of the flat roof was occupied by a small building, known as the magnet house, access to which was obtained by a door opening on to a corner of the flat roof. The distance from this door to the door of the magnet house was only a few paces, and the rest of the roof, including the route of the cable-way, was fenced off from the walking space between the two doors by a hand-rail, about three feet high and consisting of two rails. At the material time there was a gap of eighteen inches in the hand-rail. After finishing a job at the magnet house, the plaintiff walked through the gap in the hand-rail to the edge of the roof, in order to send a message to his foreman, and, as he stood in the route of the cable-way, he was struck by a bucket and injured.

Held: (i) the defendants were liable in damages to the plaintiff for breach of statutory duty under s. 14 (1) of the Factories Act, 1937, for the following reasons—

(a) the whole of the cable-way should be regarded as one piece of apparatus and was " machinery " within the meaning of s. 14 (1) and, therefore, every dangerous part of it, such as the part passing over the flat roof, was required by s. 14 (1) to be securely fenced.

(b) to constitute a secure fence complying with s. 14 (1) fencing must be such as not only to guard against accident but also to deter a man willing to run a minor risk and take a short cut, for human weaknesses must be taken into account (see p. 107, letter E, post); the hand-rail in the present case would not have been such a fence, even if there had not been a gap in it, and was not a compliance with s. 14 (1).

Dicta of LORD PORTER in *Carroll* v. *Andrew Barclay & Sons, Ltd.* ([1948] 2 All E.R. at p. 390) and of LORD MORTON OF HENRYTON in *John Summers & Sons, Ltd.* v. *Frost* ([1955] 1 All E.R. at p. 876) applied.

(ii) on the facts, the plaintiff's own negligence was the main cause of the accident, and he should bear three-quarters of the responsibility for it.

[As to the duty to fence dangerous parts of machinery, see 17 HALSBURY'S LAWS (3rd Edn.) 74, para. 126; and for cases on the subject, see 24 DIGEST (Repl.) 1049-1055, *183-218*.

For the Factories Act, 1937, s. 14 (1), see 9 HALSBURY'S STATUTES (2nd Edn.) 1009.]

Cases referred to:

Carroll v. *Andrew Barclay & Sons, Ltd.*, [1948] 2 All E.R. 386; [1948] A.C. 477; [1948] L.J.R. 1490; 24 Digest (Repl.) 1056, *221*.

Parvin v. *Morton Machine Co., Ltd.*, [1952] 1 All E.R. 670; [1952] A.C. 515; 116 J.P. 211; 24 Digest (Repl.) 1059, *239*.

Summers (John) & Sons, Ltd. v. *Frost*, [1955] 1 All E.R. 870; [1955] A.C. 740; [1955] 2 W.L.R. 825; 24 Digest (Repl.) 1055, *217*.

Action.

In this action the plaintiff, Nicholas Quintas, claimed damages against the defendants, National Smelting Co., Ltd., for personal injuries suffered and losses and expenses incurred as the result of an accident which occurred on June 28, 1955, at the defendants' factory, arising out of alleged negligence and/or breach of statutory duty of the defendants, their servants or agents. At the time of the accident the plaintiff was employed by the defendants as a fitter at their factory. By his statement of claim the plaintiff alleged, as regards breach of statutory duty, (a) failure to fence securely a dangerous part of machinery (namely, a bucket of an overhead travelling cable-way), contrary to s. 14 (1) of the Factories Act, 1937, and (b) failure to maintain and keep in position, contrary to s. 16 of the Act, some stanchions and guard-rails which at one time constituted a fence on the concrete roof of a building over which the cable-way passed. By their defence the defendants denied breach of statutory duty or negligence, and, further or in the alternative, alleged that the plaintiff's accident was caused wholly or in part by his own negligence and/or breach of his duty under s. 119 of the Factories Act, 1937.

The action came on for trial before DEVLIN, J., at Bristol Assizes on Nov. 17 and 18, 1959, and at the conclusion of the hearing HIS LORDSHIP gave judgment on the issue of negligence and reserved his judgment on the issue of breach of statutory duty. On the issue of negligence, HIS LORDSHIP held that the defendants were not in breach of any duty at common law and that the main cause of the accident was the plaintiff's own negligence. The report is confined to the issue of breach of statutory duty on the part of the defendants. The facts are stated in the judgment.

W. D. Collard for the plaintiff.

W. L. Mars-Jones, Q.C., and *H. E. Park* for the defendants.

Cur. adv. vult.

Nov. 26. **DEVLIN, J.**, read the following judgment: The defendants are the occupiers of a factory in which they operate an overhead travelling cable-way, known as the rope-way, for the purpose of transporting material from one part of the factory to another. The rope-way is supported by stanchions, on each side of which there runs a cable, and along these cables—one going one way and the other the reverse—there are large buckets constantly in motion. The buckets are spaced at intervals of 110 feet and travel at a maximum speed of three miles per hour. When they are travelling at that speed, a given spot on the route of the rope-way would be passed by a bucket about twice in a minute. For most of its route the rope-way is sufficiently high above the ground to obviate the need for any protection for men working or passing underneath; but at one point, with which this case is concerned, it crosses the flat roof of a building, containing a crushing plant, which is eighteen feet above ground level. The bottom of the bucket passes four feet above the level of that roof, and, therefore, persons on the roof, if they do not remember to keep clear of the rope-way, are in danger. The plaintiff was standing on the roof and was hit and injured by a bucket.

Part of the flat roof of the crushing plant was occupied by a small building known as the magnet house. Access to the magnet house was obtained by a door which opened on to a corner of the flat roof. A man emerging from this door and turning left had to walk only a few paces to get to the door of the magnet house, and this walking space was fenced in—or, it may equally well be put, the rest of the roof including the route of the rope-way was fenced off—by a hand-rail about three feet high and consisting of two rails. At the material time there was a gap of eighteen inches in this hand-rail. It had been cut to allow some equipment through and was never replaced. Just before the accident the plaintiff, who had finished a job in the magnet house, walked through the gap out to the edge of the roof to attract attention so that he could send a message to his foreman and, standing in the route of the rope-way, he was struck by a bucket.

In my judgment, the main cause of the accident was the plaintiff's own negligence since he knew that it was dangerous to work or stand under the rope-way at this point. I have already given my reasons for this finding and also for holding that the defendants were not in breach of any duty at common law. The plaintiff also alleges a breach of s. 14 (1) of the Factories Act, 1937. He contends that the rope-way was machinery within the meaning of that subsection, that the part of it which crossed the roof of the crushing plant was a dangerous part and that it was not securely fenced as required by the subsection. The question whether a rope-way of this sort was " machinery " within the meaning of the section appears to be a novel point on which counsel were not able to find any clear authority, and I therefore reserved my judgment on it.

The defendants submit that the rope-way is simply a means of transport which is to be compared with a railway, the only difference being that, while in the case of a railway the vehicle moves on the rails, in the case of the rope-way it is suspended from them. The plaintiff submits that the rope-way is more justly to be compared with a conveyor belt, the only difference being that it operates over the whole factory instead of in a particular workshop. The only authority that counsel could find on the point is *Parvin* v. *Morton Machine Co., Ltd.* (1), in which the House of Lords decided that s. 14 (1) of the Factories Act, 1937, did not extend to machinery manufactured in the factory. LORD NORMAND, who made the first speech, put the question (2) as being whether the provisions of s. 14 (1) applied

> " to machines or machinery manufactured in the factory or only to machines or machinery for use in the factory in the processes of manufacture or as ancillaries to these processes."

While LORD NORMAND was not there giving a conclusive definition of the machinery to which s. 14 (1) applies, I have no doubt that he chose his words carefully. The transport of materials for use in the processes of manufacture is something ancillary to those processes. I do not think that it follows from this, as the defendants suggest, that every truck on a factory railway, or every vehicle within the factory which is carrying material, is a machine for the purposes of the Act. Even if it did so follow, it does not also follow that the machine would have to be " fenced ".

No doubt, a vehicle in motion may be a dangerous thing; but s. 14 (1) requires, not that the machine as a whole should be securely fenced, but that every dangerous part of it should be. Normally the dangerous parts of a vehicle are covered in. The defendants invited me to regard the buckets as separate pieces of machinery and to compare them with any other form of vehicle; there was nothing dangerous about a bucket, they said, except its motion. In my judgment the whole of the rope-way must be regarded as one piece of apparatus and as machinery within the meaning of s. 14 (1) of the Act. This does not of course mean that every part of it has to be fenced, but only those parts, such as the one which I am considering in this case, where there is danger to those underneath.

Have the defendants discharged their obligation of securely fencing? It would be easy to say that, as there was a gap in the hand-rail, they clearly had not. I think, however, that that would be to take too superficial a view of the problem. The gap was really immaterial. If it had been made good, a man could still have got through the fence just as easily as if the gap was there. The real question is whether there was a duty on the defendants to erect a fence that would prevent, or at least seriously hinder, a man from going where he wanted to go. If the defendants could have discharged their duty by mending the hand-rail, then I should hold that their failure to do so did not contribute to the damage, for I am sure that a complete hand-rail would not have kept the plaintiff out.

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(1) [1952] 1 All E.R. 670; [1952] A.C. 515.
(2) [1952] 1 All E.R. at p. 670; [1952] A.C. at p. 520.

Here again there does not seem to be a wealth of authority. It is clear that by a secure fence is meant one which is designed to prevent contact. Does that mean accidental contact, whether or not involving some degree of carelessness, or does it extend to deliberate contact? In *Carroll* v. *Andrew Barclay & Sons, Ltd.* (3) LORD PORTER said:

> " Fencing, in my opinion, means the erection of a barricade to prevent any employee from making contact with the machine . . . "

It must be remembered that his Lordship was speaking in a case in which the point was not the strength of the fence, but whether it was necessary to fence against the ejection of dangerous materials from the machine. But the word " barricade " is not likely to have been chosen without thought and the dictum affords valuable guidance, as is shown by the reference to it by LORD MORTON OF HENRYTON in *John Summers & Sons, Ltd.* v. *Frost* (4). LORD MORTON said that there must be " complete protection against contact "; but he added (5):

> " . . . I do not suggest that the fence must be so constructed that it cannot be climbed over, or broken down, by an employee who is determined to get at the machinery."

From these dicta it is clear, as it is clear also from the general principles that underlie the interpretation of the Factories Acts, that the fence must not merely guard against accident but must be such as takes into account human weaknesses which include, as well as forgetfulness and inadvertence, an inclination sometimes to run minor risks and to take short cuts. Some degree of recklessness has to be foreseen as well as carelessness. The fence need not be so constructed as to keep out a determined man, but, I think, it must be such as will deter a man who, in pursuit of a short cut, is willing to run a minor risk. The fence in this case, whether complete or broken, was not of that construction; it was nothing more than a line that demarcated a dangerous or forbidden area and, as such, it was an insufficient compliance with s. 14 (1) of the Act of 1937.

I consider that the plaintiff should himself bear three-quarters of the responsibility for his accident, and there will, therefore, be judgment for him for one-quarter of the sum which I have already assessed as damages.

[*Judgment for the plaintiff for £2,175; costs for the defendants after Oct. 25, 1958, the date of the first payment into court (£2,500), and costs for the plaintiff up to that date to be set off against the costs of the defendants.*]

Solicitors: *W. H. Thompson* (for the plaintiff); *Gascoin & Co.* (for the defendants).

[*Reported by* DEIRDRE MCKINNEY, *Barrister-at-Law.*]

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(3) [1948] 2 All E.R. at p. 390; [1948] A.C. at p. 486.
(4) [1955] 1 All E.R. at p. 876; [1955] A.C. at p. 757.
(5) [1955] 1 All E.R. at p. 876; [1955] A.C. at p. 758.

BROWN *v.* NATIONAL COAL BOARD. A

[NEWCASTLE-UPON-TYNE ASSIZES (Thesiger, J.), October 15, 16, 30, 1959.]

Coal Mining—Statutory duty—Breach—Security of road and working place—Electrician removing electric light fitting from partly fallen girder before receiving actual instructions to do so and without knowledge of overman—Fall of stone from roof—Whether breach of statutory duty—Whether impracticable B *to avoid or prevent the contravention—Whether electrician summoned to danger zone employed in that part of the mine—Whether light fitting on partly fallen girder constituted "debris"—Mines and Quarries Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 70), *s.* 48 (1), *s.* 51 (3) (*b*), *s.* 157—*Coal and Other Mines* (*Support*) *Order*, 1956 (*S.I.* 1956 *No.* 1763), *Sch.* 1, *reg.* 12.

The plaintiff was employed by the defendants as an electrician in one of C their coal mines. On Apr. 8, 1958, when the plaintiff had finished what he was required to do on that shift and was on his way to the shaft, a tub coming up from a drift in the mine knocked away a concrete prop holding up a girder, the girder fell down at that end, and at the same time a piece of stone fell from the roof. An electric light fitting was attached to the centre of the girder by a bracket, and, as it would be difficult to insert a prop to support D the girder unless the light fitting was removed, the overman in charge of that part of the mine sent a message to recall the plaintiff in order that he would be available in due course to remove the light fitting. After sending for props and warning the other men to stand clear, the overman then went under that part of the roof where the fall had taken place; he did not know that the plaintiff had returned and was near the fallen girder. E The plaintiff, knowing what he was required to do, had started on the work, without waiting for instructions, when another stone fell, injuring him. In an action for damages against the defendants, the plaintiff alleged (among other allegations) that the defendants were in breach of their statutory duty under s. 48 (1)* and s. 51 (3) (b)† of the Mines and Quarries Act, 1954, and under reg. 12‡ of the Coal and Other Mines (Support) Regulations, F 1956. The defendants denied the plaintiff's allegations, and, alternatively, contended that, if they were in breach of any statutory duty, it was impracticable to avoid or prevent the contravention and they were, therefore, absolved from liability to the plaintiff by s. 157§ of the Act of 1954.

Held: the defendants were not liable in damages to the plaintiff for breach of statutory duty for the following reasons— G

(i) section 48 and s. 157 of the Act of 1954 were to be read together, and, on the facts, there had been no breach of s. 48 (1) or, if there had been, the contravention was one which it was impracticable to avoid or prevent (within the meaning of s. 157), because, at the time when the plaintiff was injured, the defendants, by their servants or agents, were taking such steps as were necessary for keeping the roof secure, and his injury was due to the H fact that, without their knowledge, he tried to assist in that work (see p. 116, letters E and H, post).

(ii) the words of s. 51 (3) (b) of the Act of 1954 were not apt to cover the plaintiff's case, because, until he was summoned and went into the danger zone, he was not a workman "employed in that part of the mine", within s. 51 (3) (b) (see p. 111, letter E, post). I

(iii) the defendants were not in breach of reg. 12 of the Coal and Other Mines (Support) Regulations, 1956, because the light fitting did not constitute "debris", within the meaning of the regulation, and, even if it

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* The terms of s. 48 (1) are printed at p. 112, letter G, post.

† The terms of s. 51 (3) are printed at p. 110, letter I, to p. 111, letter B, post.

‡ The terms of reg. 12 are printed at p. 112, letter A, post. The regulations are contained in Sch. 1 to the Coal and Other Mines (Support) Order, 1956.

§ The terms of s. 157 are printed at p. 112, letter H, post.

A did, the work of clearing it was " necessary for the setting of the supports ", within the regulation (see p. 112, letter F, post).

[As to breach of statutory duty on the part of a mine owner and as to the defences open to the owner, see 26 HALSBURY'S LAWS (3rd Edn.) 566, 568, paras. 1136, 1138.

B For the Mines and Quarries Act, 1954, s. 48, s. 51 (3), and s. 157, see 34 HALSBURY'S STATUTES (2nd Edn.) 555, 557, and 627.

For the Coal and Other Mines (Support) Regulations, 1956, reg. 12, see 14 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 61.]

Cases referred to:

C *Atkinson* v. *Shaw*, [1915] 2 K.B. 768; 84 L.J.K.B. 1748; 113 L.T. 485; 79 J.P. 376; 34 Digest 745, *1196*.

Edwards v. *National Coal Board*, [1949] 1 All E.R. 743; [1949] 1 K.B. 704; 2nd Digest Supp.

Hayes v. *National Coal Board*, (Leeds Assizes, Apr. 29, 1952), Unreported.

Jackson v. *National Coal Board*, [1955] 1 All E.R. 145; [1955] 1 W.L.R. 132; 3rd Digest Supp.

D *Marshall* v. *Gotham Co., Ltd.*, [1954] 1 All E.R. 937; [1954] A.C. 360; [1954] 2 W.L.R. 812; 3rd Digest Supp.

Walsh v. *National Coal Board*, [1955] 3 All E.R. 632; [1956] 1 Q.B. 511; [1955] 3 W.L.R. 829; 3rd Digest Supp.

Wright v. *Jenkins*, (1958), 43 Cr. App. Rep. 17.

E **Action.**

In this action the plaintiff, Frank Hall Brown, claimed damages against the defendants, the National Coal Board, for personal injuries, loss and damage caused to him by the negligence and breach of statutory duty of the defendants, their servants or agents at Crofton Mill Colliery, Blyth, Northumberland.

F The plaintiff was employed by the defendants as an electrician at the colliery, which was a mine within the meaning of the Mines and Quarries Act, 1954. On Apr. 8, 1958, a tub coming up the Beaumont Drift knocked away a concrete prop holding up a girder, the girder fell down at that end, and a piece of stone at once fell from the roof. In the centre of the girder, and attached to it by a bracket, was an electric light fitting. The overman in charge of that part of the mine, James Simpson, wished to insert a prop to support the leaning girder, and, as it would be difficult to insert the prop unless the light fitting G was removed, he sent a messenger to recall the plaintiff who was then proceeding outbye along the main haulage road in the Beaumont Seam, having finished what he had to do on that shift just before the fall. After the plaintiff arrived near the leaning girder, he put down his tool bag and was looking for a spanner to remove the bracket of the light fitting when another stone fell down and injured him, causing a mild compression fracture of one of the upper lumbar H vertebral bodies. After being in bed for a week, he was in a plaster cast for six weeks and then had some further treatment. He made a good recovery and was able to start light work on Sept. 8, 1958, though he remained slightly and partially incapacitated in September, 1959.

I What happened immediately before the accident to the plaintiff was in dispute. The plaintiff alleged in the statement of claim that, when he arrived near the leaning girder, the overman instructed him to remove the light fitting so that the girder could be moved. By their defence the defendants alleged that the plaintiff had been called back so that he could in due course be instructed to remove the light fitting, and they denied that he had been instructed to remove the fitting at any time prior to his accident. According to the evidence on behalf of the defendants, the overman did not know of the plaintiff's arrival, as the overman was then under that part of the roof where the fall had been, having previously sent for the necessary props and told the men to stand back.

By para. 3 of the statement of claim the plaintiff alleged that his injuries

> "... were caused by the breach of statutory duty, negligence and/or breach of duty of the defendants and their servants.
>
> "*Particulars.*
>
> "(a) In breach of s. 48 (1) of the Mines and Quarries Act, 1954, the defendants failed to take such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the plaintiff's working place as were necessary for keeping the said working place secure.
>
> "(b) In breach of s. 51 (3) of the said Act they failed to ensure that a sufficient supply of suitable material for support was readily available for use at the place where the plaintiff was working, in that the only props at the working place were too long. In breach of s. 51 (3) (b), the defendants' servant Simpson, the overman, failed to withdraw the plaintiff from the working place when no suitable supports as aforesaid were available.
>
> "(c) In breach of s. 53 of the said Act the said overman failed to set necessary supports in addition to those set in pursuance of the supports requirements and the provisions of the Act.
>
> "(d) In breach of para. 12 of the Coal and Other Mines (Support) Regulations, 1956, after a fall of roof and/or side involving the displacement and/or breakage of supports the [overman] failed forthwith to ensure that all roof and side exposed thereby was dressed and secured by supports before any work of clearing debris was begun."

Paragraph 3 (e) dealt with the allegation of negligence at common law. The defendants, by their defence, denied any liability for the accident to the plaintiff and alleged that the accident was caused, or materially contributed to, by the negligence of the plaintiff.

The action came on for trial before THESIGER, J., at Newcastle-upon-Tyne on Oct. 15, 16, 1959, and HIS LORDSHIP delivered his reserved judgment at Durham on Oct. 30, 1959. THESIGER, J., after reviewing the evidence, found (a) that the plaintiff had not at any time been instructed to remove the light fitting from the girder but had been called back by a messenger (a boy) sent to call the plaintiff back in order that he should be available in due course to remove it; (b) that the overman did not know that the plaintiff had arrived near the fallen girder; (c) that the plaintiff was not present when the overman directed the men to stand back; and (d) that the plaintiff, knowing from the message sent to him why he was wanted, proceeded on the work of his own accord. HIS LORDSHIP held that the allegation of contributory negligence on the part of the plaintiff had not been established.

G. S. Waller, Q.C., and *J. A. Baldwin* for the plaintiff.

Geoffrey Veale, Q.C., and *D. B. B. Fenwick* for the defendants.

Cur. adv. vult.

Oct. 30. **THESIGER, J.**, having reviewed the facts and stated his findings, continued: On my findings of fact the plaintiff could not succeed at common law. The question is whether his injuries were caused by some breach of statutory duty owed to him. The plaintiff relies on various provisions of the Mines and Quarries Act, 1954, which I shall call "the Act of 1954". I start with para. 3 (b) of the statement of claim (1). Though the plaintiff does not now rely on a breach of s. 51 (3) (a) of the Act of 1954, he does rely on an alleged breach of s. 51 (3) (b) of that Act. Section 51 (3) reads:

> "It shall be the duty of the manager of every mine to secure that a sufficient supply of suitable materials for support is at all times readily available, for use at the place where he is actually working, to each workman who needs them, and—(a) where a sufficient supply of such materials is not readily available, for use at the place where he is actually working, to a

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(1) Paragraph 3 (b) of the statement of claim is printed at letter B, above.

> A workman who needs them, he shall withdraw to a place of safety and forthwith report to an official of the mine that, by reason of the premises, he has done so; and (b) where it appears to the person for the time being in charge of a part of a mine that such a supply is not available as aforesaid to a workman employed in that part of the mine, the said person shall cause the workman to withdraw as aforesaid; and where, on any occasion, B a workman has, in pursuance of either of the foregoing paragraphs, withdrawn from the place where he was actually working, the person for the time being in charge of the part of the mine in which that place is situate shall not permit the workman to return to it thereafter until that person is satisfied that such a supply of materials as aforesaid will be readily available, for use at that place, to that workman when he needs them."

C

Counsel for the defendants argued (i) that, if para. (a) of the subsection did not apply, then para. (b) could not apply, for para. (b) assumed that it appeared to the person in charge that a sufficient supply of suitable materials was not available; and (ii) that, if a person did not know that the workman was there, he could not cause him to withdraw to a place of safety. Counsel also relied, D in answer to this part of the claim, on the provisions of s. 157 of the Act of 1954. Counsel for the plaintiff contended that there were no such materials, to wit, props of the right length, readily available; therefore, it was the duty of the overman, Mr. Simpson, as " the person for the time being in charge of a part of the mine " (which Mr. Simpson was in fact), to " cause the workman to withdraw ", and, says counsel, he did not do so, and, as he did not give the E order " Stand back " at that time, the defendants have not proved that it was impracticable to comply with s. 51 (3) (b). In my judgment, the words of s. 51 (3) are not apt to cover the case of the plaintiff, who was summoned to come and who was not, until he came and then went into the danger zone, " employed in that part of the mine "; therefore, there was no question of withdrawing him until materials arrived for his use.

F The plaintiff next, by para. 3 (c) of the statement of claim (2), relies on s. 53 of the Act of 1954 which provides:

> " It shall be the duty of every person employed at a mine who is appointed for the purpose of fulfilling any requirements imposed with respect to the mine by virtue of s. 12 (1) (a) of this Act to ensure to the best of his ability that all such rules made under or by virtue of any of the foregoing provisions G of this Act relating to support as have effect with respect to the mine are executed and enforced and that there are duly set any supports which appear to him to be necessary in addition to those set in pursuance of the requirements imposed by or by virtue of the said provisions."

Counsel for the defendants submitted that this provision is the normal support H provision with which deputies and overseers must comply, and that Mr. Simpson was in the course of complying with this provision (if, indeed, the substitution of the broken support by a new one could properly be described as " addition "). Counsel for the plaintiff argued that, if (but I think only if) Mr. Simpson was not doing his best to get supports but was trying to shift the girder first to expedite the flow of coal, the plaintiff could say that there was a breach of s. 53. I I hold that Mr. Simpson had sent for supports and was not moving or intending to move the girder until supports arrived and were put under it. I hold that Mr. Simpson was not in breach of his duty under s. 53.

The plaintiff next, by para. 3 (d) of the statement of claim (3), relies on reg. 12 of the Coal and Other Mines (Support) Regulations, 1956. Regulation 12 provides:

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(2) Paragraph 3 (c) is printed at p. 110, letter C, ante.
(3) Paragraph 3 (d) is printed at p. 110, letter D, ante.

> " If any fall of roof or side involving the displacement or breakage of any support has occurred at a place where any person has to work or pass, it shall be the duty of the person for the time being in charge of that part of the mine forthwith to ensure that any roof or side exposed thereby is, if necessary, dressed and is secured by supports, and that any such dressing and securing is done before any work of clearing debris is begun, other than such work of clearing debris as is necessary for the setting of the supports."

Counsel for the plaintiff submitted, (i) that a fall of roof or side involving displacement or breakage of support had occurred at a place where a workman had to " work or pass ", and (ii) that Mr. Simpson was a " person for the time being in charge of that part of the mine ". So far, I agree. Then, says counsel, Mr. Simpson had a duty forthwith to ensure that any roof exposed by the breakage of support was, if necessary, secured by supports and that any such securing was done before any work of clearing debris was begun, other than such work of clearing debris as was necessary for the setting of the supports. Counsel says that one should do the necessary clearing of the ground only and then should wait for supports. The light fitting was, so he says, " debris " because it was something that had fallen. Counsel for the plaintiff then relied on the testimony of Mr. Hindson (an expert called for the plaintiff), who said that it was not necessary to remove the light fitting. Counsel for the defendants submitted that, if one looked at the regulations as a whole, they were dealing with support; that " debris " really meant stone from the roof; that Mr. Simpson was complying with the first part of the duty imposed by reg. 12, and that, if someone were moving or breaking up a stone which was part of the " debris " properly so called, that someone was not the plaintiff, and any breach of the regulation in connexion with that person did not contribute to the plaintiff's injury. I was not at all convinced by Mr. Hindson's evidence. In my opinion, the light fitting did not, on the facts of this case, constitute " debris " within the meaning of reg. 12. More important is the fact that I hold that, if it did, it was necessary to move it to set the supports. In this regulation at least the word " necessary " must be construed so as to allow some latitude to the man directing the work.

I now come to the main problem in this case. Counsel for the plaintiff relied chiefly on the provisions of s. 48 of the Act of 1954, which counsel for the defendants contended did not impose an absolute liability, and, if they did impose such liability, counsel for the defendants relied on the provisions of s. 157 of the same Act. Those provisions replace the provisions of s. 49 and s. 102 (3) and (8) of the Coal Mines Act, 1911. Section 48 (1) of the Act of 1954 reads:

> " It shall be the duty of the manager of every mine to take, with respect to every road and working place in the mine, such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the road or working place as may be necessary for keeping the road or working place secure . . ."

Section 157 of the Act of 1954 reads:

> " It shall be a defence in any legal proceedings to recover damages and in any prosecution, in so far as the proceedings or prosecution are or is based on an allegation of a contravention, in relation to a mine . . . to prove that it was impracticable to avoid or prevent the contravention."

The case for the plaintiff is set out in para. 3 (a) of the statement of claim (4) and is that in breach of s. 48 (1) of the Act of 1954 the defendants failed to take such steps by way of controlling movement of the strata in the mine and supporting the roof and sides of the plaintiff's working place as were necessary for keeping the working place secure. The plaintiff's argument is that: (i) the two falls, or at least the second fall, established the failure to take such steps as were necessary for keeping secure the place to which the plaintiff went in order to work, and at which he was working; (ii) that place was therefore not secure; and (iii) it was a working place and a road. The plaintiff then says that the defendants have not proved that it was impracticable to avoid or prevent the contravention: therefore the plaintiff must succeed. Such was the way in which the case for the plaintiff was put on this part of his claim in opening. I will now set out the argument for the defendants and then the reply on behalf of the plaintiff.

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(4) Paragraph 3 (a) is printed at p. 110, letter A, ante.

For the defendants counsel admitted that the former s. 49 of the Act of 1911 had been held to impose an absolute duty and that defendants bound by it could escape liability only if s. 102 (8) of the Act of 1911 applied. He submitted that "not reasonably practicable", in s. 102 (8) of the Act of 1911, meant the same thing as "impracticable" in s. 102 (3) of that Act, for otherwise it would be easier to defend a civil claim than a criminal prosecution. I am not much impressed by this argument, because, if Parliament wants to induce caution, it is apt to impose absolute liability when constituting these summary offences in which small maximum penalties only are involved, and for which magistrates may impose only a small part of that maximum penalty. Counsel for the defendants went on to argue that s. 48 of the Act of 1954 makes a clear change in form in that sub-s. (1) thereof merely says "It shall be the duty of the manager . . . to take . . . such steps . . . as may be necessary . . ." The former section, s. 49 of the Act of 1911, used the phrase "The . . . sides . . . shall be made secure . . .". Moreover, in the Act of 1954, the legislature, when it wishes to impose absolute liability, says "he shall" in s. 79 and s. 80, and "shall be" in s. 81 (which corresponds to a section in the Factories Act, 1937, (5)). Section 82 (1) of the Act of 1954 also uses the phrase "shall be", and in s. 82 (2), which refers to the manager (as does s. 48, which is under discussion), the wording is different from that of s. 48. Section 55 also deals with the manager and sub-s. (1) thereof says "such steps as are necessary", not "such steps as may be necessary". The former s. 49 of the Act of 1911 (so runs the argument) used words which were held to impose an absolute duty. The new s. 48 in the Act of 1954 uses different phrases from those which had been held to impose absolute duty, and it now imposed some duty on the manager personally, using different phrases from those used in other sections of the Act of 1954 when it desired to impose absolute duty. Counsel for the defendants further argued that s. 48 of the Act of 1954 introduced for the first time reference to controlling movement of the strata, and, since strata must move, one would expect Parliament to be requiring the greatest efficiency rather than absolute success in controlling such movement; therefore one would expect the requirement to be to take the best steps taken by the most competent managers in practice in the coal fields. Indeed, as counsel pointed out, sub-s. (2) of s. 48 uses the phrase "discharge efficiently the duty imposed . . .by the foregoing subsection". I am a little impressed by this part of the argument. If a member of Parliament says that it is the duty of a motorist to take such steps for controlling the movement of his motor car on the roads and applying his brakes as may be necessary for avoiding accidents, one would, I believe, think that he was uttering a platitude rather than suggesting imposing liability for every accident.

Counsel for the defendants next argued that certain decisions under the Act of 1911, which was held to impose an absolute duty, nevertheless held the defendants to be not liable. These decisions, he said, must apply a fortiori to the new phrases in s. 48 of the Act of 1954. He referred to two decisions of HALLETT, J., on this circuit. The first, on Apr. 29, 1952, in *Hayes* v. *National Coal Board*, is unreported, and the second is *Jackson* v. *National Coal Board* (6), which refers to the earlier decision. The legislature, counsel urged, would not put an absolute duty on a manager to control strata—unless, perhaps, the legislature thought that the words " keep secure " (7) merely meant " keep reasonably safe "—and the words " as may be necessary " must import judgment and foreseeability. Counsel for the defendants adopted as part of his argument the only reported decision on this new s. 48 in the Act of 1954; that is the decision of a quarter sessions court in *Wright* v. *Jenkins* (8). Counsel urged that some guilty mind is assumed to be required when a breach of duty is, as this one is, subject to enforcement by criminal prosecution.

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(5) Compare s. 24 (1) of the Factories Act, 1937; 9 HALSBURY'S STATUTES (2nd Edn.) 1016.

In considering the construction of s. 48 of the Act of 1954, counsel for the defendants mentioned two technical points. Section 48 puts a personal duty on the manager (who also has a duty of seeing that others discharge their duty: see s. 2 (2) of the Act of 1954). The statement of claim, so he pointed out, put the duty on the defendants, and the whole of the evidence was directed to the activities of an overman in an emergency. Then, again, the point at which the accident took place was really a road, and not a working place (9). Passing to the facts of the case in relation to s. 48, counsel argued that the work which was being done was the operation of complying with the provisions of s. 48, and, on reasoning parallel to that which appealed to ROMER, L.J., and the other members of the Court of Appeal in *Walsh* v. *National Coal Board* (10), the defendants could not be under an absolute duty to do something and an absolute liability for doing it. So far as these two technical points are concerned, counsel was, I think, really emphasising that this new section, in contrast to the old section, imposed a duty on the manager; that any alleged contravention was that of the manager; and that the operation of s. 157 with its test of " impracticability " must be considered in relation to the position of the manager. The statement of claim, in using the phrase " the defendants " (11), is presumably assuming that there is vicarious responsibility, and I hold that the omission to add the words " by their servant and agent the manager " cannot in itself be fatal. As counsel for the defendants did not expressly argue the point (which, indeed, is masked by the omission of those words), I will assume that, having regard to s. 159 of the Act of 1954, an employer is vicariously liable for a breach of statutory duty imposed, not on him, but expressly on someone else who merely happens to be acting as his servant or agent. On the other technical point, counsel for the defendants was willing that para. 3 (a) of the statement of claim should be amended by adding or substituting an allegation that the defendants failed to take such steps as were necessary, by way of controlling movement of the strata in the mine and supporting the roof of the road, for making the road (as opposed to a working place) secure.

Finally counsel for the defendants argued that it was impracticable to avoid or to prevent the alleged contravention, and he emphasised that s. 157 of the Act of 1954, which provided a defence in those circumstances, referred to " contravention " and not to the fall of stone or the injury. He urged that, while it was the manager who had the duty, the overman was doing all that was necessary for keeping the roof secure by getting a temporary prop. There were, said counsel, possibly three concepts: (i) physically possible; (ii) practicable; (iii) reasonably practicable. He referred me to two cases. In the first, *Marshall* v. *Gotham Co., Ltd.* (12), he drew attention to passages in LORD OAKSEY'S

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(6) [1955] 1 All E.R. 145. (7) See s. 48 (1) of the Act of 1954, at p. 112, ante.

(8) (1958), 43 Cr. App. Rep. 17.

(9) Paragraph 3 (a) of the statement of claim referred to a " working place ", not to a " road "; see p. 110, letter A, ante.

(10) [1955] 3 All E.R. at p. 636, letter D, to p. 637, letter H; [1956] 1 Q.B. at pp. 521, 522.

(11) In para. 3 (a) of the statement of claim; see p. 110, letter A, ante.

(12) [1954] 1 All E.R. 937; [1954] A.C. 360.

A speech (13) and in LORD REID's speech (14). He also referred to *Atkinson* v. *Shaw* (15). Counsel submitted that "practicable" implies some element of reasonableness, and the word "reasonably" inserted before "practicable" might be regarded as redundant, like the first word in the common phrase "surrounding circumstances". I am interested by the recognition that even in an Act of Parliament one may sometimes attempt to express an idea more B shortly than was done in older Acts without intending to alter the meaning. I notice also that counsel's argument, which attaches importance to the qualifying word "efficiently" in one place (sub-s. (2) of s. 48 of the Act of 1954) (16), attaches little to the omission of a qualifying word in another.

I will now summarise the reply for the plaintiff. Counsel for the plaintiff submitted that, so far as s. 48 and s. 157 of the Act of 1954 were concerned, it C was useful to trace the history of the liability through the successive Acts of 1872, 1887 (17) and 1911. The duty seems to have been imposed in similar words each time. It was unthinkable, he argued, that Parliament would lighten the burden that had been imposed on employers for so long. The Act of 1954 only used altered phraseology in order to set out the same duties in greater detail and to impose them on particular people. I am not sure that, with the changes D in arrangements for compensation for industrial injuries and in the ownership of mines, it is safe to assert that Parliament cannot be supposed to intend to alter burdens if the language used is different and tends to show such intention. Counsel for the plaintiff emphasised that s. 48 did not mention "making", but only mentioned "keeping", the road or working place secure; thus it was assumed that to start with they would be secure. The phrase "as may be" E was, so he argued, used to deal with situations which changed physically from time to time, but the obligation was still absolute. The different phraseology in s. 55 (1), to wit, "such steps as are necessary", was used to deal with a changing physical situation. Counsel for the plaintiff submitted that the test could not be subjective to the manager because the words were not "such steps as appear to the manager to be necessary". "May be necessary", he F argued, was equivalent to "may prove to be necessary". The necessary steps have not been taken, counsel says, if the roof and sides are not secure. The qualification, if any, would be in the meaning of the word "secure". A fall, however, from natural causes means, so he argued, that the steps necessary for keeping secure have not been taken. I interpolate at this point my feeling that any fallacy lurking in counsel's argument is probably to be found here. G Counsel for the plaintiff went on to submit that the omission by a deputy to insert a support required to implement the manager's duty would not absolve the defendants. I again interpolate that I agree; but that may be because the defendants are vicariously liable for the deputy's negligence. Counsel for the plaintiff went on to contend that the only reasonable approach was to take Parliament as re-phrasing the duty which had always been absolute, and not H as removing the duty from everyone except the manager, and then relieving him of an absolute obligation. After dealing with the three reasons relied on in *Wright* v. *Jenkins* (18), counsel for the plaintiff said that *Walsh* v. *National Coal Board* (19) was wrongly decided in the Court of Appeal, the fallacy being that a man can, and does in practice, make the place secure ahead of him before he actually goes under the roof and between the sides. That case, said counsel I for the plaintiff, though binding on me as regards the exact point, was decided on a different section and the fallacious argument, even if it were sound, depended

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(13) [1954] 1 All E.R. at p. 939; [1954] A.C. at p. 370.
(14) [1954] 1 All E.R. at p. 942; [1954] A.C. at pp. 372, 373.
(15) [1915] 2 K.B. 768.
(16) 34 HALSBURY'S STATUTES (2nd Edn.) 555.
(17) The Coal Mines Regulation Act, 1872, and the Coal Mines Regulation Act, 1887.
(18) (1958), 43 Cr. App. Rep. at pp. 18, 19.
(19) [1955] 3 All E.R. 632; [1956] 1 Q.B. 511.

on the obligation to " make secure ". Here the obligation is to take steps to A
" keep secure ". Moreover, counsel argued, Walsh was a road-head man and the decision should not be extended to any person who for one minute was helping indirectly to make a roof secure by the work of removing a light fitting.

Finally, on s. 157 of the Act of 1954, counsel for the plaintiff submitted that the elimination of the qualification " reasonably " made it more difficult for the defendants to bring themselves within the section. He relied on the judgment B
of Asquith, L.J., in *Edwards* v. *National Coal Board* (20) and on the speech of Lord Reid in *Marshall* v. *Gotham Co., Ltd.* (21). " Practicable ", so he argues, means " capable of being carried out ", and the defendants had called no evidence on the point. So much for the reply of the plaintiff.

I will now state my own view of s. 48 and s. 157 of the Act of 1954 in the light of those arguments and in so far as those sections have to be applied to the facts C
of this case, in which the fall and injury followed on the knocking away of a support.

First, it is important to remember that a short phrase like " absolute liability " is apt to mislead, because one is tempted to add to it some words to describe the direct physical cause of the injury such as " for the fall of the stone " and to say that the section imposes " absolute liability for damage done by the fall of a D
stone ". Strictly, however, the imposition of a specific statutory duty merely relieves a jury of the burden of considering whether a reasonably careful man would have done that which the statute directs. It is in that respect that a statutory duty differs from the common law duty to exercise reasonable care. Next, it is important to remember that Parliament when debating the form of the clause imposing the duty, and any proposed amendments to the original form of E
the clause, would undoubtedly be invited to consider the effect of cl. 157 of the same Bill. Therefore, I must construe the two sections together because Parliament intended them to have effect in combination. Now s. 48 places a duty on the manager of the mine. That duty is to deal with controlling the movement of the strata in the mine. The duty is imposed in relation to roadways and working places. All this points to somewhat long-term strategic planning as opposed to F
short-term tactical measures of repair. The latter measures might have to be taken by the men on the spot immediately on the occurrence of an emergency; the emergency might be due to the knocking away of an effective support by a third party. It is a defence to prove that it was impracticable for the manager to avoid or prevent a contravention of that long-term though continuing duty. I do not believe that Parliament intended that the fall of a stone in the circum- G
stances of this case should be held to prove a contravention of the duty imposed by s. 48 and that s. 157 should then be practically useless by way of defence in such circumstances. In other words, I do not believe that Parliament intended to impose liability on a manager to pay damages for injury caused almost immediately after the knocking away of a support, by the fall of a stone from the roof of a temporarily blocked roadway, on someone who (without H
the knowledge of anyone on the spot who mattered) went under the roof while such steps as were necessary were being taken to keep the roof secure. One may hold either, in those circumstances, that the fall of the stone was not sufficient evidence of a contravention of his duty by the absent manager, or that it was impracticable for him to avoid or prevent any contravention of the statutory duty that could fairly be inferred from that fall. When the roadway I
that had been effectively supported was deprived of its support, I think that one must ask oneself what step the manager then failed to take that was practicable for him to take and that was necessary to make the roof secure in the sense of preventing the fall of the stone that hit the plaintiff. I cannot see on the evidence that the manager omitted any step that was practicable. It was, indeed,

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(20) [1949] 1 All E.R. 743; [1949] 1 K.B. 704.
(21) [1954] 1 All E.R. at p. 942; [1954] A.C. at pp. 372, 373.

A impracticable for him to act to avoid the fall. The plaintiff went into a place where the roadway was blocked, and I reject the evidence that he was specifically set to work at that place. At the time when he was injured, the defendants, by their servants or agents, were taking such steps as were necessary for keeping the roof secure. The plaintiff was injured because he, unknown to the defendants, tried to assist in that work.

B I hold that the defendants have not been proved to be negligent, and I hold that the plaintiff's action must fail also on the allegation of breach of statutory duty.

[HIS LORDSHIP then assessed the total damages, if liability had been established, at £1,137 11s. 7d., which included the agreed sum of £537 11s. 7d. as special damages.]

C *Judgment for the defendants.*

Solicitors: *Watson, Burton, Booth & Robinson*, Newcastle-upon-Tyne (for the plaintiff); *W. M. Burnside*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

D

BASHIR *v.* COMMISSIONER OF LANDS.

E [PRIVY COUNCIL (Lord Cohen, Lord Denning and Lord Jenkins), October 21, 22, December 1, 1959.]

Landlord and Tenant—Condition—Conditions and covenants distinguished—Stipulations possibly having the characters of both.

F *Privy Council—Eastern Africa—Landlord and tenant—Crown lease—Covenant or condition—Breach—Relief against forfeiture according to principles of "English law" and doctrines of equity—Whether English statute law applicable—Crown Lands Ordinance,* 1915 (*Laws of Kenya,* 1948, *c.* 155), *s.* 83—*Registration of Titles Ordinance,* 1919 (*Laws of Kenya,* 1948, *c.* 160), *s.* 21, *Sch.* 1.

G By a Crown grant dated Jan. 8, 1953, the Governor of Kenya (acting by the Commissioner of Lands and under the Crown Lands Ordinance, 1915) granted a plot of land in Nairobi to the appellant for a term of ninety-nine years from Sept. 1, 1952, subject to a progressive rent and to a number of stipulations referred to in the grant as, and there set out under the heading of, "Special Conditions"*. The special conditions were in twelve paragraphs, the first of which provided that the grantee should erect a hotel building and complete it for occupation within thirty-six months of the commencement of the term. Other paragraphs of the special conditions H were stipulations on the appellant's part to connect the drainage system with the town system, not to sell or alienate until the first condition was fulfilled, to pay a proportion of the cost of constructing roads, and to pay rates and taxes, and other stipulations also were made. The grant was in the form prescribed for a Crown grant of land for a term of years by s. 21 of, and form B (1) in Sch. 1 to, the Registration of Titles Ordinance, 1919. The form so I prescribed was a deed poll, and the grant was executed only by the Governor and not by the appellant. The appellant failed to erect any building on the plot within the prescribed period and the Commissioner of Lands took proceedings claiming possession of the plot and mesne profits on the ground that para. 1 of the special conditions was a condition of the lease constituted by the grant, the non-fulfilment of which entitled him to treat the lease as

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* The special conditions are printed at p. 119, letter D, and p. 124, letter D, to p. 125, letter A, post.

avoided; and claiming alternatively, if the stipulation in para. 1 of the A
special conditions were a covenant and not a condition, a declaration of
forfeiture of the lease under s. 83* of the Crown Lands Ordinance, 1915,
and damages for breach of covenant. By that section a power to grant
relief against forfeiture for breach of covenant was conferred in exercising
which "the court shall be guided by the principles of English law and the
doctrines of equity". The question arose whether the "special conditions" B
were† "covenants", meaning thereby obligations which the appellant was
contractually bound to observe or perform, or "conditions", meaning
thereby stipulations which the appellant might fulfil or not fulfil as he
chose but which, if not fulfilled, were to operate as conditions of defeasance
(viz., conditions on breach of which the appellant's estate would be determined), or whether the "special conditions" combined both qualities‡. C

Held: (i) there was jurisdiction under s. 83 of the Crown Lands Ordinance,
1915, to grant relief against forfeiture in respect of breaches of the "special
conditions" for the following reasons—

(a) if the special conditions had been included in a lease inter partes
operating at common law in which the demise had been expressed to be
"subject to the following special conditions", being these special conditions, D
they would have constituted covenants, since the description "conditions"
would not have been conclusive of their nature and their nature was that of
obligations which a lessee would be bound contractually to perform (see
p. 124, letter C, and p. 125, letter H, post).

(b) although the Crown grant in the prescribed form under the Ordinance
of 1919 was by deed poll to which the appellant was not a party, the appellant E
by accepting the lease and going into possession under it contracted to
observe and perform the "special conditions" which thus amounted to
covenants for the purposes of s. 83 of the Ordinance of 1915 (see p. 126,
letter I, post).

(c) moreover, a stipulation might have a dual character, as both a condition
and a covenant, and such a stipulation would constitute a covenant within F
s. 83 and the remedy under that enactment would, quoad forfeiture, be
exhaustive (see p. 126, letter I, to p. 127, letter A, post).

(ii) in determining whether to grant relief against forfeiture under s. 83
of the Crown Lands Ordinance, 1915, which required the court to be guided
"by the principles of English law and the doctrines of equity", the reference
to English law included statute law in force when s. 83 became law, viz., G
s. 14 (2) of the Conveyancing Act, 1881, and the decisions of English courts
under that enactment so far as applicable (see p. 127, letters G and H, post).

Appeal allowed.

Case referred to:

Dedhar v. *Special Commissioner and Acting Commissioner of Lands*, [1957]
E.A. 104. H

Appeal.

Appeal by special leave by Sheik Mohamed Bashir from an order of the Court
of Appeal for Eastern Africa (SIR KENNETH O'CONNOR, P., SIR RONALD SINCLAIR, C.J., Kenya, and FORBES, J.A.), dated Mar. 24, 1958 ([1958] E.A. [C.A.]
45), reversing a decree of the Supreme Court of Kenya (RUDD, J.), dated May 2,
1957, whereby the appellant was granted, on conditions, relief from forfeiture to I

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* Section 83 of the Ordinance of 1915 is printed at p. 119, letter I, post.

† See p. 123, letter C, post, for the statement of the first two alternatives. The importance of the difference was that, if the stipulations were covenants, s. 83 would apply and the appellant would have the possibility of obtaining relief against forfeiture. If, however, the stipulations were conditions, the appellant's estate would be defeated without there being jurisdiction in the court to grant him relief.

‡ See p. 121, letters D and E, and p. 126, letter I, to p. 127, letter A, post, as to this third possibility.

the respondent, the Commissioner of Lands, of certain land in Nairobi which had been leased to the appellant by Crown Grant No. I.R. 9210. The facts are set out in the judgment of the Board.

Dingle Foot, Q.C., Swarej Singh (of the Bar of Kenya) and *Miss J. R. Bisschop* for the appellant.

Geoffrey Cross, Q.C., J. G. Le Quesne and *H. G. Sherrin* for the respondent.

LORD JENKINS: This case concerns a Crown Grant dated Jan. 8, 1953, and made by the Governor of Kenya (acting by the respondent Commissioner of Lands) whereby a town plot in Nairobi was granted by the Governor to the appellant, Sheik Mohamed Bashir, for the term of ninety-nine years from Sept. 1, 1952, subject to the progressive rent therein mentioned and subject also to the provisions of the Crown Lands Ordinance (c. 155) and to a number of stipulations referred to in the grant as, and therein set out under the heading of, " Special Conditions ". The " special conditions " comprised twelve numbered paragraphs of which the first was in these terms:

> " 1. The grantee shall erect complete for occupation within thirty-six months of the commencement of the term a hotel building of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paintwork) in good and substantial tenantable repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least shillings seven million."

The grant was made by the Governor in exercise of his powers under the Crown Lands Ordinance of 1915 (c. 155), and was in the form prescribed for a Crown grant of land for a term of years by s. 21 of, and form B (1) in Sch. 1 to, the Registration of Titles Ordinance of 1919 (c. 160). The form so prescribed is that of a deed poll as distinct from a deed inter partes, but it is not now disputed that, albeit made in this form and executed only by the Governor and not by the appellant, the grant constituted in law a lease from the Governor to the appellant for the term and at the rent therein mentioned, and was subject to all provisions of the relevant ordinances applicable to such leases. The appellant admittedly failed to erect any buildings on the plot within the period of thirty-six months prescribed by para. 1 of the " Special Conditions ", and, founding himself on this default, the commissioner, by a plaint dated Nov. 16, 1955, began the present proceedings claiming (in effect) possession of the plot and mesne profits on the ground that the stipulation contained in para. 1 of the special conditions was a condition of the lease constituted by the grant, the non-fulfilment of which entitled him to treat the lease as avoided; or alternatively, in case it should be held contrary to his contention that the stipulation in question was a covenant as distinct from a condition, a declaration of forfeiture of the lease and damages for breach of covenant.

In order to appreciate the materiality of the distinction between these alternative claims, it is necessary to consider s. 83 of the Crown Lands Ordinance. That section provides as follows:

> " If the rent or royalties or any part thereof reserved in a lease under this ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee's covenants, whether express or implied by virtue of this ordinance the commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such

> terms as may appear just, declare the lease forfeited, and the commissioner may re-enter upon the land.
>
> "In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity."

It will be seen that, if the stipulation contained in para. 1 of the special conditions was a covenant within the meaning of this section, it was open to the commissioner at any time after one month from the service of the prescribed notice (which he had in fact served on Sept. 29, 1955) to take proceedings under this section for a declaration of forfeiture of the lease; but that, if he took that course, his claim was liable to be defeated by a successful prayer for relief on the part of the appellant. It will be seen further that, on the footing that the stipulation in question was a covenant within the meaning of s. 83, it was only by invoking that section that the commissioner could assert a claim to forfeiture for its breach. On the other hand, if the commissioner could succeed in making good his primary contention that the stipulation in question was a condition, as distinct from a covenant within the meaning of s. 83, he was in a far stronger position. He had then no need to ask the court for a declaration of forfeiture of the lease, for that was automatically brought about through the non-fulfilment of the condition, without any need for an express proviso for re-entry, and the court would have no jurisdiction to grant the appellant relief under s. 83, inasmuch as that section would be inapplicable.

By his defence, the appellant admitted the alleged breach of covenant, but contended that the "Special Conditions" were, and were to be construed as, covenants. He alleged various facts and circumstances on which he relied as disqualifying the commissioner from claiming forfeiture (a contention not now maintained), and claimed that the action should be dismissed, or alternatively that he should be granted relief under s. 83. Rudd, J., who tried the case at first instance in the Supreme Court of Kenya, held (by a judgment dated Mar. 4, 1957) that the "Special Conditions" were covenants within the meaning of s. 83, and, accordingly, that he had jurisdiction to grant relief under that section, which (by a decree dated May 2, 1957), he proceeded to do. On appeal by the commissioner to the Court of Appeal for Eastern Africa (Sir Kenneth O'Connor, P., Sir Ronald Sinclair, C.J., Kenya, and Forbes, J.A.), that court, by an order dated Mar. 24, 1958, allowed the appeal, set aside Rudd, J.'s decree of May 2, 1957, and substituted therefor a declaration that the title of the appellant to the land in question had been extinguished as from Nov. 16, 1955 (the date of the plaint), with consequential directions as to possession and mesne profits. From that order of the Court of Appeal for Eastern Africa the appellant now appeals to this Board.

As appears from the foregoing, the substantial question in the appeal is whether the "Special Conditions" set out in the grant were, as the appellant contends, "covenants" within the meaning of s. 83, so as to give the court power to grant relief from forfeiture under that section, or were, as the commissioner contends, conditions of defeasance as distinct from "covenants" and were, therefore, outside the scope of s. 83; the commissioner being accordingly entitled to assert the forfeiture entailed under the general law by breach of a condition of defeasance, without thereby exposing himself to a claim for relief on the part of the appellant under s. 83. By the expression "condition of defeasance", their Lordships mean a condition of the kind described, and contrasted with a covenant, in the following passage from the judgment of Sir Kenneth O'Connor, P. (1), which their Lordships are content to adopt:

> "At common law, a condition is a qualification annexed to an estate, whereby the latter shall either be created (condition precedent), enlarged,

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(1) [1958] E.A. [C.A.] at p. 53.

> or defeated (condition subsequent), upon its performance or breach. The main distinction between a condition subsequent for the cesser of the term of a lease upon the happening of a certain event and a lessee's covenant is that (subject to any right of relief from forfeiture given to the lessee) upon breach of a condition the lessor may re-enter, because the estate of the lessee is determined; whereas a breach of covenant only gives him the right to recover damages (or to obtain an injunction) unless the right to re-enter is expressly reserved to him by the lease. FOA'S LANDLORD AND TENANT (7th Edn.), pp. 311, 312."

The special conditions were clearly not conditions precedent. They all related to things which the grantee was to do or refrain from doing after the grant had been made. The question is whether they were conditions subsequent, the non-fulfilment of which brought the term to an end without any necessity for an express proviso for re-entry, or were obligations in the nature of covenants, the breach of which (in the absence of any express proviso for re-entry) could only afford the commissioner grounds for relief in the shape of damages or injunction unless he chose to avail himself of the statutory provision for forfeiture contained in s. 83 and succeeded in repelling any claim to relief under that section.

To these alternatives must be added the third possibility that the special conditions might combine in themselves the dual character of covenants and conditions of defeasance, as being agreements not only enforceable as such against the lessee but also constituting conditions on the due performance of which the continuance of the term was made to depend. This combination of covenant and condition is commonly brought about by the usual express proviso of re-entry, with which this case is not directly concerned, as the grant contains no such proviso. It would, however, also be brought about by any form of words importing an intention that a given stipulation should possess this dual character. Their Lordships will later revert to this third possibility, in the meantime treating the classification of covenants on the one hand and conditions of defeasance on the other as exhaustive.

The point at issue turns on the true construction of the grant, which must be construed in the light of the relevant legislation. The ordinances immediately relevant are the Crown Lands Ordinance of 1915 (c. 155) and the Registration of Titles Ordinance of 1919 (c. 160). But it is also proper to refer to the earlier Crown Lands Ordinance of 1902 which, though replaced by the Ordinance of 1915, was relied on in argument by counsel for the commissioner as showing that, while the appellant's argument might well have prevailed under the Ordinance of 1902, the Ordinance of 1915 made a radical change in the law, with the effect of investing stipulations such as the " Special Conditions " with the character of conditions of defeasance as distinct from the character of " covenants " which they previously bore.

The Ordinance of 1902 provided for the inclusion of implied covenants in leases of Crown Lands. Some of these covenants were to be included in all leases (see s. 12 and s. 13). These were ordinary covenants by lessor and lessee which, no doubt, were regarded as universally appropriate. Other lessees' covenants which might not be appropriate in all cases were to be implied in all leases except where expressly varied or excepted (see s. 14). By s. 15, the covenants by the lessee therein set out were to be implied in all building leases unless expressly varied or excepted. By s. 16, a similar provision was made for the implication of certain lessees' covenants in leases of agricultural land. Section 18 (1) was in terms closely resembling those of the present s. 83, omitting the second paragraph which was introduced in 1915. Under the Ordinance of 1902, the difficulties which have now arisen with respect to the application of s. 83 could hardly have arisen with respect to s. 18 (1), for effect would have been given to stipulations such as the " Special Conditions " by means of express or implied covenants indubitably falling within s. 18 (1).

A The Crown Lands Ordinance of 1915, however, wholly repealed the Ordinance of 1902 and introduced new and different provisions with respect to leases. Section 3 of the Ordinance of 1915 empowers the Governor (by para. (i)) to " grant, lease or otherwise alienate . . . any Crown lands for any purpose and on any terms and conditions as he may think fit "; (by para. (ii)) to " wholly or partially remit . . . all or any of the covenants, agreements or conditions contained in any lease, agreement or licence . . ."; and (by para. (iii)) to B

> " extend . . . the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit."

Section 5 provides for the appointment of a Commissioner of Lands to administer the ordinance. Part 3 of the ordinance deals with the letting of town plots, C to which category the plot now in question belongs. Section 13 provides that leases of town plots may be granted for any term not exceeding ninety-nine years. By s. 15 it is provided that leases of town plots shall, unless the Governor shall otherwise order, in any particular case or cases, be sold by auction. By s. 14, before any town plot is disposed of under s. 15, the commissioner is required to D

> " determine—(a) the rent which shall be payable in respect of such plot; . . . (c) the building conditions to be inserted in the lease of the plot; and (d) the special covenants, if any, which shall be inserted in the lease."

Section 16 requires notice to be given of the place and time of sale, and such notice is required to state (inter alia)

E

> " (e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot."

The lease in the present case was not in fact sold by auction, but the sections dealing with that method of disposal were relied on by counsel for the commissioner for their use of the expression " building conditions " in contrast to the expression " special covenants ". On the other hand, s. 17 (also dealing with sales by auction) F uses the expression " terms and conditions of the sale " in which " conditions " clearly does not mean " conditions of defeasance ". Section 21 (1) provides that in every lease of a town plot there is to be implied " a covenant by the lessee not to divide the plot and assign any portion thereof ". It is interesting to note that an express stipulation to the same effect appears as number 5 of the special conditions in the present case. Subsection (2) of s. 21, which enables applications G for leave to subdivide to be made, provides that " No such application shall be entertained unless the building conditions (if any) in the lease have been complied with." Subsection (3) of the same section provides that new leases granted under sub-s. (2) shall be granted " on the same terms and conditions as the original lease." Other examples of implied covenants are to be found in various sections which need not to be referred to in detail. See, for example, s. 36, s. 37, s. 38 and H s. 39. Section 47, under the heading of " Part 5—Disposal of Land for Special Purposes," implies covenants (a) not to assign, sub-let, etc., without previous consent, and (b) not to use the land leased for any purpose other than the purpose or purposes specified in the lease. It is not clear that the plot now in question falls within Part 5, but there is some significance in the fact that here again the " Special Conditions " include (as No. 4) a stipulation restricting user of the I premises to " hotel purposes only except that shops may be constructed on the ground floor ", and (as No. 7), a stipulation against disposal of the land until special condition No. 1 has been complied with. Section 63 and s. 64 contain references to the grant of leases " upon such conditions as may be specified in such leases or as may be prescribed " (s. 63) and " upon such conditions as " the Governor " may deem expedient " (s. 64). Section 76 provides for an implied covenant for quiet enjoyment for the benefit of the lessee " paying the rent and fulfilling the conditions " contained in the lease. Section 77 provides for implied covenants and conditions in every lease or licence by the lessee or licensee (putting it shortly) (a) to pay the rent and royalties thereby reserved and (b) to pay the taxes charged on the land or the buildings thereon. Their Lordships have already referred to the terms of s. 83. By s. 84, provision is made for the forfeiture of a licence for (inter alia) any breach of the conditions of the licence express or implied. By s. 86, the acceptance by or on behalf of the Crown of any purchase money or of any rent or other payment is not to be held to operate as a waiver by the Crown of any forfeiture accruing by reason of the breach of any covenant or condition annexed to any sale, lease or licence of or respecting Crown land. Section 157 provides procedure under which possession may be obtained against any person in occupation of Crown land whose right, title or interest has expired or been forfeited, but this clearly cannot have been intended to override s. 83.

Having considered all the various references to " covenants ", " conditions " and " terms " which are to be found in the Ordinance of 1915, their Lordships are unable to hold that this enactment draws any clear-cut or consistent distinction between the word " covenant " as meaning an obligation laid on the lessee which he is to be contractually bound to observe or perform and the word " condition " as meaning a stipulation which the lessee may fulfil or not as he chooses but which, if not fulfilled, is to operate as a condition of defeasance. Counsel for the commissioner did not seek to maintain that the word " conditions " was throughout the ordinance used in the sense just stated, and admitted that it was sometimes simply used as equivalent to " terms ". But he argued that, in s. 14 and s. 16, " the building conditions to be inserted in the lease," contrasted as it was with " special covenants," did mean " conditions " in the technical sense of conditions of defeasance, so that the " building conditions " when inserted in the lease could only be framed as " conditions " in that sense and could not be imposed as obligations in the nature of covenants. Their Lordships find it impossible to accept this view. It appears to them that the expression " building conditions " means simply conditions as to building in the sense of the terms, or requirements, or stipulations, as to building which the lessee is to be bound to observe and perform under the lease. In their Lordships' judgment, clear words would be necessary to justify the imputation to the legislature of an intention that the " building conditions " should not take effect as covenants but merely as conditions of defeasance, which would involve a radical departure from the commonly accepted practice. Their Lordships find no words in the ordinance clearly enjoining acceptance of this construction of the ordinance, and they decline to adopt it.

Accordingly, as the law stood between the enactment of the Ordinance of 1915 and the enactment of the Registration of Titles Ordinance, 1919, there was nothing to prevent " building conditions " under s. 14 and s. 16 of the former from being so framed as to operate as covenants on the part of the lessee. It is to be observed, however, that the special conditions in the present case were not strictly " building conditions " within s. 14 and s. 16, because the lease was not sold by auction, and, moreover, that the " special conditions " were not confined to building. But this, if anything, assists the appellant's case, for it is not suggested that it was not open to the Governor (apart from any restriction to be spelt out of s. 14 and s. 16 of the ordinance where applicable) to impose such stipulations (whether by way of condition or covenant) as he thought fit. On the other hand, their Lordships find it impossible to collect from the various references to covenants and conditions in other parts of the ordinance any sufficient indication to justify the view that the words " lessee's covenants " in s. 83 mean lessee's covenants and conditions so as to bring within its scope mere conditions of defeasance. But they see no reason for excluding covenants which are also conditions, as constituting agreements or promises by the lessee to perform given stipulations and at the same time making their performance a condition of the continuance of the lease. Indeed (as RUDD, J., has pointed out), the provision for forfeiture in s. 83 itself has the effect of turning all covenants into conditions in this sense.

Their Lordships should next state that, in their opinion, it is plain that, under the Ordinance of 1915, the proper form of lease was an ordinary lease inter partes.

The next stage in the inquiry is to consider whether the " special conditions " in the present case, if inserted just as they stand in a lease of the plot granted between 1915 and 1919, would have operated as lessee's covenants or merely as conditions of defeasance. This depends on the true construction of the hypothetical document. One must assume that the words of demise expressed the demise to be made " subject to the following special conditions ", and that the lease went on to set out under the heading " special conditions " the twelve numbered paragraphs set out in the actual grant with which this case is concerned, but, like the actual grant, contained no statement in so many words that the grantee covenanted, or agreed, or promised to perform or observe such conditions. The special conditions in question as set out in the present grant (omitting No. 1 to which reference has already been made) were in these terms:

> " SPECIAL CONDITIONS
>
> " 2. The building shall not be erected until plans (including block plans, showing the positions of the buildings and a system of drainage for disposing of sewage surface and sullage water) drawings elevations and specifications thereof shall have been approved in writing by the local authority and the Commissioner of Lands.
>
> " 3. The grantee shall properly connect the drainage and sewage systems with any town systems when in the opinion of the Commissioner of Lands and the local authority the latter systems are so far completed as to enable the grantee so to do.
>
> " 4. The land and buildings shall be used for hotel purposes only except that shops may be constructed on the ground floor.
>
> " 5. The grantee shall not subdivide the land.
>
> " 6. The buildings shall conform to a building line prescribed by the local authority.
>
> " 7. The grantee shall not sell transfer sublease or otherwise alienate or part with the possession of the land nor enter into any charge (other than with the consent of the Commissioner of Lands for the raising of a loan for building purposes) or agreement of sale in respect thereof until special condition No. 1 has been complied with.
>
> " 8. The grantee shall pay to the Commissioner of Lands on demand such sum as the commissioner may estimate to be the proportionate cost of constructing all roads drains and sewers serving the land.
>
> " 9. The grantee shall pay such rates taxes charges duties assessments or outgoings of whatever description as may be imposed charged or assessed by any government or local authority upon the land or the buildings erected thereon including any contribution or other sum paid by the Governor in lieu thereof.
>
> " 10. The Governor or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the grantee shall not erect any building in such a way as to cover or interfere with any existing alignments of main or service pipes or the telephone or telegraph wires and electric mains aforementioned.
>
> " 11. The main entrance to the building shall be set back to provide for the setting down of vehicular passengers on the land and similar provision shall be made for tradesmen's vehicles.

> " 12. The water supply system of the building shall include storage for at least twenty-four hours' requirements."

These conditions must be construed as a whole, and the mere fact that they are described as conditions is by no means conclusive of their character. It will be seen that they relate to a number of different matters of varying importance, all of which, according to ordinary conveyancing practice, would be made the subject of covenants with a suitable proviso for re-entry on breach. It will be seen further that they are for the most part expressed in such a way as to impose an imperative obligation on the lessee to perform and observe them. Special Condition No. 1 provides that "The grantee shall erect . . . and shall maintain . . ." No. 2 is in the passive, but imposes restrictions on the doing of that which the grantee is obliged to do under No. 1, i.e., the erection of the building. Then, by No. 3, " The grantee shall properly connect . . ." No. 4 is expressed in the passive as is usual in the case of a restriction as to user. Then comes No. 5 " The grantee shall not subdivide the land ". No. 6 relates to the building line, and may be said to concern the way in which the grantee is to carry out his obligation under No. 1. By No. 7, " The grantee shall not sell . . ." By No. 8, " The grantee shall pay to the commissioner . . ." By No. 9, " The grantee shall pay such rates taxes ", etc. By No. 10, " . . . the grantee shall not erect ", etc. No. 11 and No. 12 again refer to the characteristics of the building which the grantee " shall erect " under No. 1. Their Lordships, therefore, construe the special conditions as plainly designed to make it obligatory on the grantee to observe and perform them, as distinct from merely providing a list of stipulations which the grantee could comply with if he chose, but non-compliance with which would work a forfeiture. This view is strongly reinforced by the inclusion of the provisions in No. 8 and No. 9 for the payment of the sums therein mentioned. It could hardly be intended that these provisions were not to give the commissioner the right to sue the grantee for the amount mentioned in No. 8, or any sum which the commissioner might have had to spend in respect of the matters mentioned in No. 9. Again, it would be surprising if the commissioner was not to be entitled to restrain by injunction a sub-division of the land in breach of No. 5. The same observation applies to the restriction as to user contained in No. 4. The provision as to the repair of the building in No. 1 calls for similar comment. It would be surprising if the commissioner was to be unable to sue for damages in the event of the grantee's failure to repair.

All in all, this set of stipulations appears to their Lordships to include provisions wholly unsuitable for treatment merely as conditions of defeasance as distinct from covenants; and, inasmuch as the question turns on the intention of the parties to be collected from the document as a whole, this is a circumstance of considerable importance. For these reasons, their Lordships are of opinion that, in a lease inter partes under the Ordinance of 1915 and before 1919, the special conditions would have constituted covenants within the meaning of s. 83 of that ordinance.

It remains to consider whether this conclusion as to the effect of the " special conditions ", if they had appeared in a lease inter partes between 1915 and 1919, holds good with respect to those same conditions when included, as they actually are, in the grant now under consideration, being a grant operating as a lease but made as a deed poll in the form B (1) prescribed by the Registration of Titles Ordinance of 1919. This ordinance provides, by s. 1 (2), that

> " Except so far as is expressly enacted to the contrary no ordinance in so far as it is inconsistent with this ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this ordinance."

By s. 2, " grant " is defined as meaning (inter alia) " any . . . lease . . . for a period exceeding one year, made by and on behalf of the Crown ". By s. 20:

> "all land which is comprised in any grant issued subsequent to the commencement of this ordinance shall be subject to this ordinance, and shall not be capable of being transferred . . . or otherwise dealt with except in accordance with the provisions of this ordinance and every attempt to transfer . . . or otherwise deal with the same, except as aforesaid, shall be null and void and of no effect."

By s. 21:

> "Grants shall be issued in duplicate in form B (1) or B (2) in Sch. 1, as the case may be . . . The grant in duplicate shall be delivered out of the Land Office to the registrar of the registration district in which the land is situated, who shall register the grant . . . and thereafter deliver one of the duplicates to the Commissioner of Lands for issue to the grantee, and retain the other to be bound up in the register as hereinafter directed."

As has already been stated, form B (1) is the form prescribed for a grant of land by the Crown for a term of years, or in other words a Crown lease, and the present grant was made in that form, viz., as a deed poll and not as a deed inter partes.

It is argued on the commissioner's side that a deed in this form (the use of which is made obligatory by s. 21 of the Ordinance of 1919) could not contain any covenants on the part of the lessee, inasmuch as he not only did not execute but was not even expressed to be a party to the grant. The effect of this argument, were it to prevail, would be far-reaching. It would be impossible for the commissioner to impose any express covenants on a lessee of Crown land, although the Ordinance of 1915 clearly authorises this. By parity of reasoning, it would be impossible for any covenants on the part of such lessee to be implied. If it is indispensably necessary that the lessee should be a party to and execute the lease in order to be fixed with a covenant or obligation to do or abstain from doing what the lease expressly says he shall do or abstain from doing, then it must surely be equally necessary that he should be a party to and execute the lease in order to be fixed with a covenant to do or abstain from doing what the lease by statutory implication says he shall do or abstain from doing. Section 83 of the Ordinance of 1915 would thus, in effect, be wholly abrogated, except in cases of non-payment of rent. The abolition of covenants and substitution of conditions of defeasance would prevent the commissioner from enforcing the terms of the lease except by forfeiture, which might well be against his interest.

On the other hand, the lessee would be liable to suffer forfeiture without any claim for relief, however trifling the breach of condition and however valuable to him the lease might be. Their Lordships would not, unless constrained to do so, attribute these sweeping and untoward changes in the law to a form scheduled to what may be described as a procedural ordinance. It will be remembered that the form of grant B (1) is expressed to be subject to "the provisions and conditions contained in the said ordinance" (i.e., for present purposes, the Ordinance of 1915). The effect of that language is reproduced in the present grant by the words "and subject also to the provisions of the Crown Lands Ordinance (c. 155)". These words appear to their Lordships to import into the document itself a reference to s. 83 of the Ordinance of 1915, and also to the covenants implied by s. 21 (1) and s. 77, the implication of which postulates a document in which covenants are capable of being implied. It would appear further that there are no express covenants in the document to which s. 83 could apply unless the special conditions are treated as covenants for the purposes of that section.

Their Lordships' conclusion on this by no means easy question is that, on accepting the lease and going into possession under it (as he undoubtedly did), the appellant contracted obligations to observe and perform the special conditions which amounted to covenants for the purposes of s. 83.

Reverting to the possibility that the special conditions might be regarded as possessing the dual character of covenants and conditions, their Lordships would say that, in their opinion, a stipulation of that combined character would, nevertheless, be a covenant within the meaning of s. 83, and the remedy by way of forfeiture (subject to relief) conferred by s. 83 would (quoad forfeiture) be exhaustive and exclude any other mode of enforcing forfeiture for breach of the stipulation in question. If follows, in their Lordships' view, that RUDD, J., did have jurisdiction to make the decree of May 2, 1957, relieving the appellant from forfeiture.

There remains the question whether, given the jurisdiction to grant relief, the learned judge was right in holding that this was a case in which relief from forfeiture should be granted and, if so, whether the terms on which he granted relief were terms on which he could properly grant it in the exercise of his discretion. This aspect of the case was included in grounds 2, 3 and 4 of the commissioner's Memorandum of Appeal to the Court of Appeal for Eastern Africa, but, as that court decided in his favour on ground 1 (want of jurisdiction), it was unnecessary for it to consider grounds 2, 3 and 4, and it refrained from doing so. In connexion with these grounds, the commissioner applied to the Court of Appeal to adduce further evidence bearing on the question whether or not it would be just to grant relief, and tending to show that the present appellant was no longer financially able to build a hotel. There was some discussion before their Lordships as to the principles on which the court should exercise its discretionary jurisdiction to grant relief against forfeiture in cases in which (subject to any relief the court may think fit to grant) the commissioner is shown to be entitled to a declaration of forfeiture under s. 83. This turns on the words " subject to relief upon such terms as may appear just " in the first paragraph of the section, in conjunction with the second paragraph which provides that

> " In exercising the power of granting relief . . . under this section the court shall be guided by the principles of English law and the doctrines of equity."

It appears to their Lordships that the effect of the second paragraph of s. 83 is that, where a case for forfeiture (subject to any relief the court may think fit to grant) has been made out under the first paragraph of the section, the court, in determining whether relief should be granted and if so on what terms, is to be guided by the principles on which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law in force at the date when the ordinance came into operation, and by the doctrines of equity. In their Lordships' opinion, the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute, and the statute law referred to must be the statute law in force at the date when s. 83 became law, inasmuch as there are no words in the second paragraph to give the reference an ambulatory effect, and, prima facie, a Kenya Ordinance could hardly be taken, in the absence of some indication to the contrary, to adopt in advance future English legislation of unknown content. This means, in effect, that the court is to be guided (which does not mean necessarily bound) by the principles laid down by s. 14 (2) of the Conveyancing Act, 1881, (2), and the decisions of the English courts under that section, so far as applicable to a case under s. 83, which (apart from requiring a bare notice of the breach) does not include the preliminary steps prescribed by s. 14 (1) as necessary in order to make the forfeiture enforceable; and that the court should also have regard to the doctrines of equity. This accords with the view expressed in the case in the Court of Appeal for Eastern Africa of *Dedhar* v. *Special Commissioner and Acting Commissioner of Lands* (3), a case which is also noteworthy in that it was assumed without argument that a " special condition " in a post 1919 Crown lease of a town plot was a covenant within the meaning of s. 83. For the reasons given in the judgment of Sir Kenneth O'Connor, P. (4), their Lordships cannot accept the argument that the second paragraph of s. 83 does not import a reference to s. 14 of the Act of 1881 because that Act did not bind the Crown in England. The view their Lordships have taken as to the application of s. 83 makes it unnecessary for them to discuss the question whether the appellant could otherwise have made good a claim to relief under the pure doctrines of equity on the ground of accident or surprise.

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(2) The Conveyancing Act, 1881, s. 14 (2), was repealed by the Law of Property Act, 1925, s. 207 and Sch. 7. See now s. 146 (2) of the Act of 1925 (20 HALSBURY'S STATUTES (2nd Edn.) 742).

(3) [1957] E.A. 104.

Their Lordships would express their indebtedness to the full and careful judgments of Sir Kenneth O'Connor, P., and Rudd, J., from which they have derived much assistance.

For the reasons above stated, their Lordships are of opinion that this appeal should be allowed, and the order of the Court of Appeal for Eastern Africa dated Mar. 24, 1958, should be discharged, and that the case should be remitted to the Court of Appeal for Eastern Africa to hear and determine the grounds of appeal contained in 2, 4 and 3 of the commissioner's Memorandum of Appeal to that court, and also the commissioner's application to adduce fresh evidence bearing on these grounds.

Their Lordships will humbly advise Her Majesty accordingly.

The commissioner must pay the costs of this appeal and of the hearing in the Court of Appeal. The order as to costs made in the Supreme Court will not be disturbed. The costs of the further hearing will be in the discretion of the Court of Appeal.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Charles Russell & Co.* (for the respondent).

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

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(4) The relevant part of the judgment of Sir Kenneth O'Connor, P., delivering judgment in the Court of Appeal for Eastern Africa on Mar. 24, 1958, was as follows: ". . . Hitherto it has been assumed (and it was so held in *Hassanali Dedhar's* case, [1957] E.A. 104 (C.A.)) that the principles of English law by which the court was to be guided in granting relief were the principles set out in s. 14 (2) of the Conveyancing Act, 1881, that is to say that the court might grant or refuse relief, as the court having regard to the proceedings and conduct of the parties under the foregoing provisions of s. 14 and to all the other circumstances thought fit and might grant relief on terms as set out in the subsection. But it has now been contended for the appellant that, as the Conveyancing Act, 1881, does not bind the Crown in England, those principles are inapplicable here. The result of this would be that the court could not relieve against forfeiture for breach of a lessee's covenant except in cases where relief could be granted apart from the Conveyancing Act, 1881, i.e., relief for non-payment of rent, failure to insure, and rare cases of accidents or surprise. The question is how are the words ' the principles of English law ' to be construed. In this context they are far from plain. I am unable to believe that it was the intention of the legislature in 1915 to continue to empower the court in the main enacting part of the section to give relief on such terms as might appear just and then, by an additional paragraph in this form, so to restrict the court's powers as to prevent it doing justice. All the above mentioned cases in which relief could be granted apart from the Conveyancing Act, 1881 (except perhaps failure to insure), could be relieved against under the ' doctrines of equity ' without invoking any of the ' principles of English law ', so that the interpretation contended for would give no meaning to the words ' the principles of English law '. And, as the doctrines of equity would apply in any event, without the 1915 addition to the section, that addition, if construed as the Crown contends, would have been unnecessary. Moreover, such a restriction as is suggested would be repugnant to the main enacting part of the section the object of which clearly is to permit relief upon such terms as may appear just. I have no doubt that the intention was to direct that the Supreme Court in granting relief against forfeiture for breach of lessee's covenants in Crown leases should be guided by the principles of English law as between subject and subject and the doctrines of equity, and that if the legislature had intended to exclude the operation of s. 14 (2) of the Conveyancing Act, 1881 (which was the main provision of English law covering relief against forfeiture for breach of covenants in leases, though not, it is true, in Crown leases), they would have said so in plain terms. To give effect to the Crown's contention would, in my view, be to offend against various canons of construction of statutes. It would be to defeat the manifest object of the legislature, to render certain words in the section nugatory, and to permit the 1915 addition, which though not in form a proviso, is somewhat similar to a proviso, to control the main enacting part of the section. I would, therefore, reject this contention."

INSTITUTION OF MECHANICAL ENGINEERS *v.* CANE (VALUATION OFFICER) AND ANOTHER.

[Court of Appeal (Hodson and Ormerod, L.JJ., and Wynn-Parry, J.), October 14, 15, 16, 19, December 1, 1959.]

Rates—Exemption—Scientific society—"Purposes of science . . . exclusively"—"Development of mechanical engineering"—"Annual voluntary contributions"—Subscriptions of members—Advantages of membership of organisation of professional men—Whether subscriptions were "voluntary" contributions—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The object of the Institution of Mechanical Engineers was "To promote the development of mechanical engineering". The institution was supported in part by the subscriptions of members who received in return therefor the institution's publications, whose cost was about thirty per cent. of the amount of the subscriptions, corporate benefits such as the right to attend meetings of a society of professional men interested in the same subjects and advantages from their corporate studies. The institution carried on educational work, holding its own qualifying examinations and co-operating with government departments in technical education, and had formed an appointments bureau and provided a model contract for use in projects involving mechanical engineering. The petition for its charter stated that its activities had "for long been of great value to the profession . . . The opportunities afforded by the meetings . . . for the interchange of ideas and experience have proved of great value to the members . . . the election of suitable persons as graduates and students affords encouragement to those commencing their engineering career, and brings them in touch with senior members of their profession and with its current development". An annual report referred to "the increasingly influential part that the institution is playing in mechanical engineering and to the esteem in which it is held in the profession . . . the appeal which membership . . . holds for the younger aspirants to professional status . . . the value of services rendered to members." The institution claimed exemption from rates as being a society falling within s. 1 of the Scientific Societies Act, 1843.

Held: the institution was not exempt from rates under s. 1 of the Act of 1843 because—

(i) it was not "instituted for purposes of science . . . exclusively", since "mechanical engineering" included something more than the science of mechanical engineering and in particular the practice and technique of engineering (see p. 133, letter A, post); and

(ii) the institution was not supported in part by annual voluntary contributions, since the nature of the society as revealed by its charter and bye-laws and its activities showed that the subscriptions were not altruistic but were induced by the advantages of membership.

Appeals allowed.

[As to the exemption of scientific societies from rates, see 21 Halsbury's Laws (2nd Edn.) 12, para. 26; and for cases on the subject, see 38 Digest 493-499, *485-540.*

For the Scientific Societies Act, 1843, s. 1, see 14 Halsbury's Statutes (2nd Edn.) 7.]

Cases referred to:

Battersea Metropolitan Borough v. *British Iron & Steel Research Assocn.*, [1949] 1 K.B. 434; [1949] L.J.R. 646; 2nd Digest Supp.

Birmingham (Churchwardens) v. *Shaw,* (1849), 10 Q.B. 868; 116 E.R. 329; sub nom. *Re Birmingham New Library, Ex p. Birmingham Overseers,* 18 L.J.M.C. 89; sub nom. *R.* v. *Shaw, Birmingham JJ.*, 13 L.T.O.S. 23; 13 J.P. 395; 38 Digest 496, *502.*

British Launderers' Research Assocn. v. *Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 462; [1949] L.J.R. 416; 113 J.P. 72; 2nd Digest Supp.

Cane v. *Society of Chemical Industry*, (1956), 1 R.R.C. 106; *affd.* H.L., (1957), 2 R.R.C. 105.

Inland Revenue Comrs. v. *Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 38 Digest 496, *503*.

Institute of Fuel v. *Morley*, [1955] 3 All E.R. 843; [1956] A.C. 245; 120 J.P. 39; [1956] 2 W.L.R. 64; 3rd Digest Supp.

Institution of Civil Engineers v. *Inland Revenue Comrs.*, [1931] All E.R. Rep. 454; [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp.

R. v. *Institution of Civil Engineers*, (1879), 5 Q.B.D. 48; 49 L.J.M.C. 34; 42 L.T. 145; 44 J.P. 265; 38 Digest 497, *508*.

Royal College of Music v. *Westminster Vestry*, [1898] 1 Q.B. 304; 67 L.J.Q.B. 80; *affd.* C.A., [1898] 1 Q.B. 809; 67 L.J.Q.B. 540; 78 L.T. 441; 62 J.P. 357; 38 Digest 499, *540*.

Royal College of Surgeons of England, Re, [1899] 1 Q.B. 871; 68 L.J.Q.B. 613; 80 L.T. 611; 39 Digest 299, *781*.

Royal College of Surgeons of England v. *National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631; 3rd Digest Supp.

Savoy Overseers v. *Art Union of London*, [1896] A.C. 296; 65 L.J.M.C. 161; 74 L.T. 497; 60 J.P. 660; 38 Digest 498, *525*.

Case Stated.

The respondent institution was the occupier of a hereditament described as "Professional institution offices and premises (including basement, ground, first and second floors of 2/4, Old Queen Street and second and third floors of 6, Old Queen Street)" Westminster, assessed at £6,000 gross value, £4,997 rateable value in the valuation list for Westminster City. It appealed to the Lands Tribunal against a decision confirming the assessment given by a local valuation court of Central London Local Valuation Panel on Aug. 9, 1956. Its grounds of appeal were that the institution was exempt from liability for rates as a scientific society within the meaning of the Scientific Societies Act, 1843, that it occupied the hereditament for the transaction of its business and for carrying into effect its purposes, and that the assessment of the hereditament should therefore be deleted from the valuation list. It was conceded that the institution complied with so much of the Act of 1843 as required that it should not, and by its laws might not, make any dividend, gift, division, or bonus in money unto or between any of its members, and that it had obtained the certificate of the Registrar of Friendly Societies that it was entitled to the benefit of the Act. On Mar. 11, 1958, the Lands Tribunal (SIR WILLIAM FITZGERALD, President) allowed the institution's appeal, holding that it was instituted for purposes of science exclusively and was supported in part by annual voluntary contributions (members' subscriptions) ((1958), 3 R.R.C. 155). The valuation officer and the rating authority appealed by way of Case Stated to the Court of Appeal. The questions for the decision of the court were whether there was any evidence on which the tribunal could find that the subscriptions paid by the members of the institution were annual voluntary contributions within the meaning of the Scientific Societies Act, 1843, and whether on the other findings of fact the tribunal came to a correct decision in law.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the valuation officer.

R. W. Bell for the rating authority.

W. L. Roots, Q.C., and *F. A. Amies* for the institution.

Cur. adv. vult.

Dec. 1. **HODSON, L.J.:** The judgment which I am about to read is the judgment of the court, and is a composite judgment. These appeals are from a

A decision of the Lands Tribunal dated Mar. 11, 1958, allowing an appeal from a decision of a local valuation court for Central London given on Aug. 9, 1956, confirming an assessment for the purpose of rating of a hereditament owned and occupied by the respondent institution.

The question at issue is whether the institution is entitled to exemption from rating under the provisions of the Scientific Societies Act, 1843, s. 1 of which B reads as follows:

> " . . . No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, C and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law or lord advocate, as hereinafter D mentioned."

Before the Lands Tribunal it was contended by the institution (i) that the institution was formed for the purpose of science exclusively and (ii) that it was supported wholly or in part by annual voluntary contributions. The Lands Tribunal upheld the institution's contentions and allowed its appeal.

E The first question for consideration is whether on a true construction of the charter it can be said that the institution was formed for the purposes of science exclusively. If the answer to this question is in the negative, then clearly this appeal must be allowed. If on the other hand we should come to the conclusion that the question demands an affirmative answer, then two further questions arise. (i) Are the activities of the institution such as come within its objects as F defined by its charter, or does the institution occupy its premises for the pursuit of activities not exclusively scientific, and (ii) is the institution supported wholly or in part by annual voluntary contributions?

According to para. 1 of the petition for a royal charter, the Institution of Mechanical Engineers was founded in the year 1847 as a voluntary association

> " having for its general objects the promotion of the science and practice G of mechanical engineering."

It was incorporated in 1878 under the Companies Acts as an association limited by guarantee, and was granted a royal charter on Apr. 22, 1930. Clause 7 of the charter reads as follows:

> " The objects and purposes for which the institution is hereby constituted H are to promote the development of mechanical engineering and to facilitate the exchange of information and ideas thereon and for that purpose: (A) To encourage invention and research in matters connected with mechanical engineering and with this object to make grants of money or books or otherwise to assist such invention and research. (B) To hold meetings of the institution for reading and discussing communications bearing upon mechanical engineering or the application thereof or upon subjects relating thereto. I (C) To print publish and distribute the proceedings or reports of the institution or any papers communications works or treatises on mechanical engineering or its application or subjects connected therewith. (D) To co-operate with universities, other educational institutions and public educational authorities for the furtherance of education in engineering science or practice. (E) To do all other things incidental or conducive to the attainment of the above objects or any of them."

The appellants contend that the objects of the institution as defined by this clause are such that it cannot be said that it was formed for the purposes of science exclusively. The Lands Tribunal answered this first question in the affirmative. On page 7 of the transcript of the reasons for his decision, the learned president, after referring to the evidence of Professor Saunders, said:

> " It is clear that the development of mechanical engineering is a technical process. There must be few people in this country better qualified than Professor Saunders to explain in language the ordinary man can appreciate what that process involves, and I accept his contention that the promotion of the development of mechanical engineering means the increasing of the scientific data so that you can do things in mechanical engineering by the application of discovered scientific principles rather than by intuition or guess. This leads me to the conclusion that the object of cl. 7 of the charter is a purpose of science. I think that paras. (A), (B), (C), (D) and (E) of the clause are ancillary to that purpose in that they indicate the means by which the object can be achieved, and, on a true construction of the charter, I hold that the institution is instituted for the purpose of science exclusively."

The evidence of Professor Saunders, who is dean of engineering and head of the department of mechanical engineering at the Imperial College of Science at the University of London, was as follows:

> " I think mechanical engineering is an applied science and as such it contains a true scientific element and an art element. An engineer is obliged in the course of his work to make many decisions and to do many things which are not based on science alone; they are based on his experience, accumulated knowledge from experience, and perhaps also intuitive knowledge. The aim, however, of an engineer is to get the best possible efficiency in what he does and to replace the art element wherever possible by the scientific one. I would have thought that it is impossible to separate completely the two elements, that in any given problem both elements must be present. But I would make strongly the point that you cannot advance scientific engineering in a vacuum as a science only. You can only advance it by doing things, by building things, by studying the results, and in so doing increasing the scientific content of your knowledge. So that, listening to Mr. Rowe, I would have felt that it is quite impossible to advance mechanical engineering science without studying the practical matters, without in fact considering the art content of the subject."

It is no doubt true to say that the term " mechanical engineering " connotes a true scientific element. It was not in dispute in any of the proceedings that there is a science of mechanical engineering, and that the promotion of the development of mechanical engineering must or at least should involve the development of that science. It may well be that the sum of scientific knowledge will be increased by practical experience in engineering construction. But that is not the same thing as saying that the promotion of the development of mechanical engineering means the pursuit of an exclusively scientific object. An institution may exist for a number of purposes. Although one or more of these may properly be described as scientific, the others may not be so, although the carrying out of them may add to the sum of scientific knowledge. During the argument we were referred to various dictionary definitions of the word engineering. They did not seem to us to assist. The term " mechanical engineering " is one in common use, and it appears to us that the way to approach the question is to consider whether in the ordinary usage of the term it can be said to refer exclusively to science. The sub-paragraphs of cl. 7 of the charter do not appear to advance the matter. It is true that sub-para. (D) refers to the furtherance of education in " engineering science or practice " but otherwise they are consistent with either view of the meaning of the term " mechanical engineering ".

It was contended by the appellants that the term included, not only the development of the technique and practice of engineering, but the development

A of the engineering industry and various incidental matters such as works organisation and management. Unless we are constrained by authority to come to a different conclusion, we are of the opinion that, on a proper construction of cl. 7 of the charter, the institution is not formed for the purpose of science exclusively. Without necessarily giving it the wide meaning for which the appellants contend, the term " mechanical engineering ", in our judgment, includes something more B than the science of mechanical engineering. At the least it includes the practice and technique of engineering.

It may be, as Professor Saunders has said, that science and practice are to some extent interdependent, that modern engineering technique is in part at least the outcome of scientific research and the application of known scientific principles, and that the practice of engineering may add to the sum of knowledge C and experience from which further scientific principles may be discovered and applied. But that does not mean that the science and practice of engineering are the same thing, or that the purpose of their development can be said to be exclusively technical or practical. The two purposes may well run side by side, each to some extent the complement of the other, but in our view they remain none the less separate and distinct purposes.

D It is helpful in coming to a conclusion on this part of the case to have regard to one or two passages in the speeches of the learned law Lords in *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (1). One of the questions for decision was whether the college was in law a charity, the relevant passage in the charter being (2) " the due promotion and encouragement of the study and practice of the said art and science " of surgery. It was held that it was.

E LORD NORMAND said (2):

> " The words ' the study and practice of the . . . art and science ' of surgery do not, in my opinion, mean ' the academic study and professional practice of the art and science of surgery '. They signify rather the acquisition of knowledge and skill in surgery both by abstract study and by the exercise F of the art in the dissecting room and the anatomy theatre, and they are capable of covering both the discovery of new knowledge which is the fruit of research, and the learning of existing knowledge either by students who are qualifying or by qualified surgeons desirous of improving their knowledge and skill."

LORD MORTON OF HENRYTON said (3):

> G " This being so, I have no doubt that the object of this newly created body, the college, is stated in the last recital and is ' the due promotion and encouragement of the study and practice of the art and science of surgery '. As I read the words ' study ' and ' practice ' they embody two ideas, research in the laboratory and that practical experience which can only be gained by using surgical implements on human or other bodies. The object H of the college is to promote the art and science of surgery by encouraging each of these activities."

LORD REID said (4):

> " It is true that in *Re Royal College of Surgeons of England* (5) the Court of Appeal took a somewhat different view. There the case for the college was I that its property was legally appropriated and applied for the promotion of science, and the court held, I think rightly, that this was not the only purpose for which the property was held and used. The promotion of science is one way of promoting the study and practice of the art and science of surgery, but it is not the only way."

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(1) [1952] 1 All E.R. 984; [1952] A.C. 631.
(2) [1952] 1 All E.R. at p. 986; [1952] A.C. at p. 641.
(3) [1952] 1 All E.R. at p. 995; [1952] A.C. at p. 654.
(4) [1952] 1 All E.R. at p. 999; [1952] A.C. at p. 661.
(5) [1899] 1 Q.B. 871.

A

Lord Tucker said (6):

> "In my view, the objects of the college as set out in the charter of 1800, and never thereafter varied, were (i) the promotion of the science of surgery; (ii) the promotion of education in surgery. The latter can only be achieved by practice as well as study and the holding of examinations is an essential step in the educational process."

B

Their Lordships were not, of course, considering the effect of s. 1 of the Scientific Societies Act, 1843, but it is interesting to note that they regarded the science and practice or art of surgery as separate objects.

In *Battersea Metropolitan Borough* v. *British Iron & Steel Research Assocn.* (7), **Jenkins, J.**, said (8):

C

> "(i) 'Science' for the present purpose includes applied, as well as pure or speculative, science (see per **Lord Macnaghten** in *Inland Revenue Comrs.* v. *Forrest* (9)), so that purposes directed to the promotion of science in its application to a particular trade or industry, such as the iron and steel trade or industry in the present case, may be regarded as purposes of science within the meaning of the section.
>
> "(ii) The question whether a particular society is 'instituted for purposes of science literature or the fine arts exclusively' within the meaning of the section must be determined by reference to the purposes of the society as defined by its constitution, rather than the purposes it may actually have pursued in practice",

D

and later he said (10):

E

> "On the question of technical education we were referred to *Royal College of Music* v. *Westminster Vestry* (11) where it was held that the teaching of music was a means of promoting the fine art of music. But this proceeds on the ground that music is a fine art, and only goes to show in the present case that the teaching of science is a means of promoting science, not that technical education is necessarily and exclusively scientific education, as in my view it is not."

F

In *British Launderers' Research Assocn.* v. *Hendon Borough Rating Authority* (12), a case which was considered at the same time as the *Battersea* case (7), **Denning, L.J.**, said (13):

> "The purposes of science, however, do not include the purposes of the firms or persons who make use of science. Many of our great industrial concerns make use of science and, indeed, institute research laboratories for the purposes of science, but only as incidental to their industrial purposes. So, also, our technical schools make use of science and institute laboratories for the purposes of science, but only as incidental to the training of craftsmen. In such cases the laboratories are instituted for the purposes of individuals, not for the purposes of science except as incidental to the purposes of individuals."

G

H

In *Institute of Fuel* v. *Morley* (14), the House of Lords, reversing the decision of the Court of Appeal, came to the conclusion that the institute was formed exclusively for the purpose of science, and was accordingly exempt from rates. The purposes of the institute as set out in para. 7 of its charter were:

I

> "(a) To promote, foster, and develop the general advancement of the various branches of fuel technology as an end in itself, and as a means of furthering the more scientific and economic utilisation of fuel of all kinds for

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(6) [1952] 1 All E.R. at p. 1001; [1952] A.C. at p. 664. (7) [1949] 1 K.B. 434.
(8) [1949] 1 K.B. at p. 451. (9) (1890), 15 App. Cas. at pp. 353, 354.
(10) [1949] 1 K.B. at p. 456. (11) [1898] 1 Q.B. 304; *affd.* C.A., [1898] 1 Q.B. 809.
(12) [1949] 1 All E.R. 21; [1949] 1 K.B. 462.
(13) [1949] 1 All E.R. at p. 24; [1949] 1 K.B. at p. 468.
(14) [1955] 3 All E.R. 843; [1956] A.C. 245.

> A industrial, commercial, public, agricultural, domestic, transport and/or other purposes, and to promote, assist, finance and support such industrial and scientific research, investigation, and experimental work in the economical treatment, and application of fuel as the institute may consider likely to conduce to those ends, and to the benefit of the community at large."

B It was held that the exclusive purpose of the institute was scientific, and any advantages enjoyed by the members were ancillary to the advancement of fuel technology. LORD MORTON OF HENRYTON said (15):

> "Counsel for the respondents submitted that the sub-paragraph stated two purposes, whereof the first was scientific and the second was of a commercial nature. C I think it is quite possible to read sub-para. (a) as stating two purposes, one beginning with the words 'To promote, foster, and develop', and the other with the words 'to promote, assist, finance and support'. In my view, however, such a sub-division does not assist the respondents, as each of the two purposes so stated is, to my mind, a scientific purpose. I cannot find in either of them any suggestion that the institute can embark D on any commercial pursuit; they are both confined to the acquisition of knowledge in the realm of fuel technology, which is, admittedly, a science, and to the spread of such knowledge for the benefit of the community."

It was pointed out by counsel for the valuation officer in the argument in the present case that it was conceded from the outset that fuel technology was a science, and that the institute was occupying its premises for this purpose only. E The substantial question at issue, therefore, was whether the other objects were purposes which rendered the main purpose other than exclusive, or whether they were ancillary to that main purpose.

In *Cane* v. *Society of Chemical Industry* (16), a case decided by the House of Lords, affirming the decision of the Court of Appeal, objects A and B of the preamble to the charter read as follows:

> F "(A) To advance applied chemistry in all its branches. (B) To afford the members thereof opportunities for the interchange of ideas with respect to improvements in the various chemical industries and for the discussion of all matter bearing upon the practice of applied chemistry and the publication of information thereon."

G Clause 3 read:

> "The objects of the society shall be to carry on the work commenced and heretofore generally carried on by the society of 1881 and to promote the application of chemical science to arts and manufactures and also the discussion and diffusion of all knowledge and information and to further by causing to be made or assisting in the making of investigations inquiries and H reports upon novelties improvements inventions processes and the practical application of scientific discoveries bearing upon the practice of applied chemistry and of any of the industrial arts thereto allied and to carry on the publication of the journal."

It was held that the society was exempt from rating. PARKER, L.J., said (17):

> I "The main argument before this court turned on the construction of object B of the society as originally established in 1881. Do the words of that object, and, in particular, the words 'with respect to improvements in the various chemical industries', on their true construction, denote a commercial purpose, not merely ancillary to the advancement of applied chemistry, but a distinct, albeit subsidiary, purpose? In deciding that

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(15) [1955] 3 All E.R. at p. 847; [1956] A.C. at p. 253.
(16) (1956), 1 R.R.C. 106; *affd.* H.L. (1957), 2 R.R.C. 105.
(17) (1956), 1 R.R.C. at p. 116.

> question, I think it is important to bear two things in mind. Firstly, as the Act says, one has to see if the society is 'instituted for the purposes of science . . . exclusively'. For that purpose, one looks at the objects clause, the objects clause being the authorised activities of the society. The fact that those authorised activities are labelled A, B, C, D, etc., however many there may be, does not mean that they all constitute separate purposes; albeit separately labelled, there may be only one purpose in question.
>
> "The second thing to bear in mind is that the science we are dealing with here—it is admitted it is a science—is applied chemistry, and applied chemistry necessarily involves the promotion of chemistry applied to commercial and industrial purposes. Accordingly, one would expect to find references to industry, but it does not follow that one of the objects is to promote industry, though no doubt dissemination of the knowledge acquired in the pursuit of applied chemistry will necessarily promote industry."

Again in this case it was common ground that applied chemistry was a science and its promotion was therefore a scientific object.

The institution, in argument on this part of the case, placed considerable reliance on the decision of this court in *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (18). The question in that case was whether the Institution of Civil Engineers was "a body of persons . . . established for charitable purposes only" and therefore exempt from income tax under s. 37 (b) of the Income Tax Act, 1918. It was held that it was so exempt. The institution was incorporated by royal charter and the object for which it was founded was

> "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man."

LAWRENCE, L.J., in the opening sentence of his judgment said (19):

> "The question in this case is whether the Institution of Civil Engineers is a body of persons established for charitable purposes only and therefore exempt from income tax under the Income Tax Act, 1918, s. 37 (b). The answer to this question depends on whether the institution is established solely for the advancement of the science of civil engineering (an admittedly charitable purpose), or whether one of the purposes for which it is established is to benefit civil engineers in order to enable them to practise their profession to greater advantage."

Later he said (20):

> "Bearing in mind that the original charter of 1828 clearly states the only purpose for which the institution was established, and that this purpose has never been added to or varied by any of the supplemental charters, and further bearing in mind that the House of Lords has decided that this purpose is for the general advancement of the science of civil engineering, it follows in my judgment that the institution is established for a charitable purpose only notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the institution, this result not being a purpose for which the institution was established, but being incidental to and consequent on the way in which the institution carries out the charitable purpose for which alone it was established."

Other authorities were cited by counsel for both parties in the course of this part of the argument, but they did not in our view give us any further assistance in coming to a decision. The effect of all the authorities would seem to be that each case must be considered according to the terms of its charter, and it is to

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(18) [1931] All E.R. Rep. 454; [1932] 1 K.B. 149.
(19) [1931] All E.R. Rep. at p. 463; [1932] 1 K.B. at p. 167.
(20) [1931] All E.R. Rep. at p. 465; [1932] 1 K.B. at p. 171.

A the true construction of these terms that regard must be had in determining whether the purposes of the institution are exclusively scientific. In considering the question regard must be had to the further question whether purposes which do not appear to be scientific are merely ancillary purposes to the fulfilment of the exclusive object. That further question does not arise in the present case. The object and purpose for which the institution was constituted is "to promote B the development of mechanical engineering". We have already expressed our opinion that these words have a wider meaning than "to promote the development of mechanical science" and there appears to be nothing in the authorities cited to us which leads us to a different opinion. We would therefore answer the first question by holding that the institution was not formed for the purpose of science exclusively.

C In these circumstances it is unnecessary to consider separately whether the premises have been used by the institution for purposes other than those set out in the charter. There is, however, the further question on which the institution's entitlement to exemption depends, i.e., the question whether it is supported wholly or in part by annual voluntary contributions. The income of the institution for the year ending Dec. 31, 1955, was £168,482 2s. 11d., of which £138,750 D 2s. 6d. was derived from subscriptions, and the balance was made up chiefly of interest on capital, sale of "Proceedings", examination fees and rents. Out of these items it has been held by the Lands Tribunal that the subscriptions qualify as annual voluntary subscriptions, so that, provided the institution were formed for scientific purposes, it would be exempt from rating. There is no doubt that the subscriptions are annual and that they support the institution in fact, indeed E it depends for its support in the main on these subscriptions, but the argument turned on whether they are voluntary contributions. This matter was considered by the House of Lords in *Savoy Overseers* v. *Art Union of London* (21), where it was decided that the Art Union of London, albeit a scientific society, was not "supported by voluntary contributions" within the meaning of the Scientific Societies Act, 1843. This decision therefore laid to rest a heresy which first F appeared in *Birmingham* (*Churchwardens*) v. *Shaw* (22), where LORD DENMAN, C.J., had apparently treated the word "voluntary" as the antithesis to the word "compulsory".

It remains, therefore, to consider what is the true effect of the decision in the *Art Union* case (21), since it is argued on behalf of the institution that the *Art Union* case (21) was determined against the union on the sole ground that the G members received full value for their money in return for their subscriptions. It is true that each member of the House emphasised this aspect of the case in his speech. We take as an illustration language used by LORD MACNAGHTEN (23):

> "It appears to me to be almost absurd to say that a society is supported by voluntary contributions when it prides itself, as the Art Union of London H openly does, on returning to every contributor the equivalent of his contributions in market value and money's worth."

What then is the position where it can be fairly argued that the subscriber does not receive full value for his money and receives little by way of tangible benefits in return for his subscription? No clear answer has as yet been given by the courts to this question. We were told that in these cases what has been I described as a "local rule" has been followed by the Lands Tribunal to the effect that subscriptions do not cease to be voluntary because the subscribers obtain the publications of the society at a reduced rate, unless the value of the publications approximates closely to the amount of the subscriptions. In the case of the institution the cost to the members of the relevant publications, viz., the "Chartered Mechanical Engineer" and the "Proceedings", which represented about thirty per cent. of the total of the annual subscriptions was held not to defeat the claim of the institution that the subscriptions were voluntary within the meaning of the Act. No other benefit was taken into account as consideration for the subscription sufficient to destroy the voluntary nature of the payment.

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(21) [1896] A.C. 296. (22) (1849), 10 Q.B. 868. (23) [1896] A.C. at p. 312.

We do not find anything in the speeches of the House of Lords in the *Art Union* case (24) or in subsequent authorities which supports the liberal interpretation of the word " voluntary " given by the tribunal in this and no doubt (as the learned president has indicated) in other cases. LORD HERSCHELL used these words (25):

> " I do not think it was intended to exempt from rating buildings belonging to a society merely because the payments by which it was wholly or in part supported were made voluntarily and not compulsorily, when they were not made gratuitously, but were the price of advantages obtained in return for them. The expression ' supported by voluntary contributions ' has long been well known in connexion with hospitals and other institutions; I think the essential idea conveyed by them is that the payments are a gratuitous offering for the benefit of others, and not the price of an advantage purchased by the contributor. It was pointed out by KAY, L.J., that in the case of some hospitals the contributors receive a certain number of letters of admission measured by the amount of their subscriptions. But though this may give them a voice as to the persons who are to be the objects of the charity, I think it would be unreasonable to regard the contribution as being on that account not a gratuitous charitable gift, but the purchase of a personal advantage. If, indeed, a hospital were established on co-operative principles, each contributor being entitled to claim medical treatment there, and the inmates being confined to contributors, I should say that it was not supported by ' voluntary contributions ', even though there was nothing to compel any person to become a contributor, and he might cease to be so at any time he pleased."

It will thus be apparent that the question does not depend on whether there is any consideration at all for a payment. A nominal consideration may be ignored, and this no doubt has led the tribunal to take a liberal view in some cases. We cannot, however, regard as nominal the contractual advantages which members of an institution such as this derive from their membership, and in our opinion the authorities are against such a contention. The object of the individual members in joining a society must, as LORD MACNAGHTEN pointed out in the *Art Union* case (24), be looked at separately from the purpose of the society itself.

It is true that the evidence accepted by the learned president was to the effect that the institution has not sought to promote the professional interests of its members, but it cannot be said that the subscriptions made to the institution are in their nature altruistic. If one concedes in this connexion that the purpose of the institution is exclusively scientific, it does not follow that the motive which leads members to join it is that science may be advanced. One must still ask the question: " Are the members acting from disinterested motives, and not looking for any return in the shape of distinct personal advantage? "

The question must be answered by looking at the nature of the society as revealed by its charter and bye-laws, which regulate the election of members and the payment of subscriptions, and to the other activities of the society in which its members may take part. It is legitimate to look at the petition on which the charter was founded. Paragraph 7 reads:

> " The activities of the institution have for long been of great value to the profession. The researches directed, conducted, or assisted by the institution, the papers communicated to the institution and the discussions

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(24) [1896] A.C. 296.

(25) [1896] A.C. at p. 310.

> thereon have dealt with every aspect of mechanical engineering and have contributed not a little to the development of that science. The opportunities afforded by the meetings of the institution for the interchange of ideas and experience have proved of great value to the members; the development of its own qualifying examinations and its co-operation with departments of Your Majesty's Government in technical education have raised the standard of technical knowledge throughout Your Majesty's Empire, while the election of suitable persons as graduates and students affords encouragement to those commencing their engineering career, and brings them in touch with senior members of their profession and with its current development."

The introduction to the annual report for the year 1953 contains these passages:

> "In introducing their report the council wish to draw attention to some of the more interesting events of a year notable for the fact that for the first time in the institution's history, the total membership exceeded 40,000. This fact bears witness to the increasingly influential part that the institution is playing in mechanical engineering and to the esteem in which it is held in the profession. It is particularly gratifying to draw attention to the appeal which membership of the institution holds for the younger aspirants to professional status . . . The council continued to give careful thought to the finances of the institution and sought ways in which economics could be effected without impairing the value of services rendered to members; in this respect the detailed review of our publications carried out during the year has special importance."

Not only are members entitled to the publications referred to in the findings of the learned president, but also they obtain the other corporate benefits of a society composed of professional men interested in the same subjects and deriving advantages from their corporate studies. It should be remembered that the institution is to all intents and purposes wholly supported, not by outside donors, but by members who might be expected to join in order to enjoy the advantages which they can scarcely help obtaining from their membership. If motive in joining is (as we think it is) to be considered, it is impossible to ignore the fact that many of the activities of the institution will be inducements to join. We give, as examples, some aspects of its educational work, its formation of an appointments bureau (although there was no evidence of its use), its provision of a model contract for use in projects involving mechanical engineering, the main object of which was found by the learned president to be to protect the material interests of the engineer in his professional capacity. These advantages are not in themselves negligible, though they may be less valuable than the more intangible general benefits of membership to which we have referred.

Support for the view which we have formed is to be found in the opinions of the House of Lords in *Inland Revenue Comrs.* v. *Forrest* (26), where the question was whether the property of the Institution of Civil Engineers was exempt from duty under the Customs and Inland Revenue Act, 1885, as being applied for the promotion of science. In speaking of that institution Lord Watson said (27):

> "I do not doubt that membership is accompanied with a certain amount of prestige which may prove to be of service to the member in his professional career; but I believe that the same result would attend membership of any society which effectively promoted a branch of science intimately connected with the profession or business in which the member was engaged."

Lord Macnaghten said of that institution (28):

> "Probably the founders of the society were not insensible of the advantages which such an institution was likely to confer upon its members in their

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(26) (1890), 15 App. Cas. 334.

(27) (1890), 15 App. Cas. at p. 351.

(28) (1890), 15 App. Cas. at p. 354.

> professional capacity. That would have been a formidable objection if the language of the Act of 1885 had been the same as that of the Act of 1843."

The dictum contained in the last sentence is directly in point in considering the position of the Institution of Mechanical Engineers.

In considering *R.* v. *Institution of Civil Engineers* (29), LORD WATSON said (30):

> "In order to bring a society within s. 1 of the Act of 1843, two statutory requisites must concur. The society must be one instituted exclusively for purposes of science, literature, or the fine arts; and it must also be supported, in whole or in part, by annual voluntary contributions. I do not think the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act."

In *Institution of Civil Engineers* v. *Inland Revenue Comrs.* (31), ROMER, L.J., said (32):

> "Where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer on its holder personal advantages of considerable value to him in his profession or in his social standing."

The learned lord justice then proceeded to give examples. The decision of their Lordships in the *Forrest* case (33) was held virtually to have overruled the decision of the Divisional Court in *R.* v. *Institution of Civil Engineers* (29). ROMER, L.J., said (34):

> "As regards that judgment, [i.e., the decision of the Divisional Court] LORD MACNAGHTEN, while agreeing in the conclusion, said that he had some difficulty in accepting the proposition and following the reasoning on which the conclusion was based. The conclusion was that the institution was not entitled to exemption under the Act of 1843; and I think that LORD MACNAGHTEN meant no more than that the conclusion could be supported on the ground that the institution was not supported in whole or in part by 'voluntary' contributions."

The observations which have been cited from the cases which have been before the courts involving the Institution of Civil Engineers are we think of persuasive authority in support of the view which we have formed that the only inference which can be drawn from the documents and from the findings of fact of the learned president is that the subscriptions of members of the Institution of Mechanical Engineers cannot be regarded as voluntary within the meaning of that word in the Act of 1843. We would answer this further question by holding that the institution is not supported wholly or in part by annual voluntary contributions. On these two grounds, therefore, the appeals will be allowed.

Appeals allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Allen & Son* (for the rating authority); *Bristows, Cooke & Carpmael* (for the institution).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(29) (1879), 5 Q.B.D. 48.
(30) (1890), 15 App. Cas. at p. 348.
(31) [1931] All E.R. Rep. 454; [1932] 1 K.B. 149.
(32) [1931] All E.R. Rep. at p. 466; [1932] 1 K.B. at p. 172.
(33) (1890), 15 App. Cas. 334.
(34) [1931] All E.R. Rep. at p. 468; [1932] 1 K.B. at p. 177.

CUBAN ATLANTIC SUGAR SALES CORPORATION *v.* COMPANIA DE VAPORES SAN ELEFTERIO LIMITADA.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ.), November 23, 24, 1959.]

Practice—Service—Service out of jurisdiction—Breach of contract committed within the jurisdiction—Contract to deliver cargo to one port in United Kingdom to be nominated by plaintiffs—Ship lost when outside jurisdiction and before port of delivery nominated—Whether breach committed within the jurisdiction—Whether evidence that plaintiffs would have nominated English port admissible—R.S.C., Ord. 11, *r.* 1 (*e*).

A charterparty and bills of lading made outside the jurisdiction obliged shipowners, who were resident outside the jurisdiction, to deliver cargo to one safe port United Kingdom at charterers' option, excluding Manchester and Dunston, and entitled the cargo-owners to nominate the port on or before arrival of the ship at a specified distance from Land's End. Owing to breach of contract by the shipowners the ship sank before arriving within the specified distance, and so no port was ever nominated. On an application by the cargo owners for leave to serve out of the jurisdiction a writ for breach of contract, the cargo-owners contended that the action was " brought . . . in respect of a breach committed within the jurisdiction of a contract " within the meaning of R.S.C., Ord. 11, r. 1 (e)* and sought to tender evidence that they would have nominated a port of delivery within the jurisdiction.

Held: leave to serve the writ out of the jurisdiction could not be granted because, until a port in England had been nominated, there was not an obligation which had to be performed within the jurisdiction of which the shipowners were in breach, and thus there was no breach that had been committed within the jurisdiction and the case was not within R.S.C., Ord. 11, r. 1 (e); further, evidence that the cargo owners would have nominated a port of delivery in England was inadmissible.

Bell & Co. v. *Antwerp, London & Brazil Line* ([1891] 1 Q.B. 103) and dictum of LORD SHAND in *Comber* v. *Leyland* ([1898] A.C. at p. 533) applied.

Appeal allowed.

[As to service out of the jurisdiction in actions for a breach committed in the jurisdiction of a contract, see 26 HALSBURY'S LAWS (2nd Edn.) 32, para. 44, text and note (c); and as to the place of performance of a contract specifying alternative places, see 8 HALSBURY'S LAWS (3rd Edn.) 168, para. 287.]

Cases referred to:

Bell & Co. v. *Antwerp, London & Brazil Line*, [1891] 1 Q.B. 103; 60 L.J.Q.B. 270; 64 L.T. 276; 12 Digest (Repl.) 485, *3619*.

Comber v. *Leyland*, [1898] A.C. 524; 67 L.J.Q.B. 884; 79 L.T. 180; 12 Digest (Repl.) 354, *2750*.

Eider, The, [1893] P. 119; 62 L.J.P. 65; 69 L.T. 622; 12 Digest (Repl.) 512, *3845*.

Appeal.

The defendants appealed against an order of Winn, J., dated Oct. 22, 1959, giving the plaintiffs leave to serve notice of writ outside the jurisdiction. The facts are stated in the judgment of HODSON, L.J.

M. R. E. Kerr for the defendants.

J. F. Donaldson for the plaintiffs.

HODSON, L.J.: This is an appeal from an order of WINN, J., made on Oct. 22, 1959, which gave the plaintiffs leave to serve notice of writ outside the jurisdiction. The plaintiffs claim, as holders of two bills of lading dated Jan.

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* The relevant part of this rule is printed at p. 142, letter F, post.

25 and 31, 1958, damages for breach of contract in respect of the non-delivery A at United Kingdom port of a number of bags of Cuban centrifugal sugar shipped on board the defendants' steamship St. Elefterio at Matanzas and Tarafa, Cuba. The matter came before Master DIAMOND in chambers, who gave the plaintiffs leave on an ex parte application to issue a concurrent writ of summons against the defendants and to serve notice of writ at Costa Rica. On the matter coming before Master HARWOOD, who heard counsel on both sides and read B affidavits, it was ordered that the order of Master DIAMOND (dated Mar. 24, 1959) should be discharged. On appeal before the learned judge, the original order was restored, and Master HARWOOD's order was set aside.

The contract between the parties is contained in the bills of lading, which incorporate a charterparty headed "New York", dated Nov. 4, 1957, which relates to this ship; and by the addenda to the charterparty it was provided C that the ship should proceed as ordered by charterers or their agents and with all convenient speed to (by the second addendum) one safe port United Kingdom at charterers' option, excluding Manchester and Dunston. The discharge port was declarable one hundred and twenty hours prior to the vessel's arrival off Land's End. This charterparty was to be governed by American law. The arbitration clause provided that any dispute should be settled by commercial D men and that they were to be resident in New York. The general average was to be settled in New York. The charterparty contained the clause paramount, incorporating the United States Carriage of Goods by Sea Act, and thereby incorporated the Hague Rules. The steamer is described in the charter as being tight, staunch, strong and in every way fitted for the voyage.

What happened was that after the bags of sugar had been loaded at Cuba, E the ship sank with the cargo on Feb. 6, 1958, and the cargo was lost. Accordingly no port was nominated. The plaintiffs claim that they are entitled to bring their action based on failure to deliver; and it is to be noticed that the way in which they frame their claim is this: a claim for damages for breach of contract in respect of the non-delivery at United Kingdom port. Unless the words "United Kingdom port" are surplusage, the language of the writ F does not enable their claim to be covered by the rules. R.S.C., Ord. 11, r. 1, so far as relevant, is as follows:

> "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) The action is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made . . ." G

This application is based on the contention that the claim was made in respect of a breach within the jurisdiction.

Now the phrase "United Kingdom port" covers more than the jurisdiction. The jurisdiction of these courts does not extend to Northern Ireland or Scotland; H so that prima facie the plaintiffs are not entitled to succeed. They have succeeded before the learned judge, on the footing that the true effect of the obligation which was imposed on the defendants was to deliver at *every* United Kingdom port, not at one, although the contract was to deliver at one. The argument which was accepted by the learned judge was this. It is said: "You, the defendants, contracted to deliver at a nominated port in the United Kingdom. I We, the plaintiffs, had the option of nominating a port within that range. We would have been able to nominate a port within that range at the stated hour —one hundred and twenty hours before Land's End—if the ship had not been lost, and by your own wrongdoing you have put us in a position where it was no longer in our power to nominate a port in the United Kingdom within the range". Accordingly it is said that the defendants cannot be in a better position by reason of their own wrongdoing than they would have been in if the ship had been seaworthy and had been able to bring her cargo to a United Kingdom

A port. It is said that it is necessary to give effect to the rule by treating this as if it were a breach within the jurisdiction; and indeed the learned judge on that basis found that there was a breach as alleged within the jurisdiction. He said:

> "In allowing this appeal I base myself entirely on the narrow ground that B a contract to carry goods to any port in the United Kingdom (with the exception of two named ports), which gives the obligee an option to choose not later than a certain time, or the happening of a certain event, to which port goods shall be carried, comprises within the obligation undertaken by the obligor, the shipowners, an obligation to deliver to each and every port in the United Kingdom other than the excepted ports . . . When he fails C to deliver anywhere, he has committed a breach of his obligation to deliver where he could have been called on to deliver, i.e., at any place at which he could have been called on to deliver. It does not avail the defendants to show that, through no fault of the plaintiffs, the option was not exercised. The contract having been broken at every port in the United Kingdom (other than the excepted ports) there was a breach of contract committed in England." D

In my judgment that is a conclusion which it is not open to the court to reach. The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but whether a breach has been committed in the United Kingdom; and until a port in England E within the jurisdiction has been nominated there was no obligation on the shipowners of which they were in breach. That seems to me to be the plain conclusion on the language of the rule. It is quite true (as was pointed out by the learned judge) that there is no authority directly in point; but there is persuasive authority on the language of the old rule, which was superseded in 1921. R.S.C., Ord. 11, r. 1 formerly read (under sub-heading (e)):

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> "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

G

Counsel for the plaintiffs pointed out that the words "according to the terms thereof" and the words "ought to be performed within the jurisdiction" do not appear in the present rule. The words "according to the terms thereof" do not seem to me to add anything to the words which precede them; and although I accept the submission of counsel for the plaintiffs that the wording of the old H rule is, as it were, looking at the situation from a different point of time from the wording of the present rule, nevertheless I find no material distinction between the wording of the two rules for the purposes of the consideration of this matter.

Some authority which has been quoted by counsel for the defendants seems to me to have a bearing on this problem. The first case is *Bell & Co.* v. *Antwerp,* I *London & Brazil Line* (1), which was, of course, a decision under the old rule.

> "Where a foreign company chartered a ship from English shipowners to take a cargo from London to a foreign port, and by the terms of the charterparty it was stipulated that all lighterage should be at charterers' or consignees' risk and expense, the charterers indemnifying the shipowners from all lighterage on cargo at the port of discharge; but no place was specified for payment of moneys that might become payable under such

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(1) [1891] 1 Q.B. 103.

> contract of indemnity:—*Held*, that such contract was not one which, 'according to the terms thereof', ought to be performed within the jurisdiction, within the meaning of Ord. 11, r. 1 (e), and therefore leave to serve notice of the writ out of the jurisdiction in an action upon such contract against the foreign company could not be given."

A great deal of the discussion in that case was about the place where the contract as to payment of money was to be performed; but Lord Esher, M.R., in his judgment, having considered the facts of the case, made some observations which seem to me to be of general importance. He said (2):

> "How, then, does the case stand with regard to this contract to indemnify the shipowners in respect of lighterage? If the charterers were bound to perform it out of the jurisdiction if required by the shipowners to do so, how can it be said to be a contract which, according to its terms, ought to be performed within the jurisdiction?"

It is to be observed that that was a case where the option was the plaintiffs' option and in that sense it is parallel with this case, in which the plaintiffs had the option to nominate their port of discharge. The learned Master of the Rolls continued:

> "Where a contract is one which may be performed in or out of the jurisdiction, as the case may be, I do not see how it can be a contract which, according to its terms, ought to be performed within any more than without the jurisdiction."

This is such a case. This is a contract which could be performed either in or out of the jurisdiction; and until the nomination of a port had been made it could not be said that this was a contract to be performed within the jurisdiction. The matter was still at large.

The case cited was considered by the House of Lords in *Comber* v. *Leyland* (3). Lord Shand, in his speech, referred to the problem which had been considered after full arguments, in two cases: *Bell & Co.* v. *Antwerp, London & Brazil Line* (4), to which I have referred, and another case to which we have also been referred, *The Eider* (5); and said that he was clearly of opinion that the view taken by the learned judge in those cases as to the construction and effect of what I call the old rule was right. He continued (6):

> "The result of those cases, I take it, is practically this—that when it is shown that a plaintiff is entitled to require the performance of a contract in this country, and that consequently a breach takes place in this country, process may be served out of the country; but I hold upon the authority of those cases, and believing them to be in accordance with the true construction of the language used, that the rule is limited to this, and that there is no right to serve out of the jurisdiction where the performance of the contract may be given either within the jurisdiction or abroad in the option of the party who has undertaken the obligation."

That was a case where the option was that of the party who had undertaken the obligation; and the learned Lord was not specifically dealing with a case where the option was a plaintiff's option. In referring (6) to *Bell & Co.* v. *Antwerp, London & Brazil Line* (4) in his speech, part of which I have read, he was to my mind not doubting the validity of the view that the position would be the same if the option were a plaintiff's option.

For the reasons which I have given, supported by authority on the construction of the earlier rule, I am of the opinion that it is really impossible to come to the conclusion—which might be said to be one at which justice would seek to arrive—that there was here a claim for breach of contract within the jurisdiction. There has never been any breach within the jurisdiction because the time for nomination never arrived. If the ship was unseaworthy when she left Cuba and the owners did not take steps with due diligence to make her seaworthy before she started on her voyage, that would be a breach of contract outside the jurisdiction. Similarly, the failure to arrive at the point one hundred and twenty hours before Land's End would be a breach outside the jurisdiction; but in my view there is no breach within the jurisdiction here.

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(2) [1891] 1 Q.B. at p. 108. (3) [1898] A.C. 524. (4) [1891] 1 Q.B. 103.
(5) [1893] P. 119. (6) [1898] A.C. at p. 533.

Counsel for the plaintiffs sought, both before the master and the learned judge, to introduce evidence to establish that a port in this country would certainly have been nominated (Hull, as we were told); and no doubt there would have been available evidence to show that, as a matter of commercial practice, that nomination would have been made. We have not looked at that evidence, and I do not think that such evidence would be admissible. Even if it were admitted it would carry the plaintiffs no further; however much they might be able to say that Hull would have been the nominated port, it never was the nominated port and they could not, by that method, have extricated themselves from the difficulty in which they are, and brought themselves within the rule.

I would allow the appeal.

ORMEROD, L.J.: I agree. Counsel for the defendants at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under R.S.C., Ord. 11, r. 1 should be administered with the greatest care, as it is a rule which tends to encroach on the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction.

As the learned judge said, there is really no direct authority on this matter and the question has to be decided by considering the circumstances and the wording of the rule. The position in this case was that by the combined effect of the charterparty and the various addenda, the obligation on the defendants was to deliver the cargo of sugar at a nominated port within the United Kingdom, subject to one or two exceptions which are not material. That obligation remained during the time the contract was in existence, and remained in that form. It could only be reduced or crystallised by the plaintiffs nominating he port at which the sugar had to be delivered when the ship had arrived at a position one hundred and twenty hours from Land's End—a contingency which we know never happened. There never was any nomination, and therefore the obligation remained as it had been from the beginning, but counsel for the plaintiffs asks us to say (and I think that this is really the substance of his argument) that it was the intention of the plaintiffs to nominate a particular port, a port within the jurisdiction of this court: they did not nominate that port because they had no opportunity of nominating any port at all: but the defendants cannot be heard now to say that the plaintiffs did not nominate that port, because it was owing to the fault or breach of contract of the defendants that it was impossible to do so. In those circumstances the plaintiffs must be deemed to have nominated a particular port. In effect it was submitted that the defendants are estopped from denying that a port was nominated.

That is the argument which the plaintiffs put before this court. It is not, in my view, in accordance with the terms of the rule. The rule does not say a breach which shall be deemed to have been committed within the jurisdiction, or a breach which the defendants are estopped from denying was committed within the jurisdiction. The rule gives power to serve out of the jurisdiction only if there has been a breach of contract within the jurisdiction. In my opinion there has not been, and I agree that this appeal must be allowed.

Appeal allowed: order of Master HARWOOD *restored. Leave to appeal to the House of Lords refused.*

Solicitors: *Holman, Fenwick & Willan* (for the defendants); *Waltons & Co.* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

THE BOSWORTH.

OWNERS, ETC. OF STEAM TRAWLER WOLVERHAMPTON WANDERERS *v.* OWNERS OF MOTOR VESSEL BOSWORTH, HER CARGO AND FREIGHT. OWNERS, ETC. OF STEAM TRAWLER FARADAY *v.* OWNERS OF MOTOR VESSEL BOSWORTH, HER CARGO AND FREIGHT.

[CONSOLIDATED ACTIONS]

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), October 9, 1959.]

Shipping—Salvage—Payment into court of one sum—Two salvors—Two causes of action consolidated—Whether sum paid need be apportioned between two salvors—R.S.C., Ord. 22, r. 1 (2).

Two steam trawlers came to the assistance of the Bosworth after receiving distress signals and both rendered salvage services, the one by taking the crew of the Bosworth on board and the other by putting four men on board her and towing her safely to port. Actions for salvage were instituted on behalf of both salvors, and these actions were consolidated by order of the Admiralty registrar. The defendants, the owners of the Bosworth, paid a lump sum into court and sought to invoke the court's discretion not to apportion it between the two salvors, the plaintiffs, under R.S.C., Ord. 22, r. 1 (2), on the ground that it was a single salvage operation and, though two writs were issued, the action was consolidated.

Held: there were not less than two causes of action in this case as the salvors were different trawlers and independently rendered salvage services to the defendants' vessel in distress, and, as the pleadings showed, the defendants had an extensive knowledge of the services rendered sufficient to enable them to make an apportionment; therefore, the court in the exercise of its discretion would not relieve the defendants of making an apportionment and the application would be dismissed.

Observations of BARGRAVE DEANE, J., in *The Burnock* ((1914), 12 Asp. M.L.C. 490) applied.

[As to payment into court in Admiralty actions, see 1 HALSBURY'S LAWS (3rd Edn.) 90, para. 195, and, generally, see also 26 HALSBURY'S LAWS (2nd Edn.) 62, para. 100; and for cases on the subject, see 1 DIGEST 185, 186, *979-996* and SUPPLEMENTS and DIGEST (Practice) 482-484, *1616-1631* and SUPPLEMENTS.

For the Rules of the Supreme Court, Ord. 22, r. 1 (1), (2), see ANNUAL PRACTICE (1960) 521, 526.]

Cases referred to:

Burnock, The, (1914), 12 Asp. M.L.C. 490; 110 L.T. 778.

Gears v. *Braley,* [1940] 3 All E.R. 376; [1940] 2 K.B. 442; 109 L.J.K.B. 969; sub nom. *Gears* v. *Byaley,* 163 L.T. 240; 2nd Digest Supp.

A *Graham* v. *Heinke (C. E.) & Co., Ltd.*, [1958] 3 All E.R. 650; [1959] 1 Q.B. 225; [1959] 3 W.L.R. 737; 3rd Digest Supp.

Tallent v. *Coldwell*, [1938] 2 All E.R. 107; [1938] Ch. 653; 107 L.J.Ch. 230; 158 L.T. 347; Digest Supp.

Motion.

B This was a motion by the defendants, the owners of the motor vessel Bosworth, her cargo and freight, in salvage actions brought by the two several groups of plaintiffs, the owners of the steam trawler Wolverhampton Wanderers and the owners of the steam trawler Faraday, that the court should exercise its discretion under R.S.C., Ord. 22, r. 1 (2) and order that the defendants need not specify what sum was paid into court in respect of the services of each set of C plaintiff owners on the ground that it was a single salvage operation and that, though two writs had been issued, they had been consolidated by order of the Admiralty registrar on Oct. 10, 1958.

The salvage services took place from Dec. 21 to Dec. 23, 1957, when the Bosworth was in the North Sea on a voyage from Scotland to Norway with a cargo of coal and fourteen men on board. On the afternoon of Dec. 21, the D Wolverhampton Wanderers picked up a message that the Bosworth had developed a list in a heavy gale and was in distress. Later that night she arrived on the scene with another vessel, the Finn Merchant and stood by. Next morning the Bosworth sprang a leak and listed fifteen degrees starboard. Her master then decided to abandon the vessel and the Finn Merchant laid down oil so that the Bosworth's lifeboats could be launched and, eventually, after E unsuccessfully trying to get a line on the Bosworth, the Wolverhampton Wanderers collided with the Bosworth, but later managed to take her crew on board. The Finn Merchant had then left the scene. On Dec. 22, 1957, the Faraday arrived, also in response to a distress signal, and managed to get four of her crew on the Bosworth, fix a tow line, and with the Wolverhampton Wanderers astern, all three ships reached Aberdeen in safety.

F The motion was adjourned into court. The cases and authority enumerated below were quoted in argument in addition to those in the judgment*.

J. Franklin Willmer for the first-named plaintiffs.
D. H. Hene for the defendants.

KARMINSKI, J.: This is an application by the defendants in a salvage G action for an order that the sum paid into court by them in satisfaction of the claims of the two plaintiffs in the action need not be apportioned between them by the defendants. A sum of money has in fact been paid, as I understand it, into court, but not apportioned. I have not been informed, very rightly, what sum was paid in. It is necessary to deal with this matter in quite general terms because the action has not yet been tried and the facts cannot, therefore, be H ascertained. I shall have to do the best I can on the allegations set out in the pleadings; but as the matter has been pleaded very fully and with the greatest possible care at least I know the issues which will be canvassed before the trial judge.

It is desirable that I should refer at once to the order governing payments into court, which is R.S.C., Ord. 22. Order 22, r. 1 (1), provides that:

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> "In any action for a debt or damages or in an Admiralty action the defendant may at any time after appearance upon notice to the plaintiff pay into court a sum of money in satisfaction of the claim or . . . in satisfaction of one or more of the causes of action . . ."

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* *The Jacob Landstrom* (1879), 4 Asp. M.L.C. 58; *The Lee* (1889), 6 Asp. M.L.C. 35; *The Creteforest*, (1920) 15 Asp. M.L.C. 48; *Weber* v. *Birkett*, [1925] 2 K.B. 152; *Smith* v. *Schilling*, [1928] 1 K.B. 429; *Robertson* v. *Aberdeen Journals, Ltd.*, [1954] 2 All E.R. 767; ROSCOE'S ADMIRALTY PRACTICE (5th Edn.) (1931) 302, 303.

A R.S.C., Ord. 22, r. 1 (2) reads:

> "Where the money is paid into court in satisfaction of one or more of several causes of action the notice shall specify the cause or causes of action in respect of which payment is made and the sum paid in respect of each such cause of action unless the court or a judge otherwise order."

B It is in pursuance of the provisions of R.S.C., Ord. 22, r. 1 (2), that the defendants seek the order of this court dispensing with apportionment.

It is, I think, conceded by both sides that there is in the court a discretion whether or not to comply with an application of the present kind. What needs to be examined is the way in which such a discretion should be judicially exercised. The rule to which I have just referred is of fairly recent origin; that is it appeared C first in its present form in 1933, so that some of the earlier authorities on this topic are not particularly helpful since the earlier rule was quite different from the present and, indeed, in one respect the exact opposite.

Counsel for the defendants made two main submissions, first, that the present case is a single cause of action because it was a single salvage operation; and that although two writs were issued that is, for the purpose of this rule, immaterial, especially since the actions have been consolidated. D

Counsel who appears for the plaintiffs says that there is no single cause of action here; in fact, he went so far as to say that on an analysis of the pleadings there were no less than forty-two causes of action, he having taken separately the possibilities of not only the owners, but the various members of the crew bringing separate actions.

E When I come to look at the pleadings it is, I think, clear that, quite apart from separate writs, there are two causes of action here, and for this simple reason. The two plaintiffs are two different trawlers which, on the face of the pleadings, undoubtedly rendered at least some service to the defendants' vessel when she was in distress, although the nature of the precise services so rendered is disputed not only as between the two plaintiffs and the defendants, but, as F often happens in salvage actions, between the two plaintiffs themselves. There is, moreover, a further complication because the defendants have alleged that the crew of four put on board the defendants' vessel by the second plaintiffs, the Faraday, were guilty of grave misconduct by stealing and are, therefore, disentitled to any award of salvage, or should have that award largely reduced (1). Clearly if this was one cause of action quite different considerations might arise.

G In his reply counsel for the defendants called my attention to a recent decision of the Court of Appeal in *Graham* v. *C. E. Heinke & Co., Ltd.* (2). In that case an injured man alleged and proved that he had suffered serious personal injuries while at work and, following a very usual practice, his advisers framed his complaint in the alternative, alleging both common law negligence and a breach of statutory duty under the Factories Act, 1937. A sum of money was paid in and H the learned trial judge, DONOVAN, J., made an award which was less than the sum paid in. In that case only one sum was paid in and it was not specified in respect of which of the alternative claims it was paid in to satisfy. The Court of Appeal increased the damages awarded by DONOVAN, J., so that the payment-in point did not strictly arise; but the Court of Appeal deliberately gave their reasons for the view which they had taken on the question of payment in. Refer- I ring to that particular case LORD SOMERVELL (who gave the only judgment of the Court of Appeal) said this (3):

> "In cases such as the present, however, where the relief claimed is not cumulative, and where the two causes of action are alternative methods of claiming the same relief, the embarrassment which the rule is designed to

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(1) These allegations were withdrawn at the trial.
(2) [1958] 3 All E.R. 650; [1959] 1 Q.B. 225.
(3) [1958] 3 All E.R. at p. 651; [1959] 1 Q.B. at p. 228.

A prevent cannot arise, and, moreover, it would be impossible to comply with the rule by allocating part of the sum paid in to one, and part to the other, of the two alternative causes of action. Therefore, the learned judge was right in deciding that there had been no breach of the rule."

MORRIS and PEARCE, L.JJ., agreed with that view.

B Counsel for the defendants with great industry referred me to a number of other cases where there had been no apportionment, and I think it is desirable to refer very briefly to two of them since they were heard after the present rule came into force. The first is a copyright action, *Tallent* v. *Coldwell* (4), where the claim was for damages for infringement of copyright, damages for detention, and damages for conversion. It was held by FARWELL, J., under R.S.C., Ord. C 22, r. 1 (1) and (2), that the defendants could pay into court, with a denial of liability, one sum of money in respect of the whole action, without specifying the cause of action. It is, I think, not very difficult to distinguish that case from the present. First of all, the subject-matter was widely different, and, secondly, the plaintiff was the same in all the causes of action. FARWELL, J., was careful to state in the course of his judgment that a case of that kind was, as he put D it (5) " one of the few cases to which the rule was intended to apply "; because, as he pointed out, in a case of that kind without the relief which the defendants sought they would be put in a position of some embarrassment, to permit them to do what they wanted to do, that is to pay in; he, therefore, with those reservations, made the order.

The other case to which I desire to refer is a common law case decided in the E King's Bench Division, *Gears* v. *Braley* (6). In that case there were claims both under Lord Campbell's Act and under the Law Reform (Miscellaneous Provisions) Act, 1934, and there was an application to deal with the matter under R.S.C., Ord. 22. Both STABLE, J., and the Court of Appeal held that it would be a wrong exercise of any discretion conferred on the court under R.S.C., Ord. 22, r. 1 (2), to allow a lump sum to be paid into court by the defendant in respect of F all the causes of action. LUXMOORE, L.J., said (7):

> " Where, however, there are different classes of persons beneficially entitled to the damages, it seems to me that it would be an entirely wrong exercise of any discretion conferred on the court under R.S.C., Ord. 22, r. 1 (2), to allow a lump sum to be paid in."

GODDARD, L.J. (8), agreed with some reluctance, suggesting that perhaps the G position might after the war be considered by the Rule Committee. I am, of course, unaware whether or not, in accordance with that suggestion, the Rule Committee has ever considered the matter; but the rule has not been altered.

I have, therefore, come without any doubt to the conclusion here that there is more than one cause of action; indeed, there are in this case at least two and, as counsel for the first-named plaintiffs no doubt correctly suggested, probably a H good deal more than two causes of action. But even after deciding that there is more than one cause of action here there is no doubt a discretion in the court to allow the application made here.

Counsel for the defendants put his submission on that in this way. He says that this is a case, on the facts as at present ascertained, of great difficulty because the defendants really do not know which of the two plaintiffs did what, I if any, work; and up to a point I have a certain limited sympathy with that. I am bound to say, however, that on the pleadings my sympathy with counsel for the defendants' difficulties is very limited. The defendants' case is set out in great detail in the defence and this, at any rate, is clear; that the towing operations (which happily resulted in the defendants' vessel being brought back safely to port after her crew had been saved) took thirty-three hours and although it may well be that the defendants' crew (who had been subjected to a great deal of strain and anxiety) were for a time somewhat out of action, I am quite unable to feel that her officers and crew had no knowledge of, and took no interest in, what was going on. It may be—indeed, it is very likely—that their knowledge is not complete. I say that because the weather was at all times bad, although its ferocity, happily, diminished; and I can well understand that those of the defendants' crew who were on board the Wolverhampton Wanderers could not have known precisely what was going on between the second plaintiffs and the Faraday's master and the crew which he put on board the defendants' vessel. But it is not a case where the defendants' vessel had been abandoned and had been lying derelict for some time. Her ship's company were, as it were, next door, and had at least good opportunities for seeing what had happened. It is, of course, impossible without trying the case to ascertain, or even to estimate precisely, all their knowledge, but that at least considerable knowledge was available I have no doubt.

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(4) [1938] 2 All E.R. 107; [1938] Ch. 653.
(5) [1938] 2 All E.R. at p. 109; [1938] Ch. at p. 658.
(6) [1940] 3 All E.R. 376; [1940] 2 K.B. 442.
(7) [1940] 3 All E.R. at p. 378; [1940] 2 K.B. at p. 444.
(8) [1940] 3 All E.R. at p. 379; [1940] 2 K.B. at p. 445.

Counsel for the defendants called my attention to a decision of Bargrave Deane, J., in *The Burnock* (9). That decision was criticised by counsel for the first-named plaintiffs as being probably inconsistent with the views expressed by the Court of Appeal in other cases under the rules obtaining in 1914. For the purpose of this judgment I am prepared to treat this case as certainly having no direct bearing on the interpretation of the present rules which came into existence almost twenty years after that decision. I have derived, however, great help from some of the observations made by Bargrave Deane, J., whatever the rule was at the time. That was a salvage case in which a steamship, the Burnock, broke down and got into difficulties, and a steam trawler and the Seaham Harbour lifeboat came at various stages to her rescue. The actions were consolidated and the defendants tendered a lump sum of £350 to both salvors saying that it was sufficient for the services rendered. A summons was taken out under the existing rules for apportionment. The matter came on appeal from the learned assistant registrar to Bargrave Deane, J., and he considered the position. He said this (10):

> "It is impossible to lay down any hard-and-fast rule. There are some cases—the salvage of a derelict, for instance—where the persons whose property has been salvaged cannot know the circumstances of the salvage, and it is impossible for them, having nobody they can call to deal with the merits of the salvage, to come to a conclusion as to what apportionment they should make among the various salvors. On the other hand, there are cases where a ship goes ashore. Her crew are on board her. Her crew are present during the whole of the salvage services, and they know, as well as anybody, what the merits may be of the services of the various salvors. The value of the property salved is, of course, known to the owners of the salved property, but the merits of the services may or may not be. In the case of a derelict the owners may say 'Our ship in her derelict condition was worth so much and we tendered so much because that which was practically lost to us has been saved'. In such a case the salvors must either agree or they must ask the court to apportion. Though that expense should be saved wherever it is possible to do so. It seems to me that the fair way to look at this matter is this: Where the defendants' servants are present and able to give full information to the defendants as to the nature of the services and the particular services rendered by each set of salvors, the defendants in making their tender must have inquired into all the circumstances in order to arrive at the tender; and it stands to reason they must have inquired as to the merits of the various salvors in arriving at the lump

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(9) (1914), 12 Asp. M.L.C. 490.

(10) (1914), 12 Asp. M.L.C. at pp. 490, 491.

A sum which they tendered. In such a case as that I think the defendants should apportion. They must have gone into the matter, and they know what was in their minds in making the tender. I do not think it is advisable, if it is possible to avoid it, to treat the sum tendered as a bone thrown among a lot of dogs, who are left to fight it out."

Counsel for the defendants said that the observations of BARGRAVE DEANE, J., B about the failure to give full information mean what they say and must be taken literally. This, as I understand it from the report, was not a reserved judgment and I have to consider what possibly BARGRAVE DEANE, J., meant when he used the words "full information to the defendants as to the nature of the services . . . rendered". In my view he was drawing a broad distinction between the case of a derelict and the case where the crew were present during the whole of the salvage C services and, as he put it, "know, as well as anybody, what the merits may be of the services of the various salvors". I do not think for a moment that when he used the words "able to give full information" BARGRAVE DEANE, J., meant that every movement of the various salvors had been fully observed and noted by the salved ship, but he was using those words in their general sense.

I propose to treat the matter in the same way. I have not the slightest D doubt as the facts are pleaded that, putting it at its lowest, the defendants, through their crew, have at least an extensive knowledge of the various services rendered by the two plaintiffs and have at their disposal sufficient information to enable them to make an apportionment in this case. I do not propose, using the phraseology of BARGRAVE DEANE, J., to allow the sum paid into court to be treated as a bone thrown among a lot of dogs. In my view, exercising my E discretion in what I hope is a judicial manner and in accordance with the order, this application will be dismissed.

Motion dismissed.

[The case was tried before LORD MERRIMAN, P., on Nov. 2, 3, 4, 5, 9, 10 and 12, 1959, who found that the plaintiffs' salvage services were proved and awarded F the first-named plaintiffs, the owners of the Wolverhampton Wanderers, £11,400 and the second-named plaintiffs, the owners of the Faraday, £8,260. Counsel for the defendants then disclosed that, pursuant to an order by KARMINSKI, J., dated Oct. 9, 1959, he had apportioned the sum the defendants had paid into court as follows—£4,500 to the first-named plaintiffs and £13,000 to the second-named plaintiffs. These sums were separately declined. LORD MERRIMAN, P., G ordered the defendants to pay the costs of the first-named plaintiffs, such costs to include the costs of the consolidated action except for the amount attributable to the claim of the Faraday after the date of payment into court. HIS LORDSHIP also awarded the second-named plaintiffs their costs up to the date of payment in, and thereafter, ordered that the second-named plaintiffs pay any costs (excluding the costs as to the issue of pilfering which was abandoned) of the consolidated action which were directly attributable to their being H a party to the consolidated action and that the defendants should be ordered to pay the costs of the pilfering issue.]

Solicitors: *Holman, Fenwick & Willan* (for the first-named plaintiffs); *Theodore Goddard & Co.*, agents for *Andrew Jackson & Co.*, Hull (for the second-named plaintiffs); *Keene, Marsland & Co.* (for the defendants).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

Re APEX FILM DISTRIBUTORS, LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Sellers, L.JJ.), December 4, 7, 8, 15, 1959.]

Company—Winding-up—Contributory—B contributories—Calls on shares—Call made on A contributory—Notification of B contributories—Whether call made on B contributories—Debts subsequently bought up for B contributories—Reduction of liability—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 212 (1) (*c*), *s.* 214—*Companies* (*Winding-up*) *Rules*, 1949 (*S.I.* 1949 No. 330), *r.* 88.

The issued capital of a company included preference shares which were partly paid up. In March, 1954, the company was ordered to be wound up compulsorily, and at that time W. owned all the preference and preferred ordinary shares. On Dec. 14, 1955, a resolution was passed sanctioning a call on all the contributories of the company. On Dec. 20, 1955, a call was made in accordance with r. 88* of the Winding-up Rules, the requisite form, form 53, being filed with the registrar; the only A contributory in respect of the said shares (i.e., W.) was notified by letter and payment was required from him. On Dec. 21, 1955, a letter was sent by the liquidator to the B contributories notifying them of the call on the A contributory, and informing them that, if the A contributory failed to pay, a claim for the amount outstanding would be made against them under s. 212 of the Companies Act, 1948. W. failed to pay the amount which he was called on to pay and there was evidence that he could not pay. By a letter dated May 3, 1957, the liquidator claimed payment from the B contributories, but that letter did not amount to a call since form 53 was not filed. On Mar. 2, 1959, two " old " debts, in respect of which the B contributories would otherwise have been liable, were released. On the question whether the extinguishment or release of these debts reduced the liability of the B contributories,

Held: the liability of the B contributories was reduced by the release of the " old " debts as there had been no call on them, for W. had not defaulted at the time of the call of Dec. 20, 1955, and thus, in view of s. 212 (1) (c)† of the Companies Act, 1948, the liability of the B contributories had not then arisen; and, moreover, the letter of Dec. 21, 1955, clearly indicated that the liquidator did not regard the call as having been made on the B contributories.

Brett's Case ((1873), 8 Ch. App. 800) applied.

Decision of WYNN-PARRY, J. ([1959] 2 All E.R. 479) reversed on another ground (see p. 157, letter D, post).

[As to the liability of past members of a company to contribute in a liquidation, see 6 HALSBURY'S LAWS (3rd Edn.) 632, 633, para. 1244; and for cases on the subject, see 10 DIGEST (Repl.) 930, 931, *6367-6372*.

For the Companies Act, 1948, s. 212 (1) (c), s. 214, see 3 HALSBURY'S STATUTES (2nd Edn.) 632, 634; and for the Companies (Winding-up) Rules, 1949, r. 88, see 4 HALSBURY'S STATUTORY INSTRUMENTS 153.]

Cases referred to:

Blakely Ordnance Co., Re, Brett's Case, Re Oriental Commercial Bank, Morris' Case, (1873), 8 Ch. App. 800; 43 L.J.Ch. 47; 29 L.T. 256; 37 J.P. 612; 10 Digest (Repl.) 931, *6371*.

City of London Insurance Co., Ltd., Re, [1931] All E.R. Rep. 519; [1932] 1 Ch. 226; 101 L.J.Ch. 124; 146 L.T. 296; 10 Digest (Repl.) 964, *6643*.

Greening & Co., Re, Marsh's Case, (1871), L.R. 13 Eq. 388; 41 L.J.Ch. 111; 25 L.T. 651; 10 Digest (Repl.) 956, *6578*.

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* The relevant terms of r. 88 of the Companies (Winding-up) Rules, 1949, are set out at p. 156, letter C, post.

† The terms of s. 212 (1) (c) are set out at p. 156 letter F, post.

A **Appeal.**

This was an appeal by the applicants, eight B contributories of Apex Film Distributors, Ltd., from an order of WYNN-PARRY, J., made on May 7, 1959, and reported [1959] 2 All E.R. 479, whereby he declared that the liability of the applicants as contributories to contribute in the winding-up of the company had not been reduced by the release of two debts.

B *G. B. H. Dillon* for the applicants, the B contributories.

K. W. Mackinnon, Q.C., and *M. M. Wheeler* for the respondent, the liquidator.

Cur. adv. vult.

Dec. 15. The following judgments were read.

LORD EVERSHED, M.R.: This case is concerned with a question which C (for obvious reasons) rarely comes before the court, namely, the liability, in a winding-up of an insolvent company, of the B contributories. The extent of such liability is defined by the Companies Act, 1948, s. 212, which I shall presently read so far as it is relevant; but the extent has also been stated in summary form by EVE, J., in *Re City of London Insurance Co., Ltd.* (1) and I gratefully adopt what that learned judge said (2):

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> " Their liability to contribute is created by statute, and is restricted to so much of the amount left unpaid on their shares by their associated A contributories as does not exceed the balance of the debts and liabilities of the company, contracted before they respectively ceased to be members, which remains unpaid after the assets of the company and the contributions of the A contributories have been applied pari passu towards the payment E of all the debts of the company whenever contracted."

The question more precisely debated before us may be stated thus: Is there some point of time (and if so, what is it?) when the liability of the B contributories must be taken (subject at most to adjustment to allow for errors in estimation and the like) as fixed so as not thereafter to be capable of reduction as the result of total F or partial extinguishment of debts contracted before they (the B contributories) ceased to be members?

It is conceded (since *Re Blakely Ordnance Co., Brett's Case* (3)) that the liability is not fixed at the date of the winding-up, but that it may be reduced as a result of dealings with the " old debts " (as I will call them) up to the date of the call made on the B contributories for their contribution. But it is said by the G liquidator in this case, and it was held by WYNN-PARRY, J., in the court below, that the liability is crystallised at the date of such call and cannot be affected by anything done thereafter. This view is said to be supported by the terms of s. 214 of the Act and by the language and the reasoning of LORD SELBORNE, L.C., in *Brett's Case* (4)—language quoted by the learned judge (5), which I need not repeat. On the other hand, it is said that there is neither logic nor justice in H drawing the line at the date of the call (or indeed at any other point short at any rate of final distribution); and this view is said to be supported by the decision of BACON, V.-C., in *Re Greening & Co., Marsh's Case* (6) and by EVE, J., in the case that I have already mentioned (*Re City of London Insurance Co., Ltd.* (1)) and also by the uniform views expressed in every edition of BUCKLEY ON THE COMPANIES ACTS and in the relevant volumes of HALSBURY'S LAWS OF ENGLAND. I Without multiplying citation, I refer to a passage in the present (the 13th) edition of BUCKLEY at p. 434. I there find the following:

> " The rules, then, which have been established with respect to the contributories of a company in liquidation and the application of their contributions may be briefly stated in some such form as the following . . ."

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(1) [1931] All E.R. Rep. 519; [1932] 1 Ch. 226.

(2) [1931] All E.R. at p. 520; [1932] 1 Ch. at p. 230.

(3) (1873), 8 Ch. App. 800.

(4) (1873), 8 Ch. App. at p. 810.

(5) [1959] 2 All E.R. at p. 483.

(6) (1871), L.R. 13 Eq. 388.

There follow five heads in Roman numerals, and the fifth is:

> " If, before a call is made upon the B list, or before payment of such call, the debts in respect of which a B contributory was, having regard to sub-s. (1) (b) [of s. 212] liable to contribute, or any of them, are in any manner released or extinguished in whole or in part, his liability to contribute to the assets of the company is (subject to any question as to the costs of the winding up) thereby pro tanto discharged."

Against the words " or before payment of such call " reference is made to a note, and in the note is a citation of *Marsh's Case* (7).

The essential facts in the present case may be summarised as follows: (i) On Mar. 23, 1954, the winding-up order was made. (ii) A resolution was passed by the committee of inspection to make a call on all the partly paid shares on Dec. 14, 1955. That resolution is in the following form:

> " Resolved that a call of 10s. per share on the 7½ per cent. redeemable preference shares and a call of 2s. 6d. per share on the 10 per cent. preferred ordinary shares, be made by the liquidator on all the contributories of the company."

It bears the signatures of three persons, being the members of the committee of inspection. It follows from what I have read that of the company's capital the redeemable preference shares and the preferred ordinary shares were all partly paid, the only fully paid shares being, I think, a small block of deferred shares.

(iii) A call was then made in accordance with the requirements of the Winding-up Rules, which included the filing of the requisite form, following what is called form 53, appended to the Winding-up Rules. The date of that was Dec. 20, 1955; and the call as it was filed reads as follows:

> " I, Reginald Charles Fripp, the liquidator of the above named company, in pursuance of a resolution of the committee of inspection passed Dec. 14, 1955, hereby make a call of 10s. per share on the 7½ per cent. redeemable preference shares and a call of 2s. 6d. per share on the 10 per cent. preferred ordinary shares, on all the contributories of the company, which sum is to be paid at my office, 27 Martin Lane, London, E.C.4, on the third day of January, 1956."

(iv) Letters were then sent by the liquidator to both the A and B contributories. The A contributory was one person only, a Mr. Williams; and in his case the letter took this form. The document bears the heading

> " In the Matter of Apex Film Distributors, Ltd., and In the Matter of the Companies Act, 1948. Take notice that the committee of inspection in the winding up of this company have sanctioned a call of 10s. per share . . . on all the contributories of the company. The amount due from you in respect of the call is the sum of £26,250. This sum should be paid by you direct to me at my office, 27 Martin Lane . . . on or before Jan. 3, 1956."

It is dated Dec. 20, 1955. Underneath is a note:

> " If you do not pay the sum due from you by the date mentioned, interest will be claimed on such sum at the rate of 4 per cent. per annum from the said date until payment."

The letter (bearing date one day later, Dec. 21) to the B contributories was as follows:

> " Apex Film Distributors Ltd. (in Liquidation). I enclose herewith a copy of a resolution passed by the committee of inspection, sanctioning a call on all the contributories in respect of [these redeemable preference and

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(7) (1871), L.R. 13 Eq. 388.

> A preferred ordinary shares of the company]. As you are aware, you were included in the list as a 'B' contributory in respect of (blank) . . . redeemable preference shares, (blank) . . . preferred ordinary shares, the calls on which total £(blank). A formal claim for the full amount of the total call on all the issued shares, of both classes, has been made against the 'A' contributory demanding payment by Jan. 3, 1956, but in the event of non-B payment or only part-payment by him, a claim for any balance outstanding, on the shares shown above, will be made against you, having regard to the provisions of s. 212 of the Companies Act, 1948."

It was signed by the liquidator; and a copy of the committee of inspection's resolution was enclosed.

C (v) Nothing whatever was recovered from the A contributory, Mr. Williams. The story of the liquidator's endeavours in that respect is told in an affidavit sworn by him on June 18, 1957, to which I shall later make some reference.

(vi) On May 3, 1957, the liquidator addressed another letter to the B contributories. That was in this form (headed as before):

> D "In my letter of Dec. 21, 1955, I informed you that the committee of inspection had sanctioned a call on all the contributories and gave details of the number of shares in respect of which you were included in the list of 'B' contributories. I further explained that, in the event of non-payment of the call by the 'A' contributory, a claim would be made against you, having regard to the provisions of s. 212 of the Companies Act, 1948. No payment has been made by the 'A' contributory and I therefore enclose a formal E notice claiming the sum of £(blank) from you."

The formal notice was very much in the same style as the original notice to Mr. Williams:

> "Take notice that the committee of inspection in the winding up of this company have sanctioned a call [etc.]; The amount due from you as a 'B' contributory in respect of the call, in accordance with s. 212 of the Com-F panies Act, 1948, is as follows: [and then the calculation is made.] This total sum should be paid by you direct to me at my office, 27 Martin Lane . . . on or before May 17, 1957."

There is also a note subscribed about interest.

(vii) At a later date one or more of the "old debts" of the company was G released or extinguished, the total sum involved being (we understood) over £13,000.

Before commenting on the facts and the documents to which I have alluded, I must make my references to the Companies Act, 1948. Section 212 (1), so far as relevant, is as follows:

> "In the event of a company being wound up, every present and past H member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of sub-s. (2) of this section and the following qualifications . . ."

Subsection (2) relates to directors and managers, and I need not make further I reference to that. The first qualification is:

> "(a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up."

I pause to state that the appellants, who were past members or B contributories, are not excluded by that provision. The subsection continues:

> "(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

> (c) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act; (d) in the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member."

The other qualifications in headings (e), (f) and (g) I can pass over. Section 214 provides:

> " The liability of a contributory shall create a debt (in England of the nature of a specialty) accruing due from him at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability."

The relevant Winding-up Rule is r. 88:

> " When the liquidator is authorised by resolution . . . to make a call on the contributories he shall file with the registrar a document making the call in the form 53 in the appendix with such variations as circumstances may require."

Form 53 is the document making the call, which has to be filed; and for present purposes it may be taken that the call which I read dated Dec. 20, filed by the liquidator in this case, was entirely within the ambit of form 53. I should add that the two sections from which I read—s. 212 and s. 214—appear to have remained substantially and (so far as relevant) entirely in their present form since their language was incorporated in s. 38 and s. 75 respectively of the Companies Act, 1862.

I now return to the call of Dec. 20, 1955. There is no doubt, I think, that this was a valid call under the Act and in accordance with the rules; but it was not, and could not be, in my judgment, an effective call for any purpose on the B contributories. I say that for two reasons: first, at that date the B contributories were not under any liability, since the conditions under s. 212 for such liability, and particularly the condition in qualification para. (c) of that section, were not then satisfied—(c) being (as it will be remembered) in this form:

> " a past member shall not be liable to contribute unless it appears to the court [or, I would add, to the liquidator] that the existing members are unable to satisfy the contributions required . . ."

The second reason for my conclusion is that it is quite clear from the liquidator's letter to the B contributories of Dec. 21, 1955, that he, the liquidator, did not himself so regard it.

At that point I would like to add my reference to the evidence of Mr. Fripp, the liquidator, contained in para. 6 and para. 7 of his affidavit sworn on June 18, 1957, to which I have already referred. Paragraph 6:

> " Mr. Williams failed to pay the sum of £26,250 and on Mar. 5, 1956, this Honourable Court ordered him to pay the said sum to me on or before Mar. 12, 1956, or subsequently within four days after service of the said order upon him."

The order was served on Mr. Williams on Mar. 23, as is evidenced by another affidavit. Paragraph 7:

> " Notwithstanding the said order, Mr. Williams failed to pay the said sum or any part thereof and stated that he was unable to pay the same. Mr. Williams offered, however, to submit to an examination as to his means and at the conclusion of such examination agreed to put his statement in the form of a statutory declaration which, at my request, was subsequently amplified by a further statutory declaration."

The statutory declarations are exhibited.

> "As appears therefrom, Mr. Williams has no free assets of any value, his principal source of income being his salary as managing director of National Screen Service, Ltd. which, after deducting P.A.Y.E., amounts to £71 10s. per week. On Aug. 31, 1956, I obtained a garnishee order nisi against Mr. Williams' bank account with First National City Bank of New York but this proved abortive as the account only has 15s. in it. On Nov. 22, 1956, I also attempted unsuccessfully to garnishee Mr. Williams' salary from National Screen Service, Ltd."

Now follow the two pregnant sentences:

> "My committee of inspection and I respectfully submit that we have taken all reasonable steps open to us to obtain payment from Mr. Williams of the amount due from him. From the inquiries and investigations which we have made, we have come to the conclusion that Mr. Williams is unable to satisfy the contributions required to be made by him under the Companies Act, 1948, and we accordingly desire to proceed against the 'B' contributories."

WYNN-PARRY, J., decided the present case on the basis that the liquidator's letter to the B contributories of May 3, 1957, amounted to a call. Counsel for the liquidator before us conceded that this cannot be so, since the requirements of the Winding-up Rules, and particularly r. 88 and the appended form 53, which is required to be used on the occasion of a call, had not been complied with; and in the circumstances counsel for the liquidator was compelled to say that what the liquidator did on Dec. 20, 1955, amounted to a call on the B contributories for the purposes of s. 214: i.e., he contended that the debt which s. 214 states to be created became payable, at the time when that call was made on Dec. 20, 1955, by the contributories. In my judgment this cannot be sustained. Whatever be the exact construction of s. 214, and particularly of the phrase at the beginning of the section, "The liability of a contributory", in its context, the B contributories were, at Dec. 20, 1955, by virtue of the clear terms of s. 212, and particularly sub-s. (1) (c), under no liability at all: so that there was then nothing capable of being called or of crystallising—and this view is plainly in accordance (as I earlier stated) with what the liquidator thought and intended according to the letter that he wrote on Dec. 21, 1955, and according to the evidence of his affidavit.

The matter may, I suggest, be tested by asking: Could the liquidator, on Jan. 4, 1956 (which was the day after the date fixed for payment by the A contributory in his notice of Dec. 20 to Mr. Williams) have sued the B contributories as for a specialty debt? In my judgment the answer to that question must quite plainly be in the negative. Such an action would not have lain, because at that time the liquidator could not establish, in terms of s. 212, that the B contributories were under any liability whatever.

The result, then, seems to me to be inevitable: there has been since Dec. 20 no other call which satisfies the requirements of the Act and the regulations; so that any extinguishment of old debts, whole or partial, which has so far occurred must, on the admitted authority of *Brett's Case* (8) operate to reduce the liability of the B contributories. This conclusion is sufficient to dispose of the present case in favour of the B contributories; and I prefer, for my part, to express no concluded view on the more general, but interesting and difficult, question which has been argued before us. WYNN-PARRY, J., thought that *Marsh's Case* (9) could not be treated as an authority, since the point was not really argued but rather assumed; and he further pointed out that *Marsh's Case* (9) was decided before *Brett* (8) but that the ratio of the latter was that the date of the effective call was the determining date.

It must be said that counsel for the B contributories, to my mind, has produced at any rate a formidable argument the other way, particularly in light of the consistent statements in all the editions of Buckley and Halsbury (which were not referred to by Wynn-Parry, J., in his judgment) and of Eve, J.'s judgment in 1931 in *Re City of London Insurance Co.* (10). But if the date of the effective call is not the determining date, then it is clear to my mind that it is a difficult question to say what is the correct date. For example, what is the position if an " old debt " is wholly or partially extinguished *after* a B contributory has paid the whole or part of a call? What is the position if there are successive calls and some change has occurred in the " old debts " between the two? Is the result the same or different for B contributories (a) when an " old debt " is at some stage after a call extinguished and (b) when the liability of an A contributory, properly regarded at the time of the call as worthless, is then wholly or partially, but unexpectedly discharged?

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(8) (1873), 8 Ch. App. 800.

(9) (1871), L.R. 13 Eq. 388.

In the circumstances of the present case, these questions are academic, and I prefer, therefore, to leave them open, expressing no view of my own on them and thinking that a decision on them should await a case when such a decision is necessary—which I think all the more important since (as I stated at the beginning of my judgment) cases concerning the liability of B contributories are only likely to arise very rarely and may arise in very special circumstances which it is impossible to forecast. For the reasons which I have stated, I think that the appeal should be allowed.

ROMER, L.J.: I agree. It is expressly provided by s. 212 (1) (c) of the Companies Act, 1948, that a past member shall not be liable to contribute, unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act. In other words, the liability of the B contributories to contribute on a winding-up does not arise at all, unless it appears to the court (or, by delegation, the liquidator) that the A contributories are unable to satisfy the calls made on them; and the B contributories' liability is in any case limited to the extent of the A contributories' default. It was thought when this case was before Wynn-Parry, J., that the call on the B contributories which was relevant for consideration was made on May 3, 1957, by which date it had become apparent that the A contributory had defaulted on his liability; and the problems which would have arisen on that footing were argued before the learned judge and decided by him. In the course, however, of the discussion before this court, it transpired that the call which the liquidator made on the B contributories by his letter and notice of May 3, 1957, was not in fact effectual inasmuch as form 53 of the appendix to the Winding-up Rules was not filed as required by r. 88. The only occasion on which form 53 was filed was on Dec. 20, 1955, on which date the liquidator made a call on all the contributories of the company, both A and B; and accordingly counsel for the liquidator conceded that it was on that call alone that he could rely. On that basis it is quite clear that, by reason of the provision of s. 212 (1) (c) above referred to, the liability of the B contributories has never yet arisen; for on Dec. 20, 1955, the liquidator did not know and could not know to what extent (if at all) the A contributory would default in his contribution. It is plain from the liquidator's circular letter of Dec. 21, 1955, to the B shareholders that he did not regard himself as already having made a claim on them; and indeed, his letter of May 3, 1957, shows that he did not regard a claim as having been made on them even up to that date. In addition, there is ample evidence that for a long period after Dec. 20, 1955, the liquidator made constant but unsuccessful efforts to obtain the contribution for which the A contributory was liable.

The position, then, quite shortly is that no effectual call had been made on the B contributories by Mar. 2, 1959, on which date two of the " old " debts in

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(10) [1931] All E.R. Rep. 519; [1932] 1 Ch. 226.

A respect of which these contributories would be liable by reason of the A contributory's default were released; nor has any valid call been made on them since. It follows from this (*Brett's Case* (11)) that the release of these debts operated to reduce, to the value of the debts, the liability of the B contributories.

On this point, therefore, the appeal must be allowed; and, with LORD EVERSHED, M.R., I prefer to express no opinion on the points with which WYNN-PARRY, J., B dealt in his judgment but which, as it now appears, do not in fact arise for decision in the present case.

LORD EVERSHED, M.R.: I have been authorised by **SELLERS, L.J.,** to say that he concurs in the judgments which have just been delivered.

Appeal allowed.

C Solicitors: *Allen & Overy* (for the applicants); *Linklaters & Paines* (for the respondent).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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PACHNER *v.* PARKER (formerly PACHNER).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Marshall, J.), November 27, 1959.]

Divorce—Maintenance—Application—Leave of judge—Claim not included in petition but made nine and a half years after decree—Leave requisite E *under rules current at date of decree if application delayed for two months—Whether procedural rules applicable those at date of petition or of application—No obligation at date of petition to include claim for maintenance in petition—Leave not required merely on ground of lapse of time at date when application made—Matrimonial Causes Act,* 1950 (14 *Geo.* 6 *c.* 25), *s.* 19 (3), *s.* 29—*Matrimonial Causes* (*Property and Maintenance*) *Act,* F 1958 (6 *&* 7 *Eliz.* 2 *c.* 35), *s.* 1—*Matrimonial Causes Rules,* 1957 (*S.I.* 1957 *No.* 619), *r.* 3 (3) *proviso* (ii), *r.* 44 (1) *as amended by Matrimonial Causes* (*Amendment*) *Rules,* 1958 (*S.I.* 1958 *No.* 2082).

On June 15, 1949, the wife filed a petition for divorce on the ground of the husband's adultery. The petition did not include a prayer for maintenance. The petition was undefended and on Oct. 10, 1949, the wife was granted a G decree which was made absolute on Nov. 24, 1949. By r. 44 (1) of the Matrimonial Causes Rules, 1947, which were then in operation, an application by a wife for maintenance more than two months after decree absolute required leave. By s. 1 (1)* of the Matrimonial Causes (Property and Maintenance) Act, 1958, any power of the court under s. 19 (3) of the Matrimonial Causes Act, 1950, viz., the power to award maintenance H on or after decree, was exercisable at any time after the decree was pronounced. The wife did not give any notice of application for maintenance until Feb. 26, 1959, by which date the Rules of 1947 were revoked and the current rules were the Matrimonial Causes Rules, 1957, as amended by the Matrimonial Causes (Amendment) Rules, 1958†. These latter rules had revoked the requirement of leave for an application for maintenance made more than two months after final decree. On May 20, I 1959, the wife filed an affidavit praying leave to file an application for maintenance out of time. Under the Matrimonial Causes Rules, 1957, r. 3

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(11) (1873), 8 Ch. App. 800.

* The terms of s. 1 (1) are set out at p. 163, letter E, post.

† S.I. 1958 No. 2082. These rules revoked the provision (r. 44 (1) proviso (a)) of the Matrimonial Causes Rules, 1957, which imposed a time limit of two months, corresponding to that imposed by r. 44 (1) of the Rules of 1947 referred to above. These rules came into operation on Jan. 1, 1959, that being the date on which the Matrimonial Causes (Property and Maintenance) Act, 1958, also was brought into operation.

(3) proviso (ii), however, the leave of the judge would be required for a wife's application for maintenance under those rules because the application should (according to r. 3 (3)) have been included in the petition. On appeal from a decision that the leave of the judge was not necessary in view of s. 1 of the Act of 1958, A

Held: the wife's application for maintenance ought to be determined in accordance with the Matrimonial Causes Rules, 1957, as amended, and accordingly the leave of the judge was necessary under r. 3 (3) proviso (ii) of those rules, although at the time when the petition for divorce was filed there was no rule in operation that imposed an obligation to include an application for ancillary relief in the petition. B

Appeal allowed.

[As to the time for making an application for maintenance, see 12 HALSBURY'S LAWS (3rd Edn.) 432, para. 972; and for cases on the subject, see 27 DIGEST (Repl.) 631, *5919-5921* and 3rd DIGEST Supp. C

For the Matrimonial Causes Act, 1950, s. 19 (3), s. 29, see 29 HALSBURY'S STATUTES (2nd Edn.) 407, 415.

For the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1, Schedule, see 38 HALSBURY'S STATUTES (2nd Edn.) 441, 453. D

For the Matrimonial Causes Rules, 1957, r. 3 (3) proviso (ii), r. 83, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 218, 262; and for the amendments effected by the Matrimonial Causes (Amendment) Rules, 1958, see SUPPLEMENT.]

Summons adjourned into open court.

The husband, Henry Jindrich Parker, formerly Jindrich Pachner, appealed against a decision of Mr. Registrar FORBES dated Oct. 12, 1959. E

The parties were married in Prague, Czechoslovakia, on July 10, 1935, they both then being nationals of, and domiciled in, Czechoslovakia. On Sept. 2, 1937, the wife filed in the civil district court of Prague a petition for decree of separation as to bed and board, and a separation order was made. On Jan. 19, 1938, the husband was granted a final decree of divorce in Czechoslovakia which became absolute on Mar. 2, 1938. At or soon after the beginning of the war in 1939 the parties came to England and resumed cohabitation. In June, 1949, the wife filed a petition for divorce on the ground of the husband's adultery. The petition was undefended and on Oct. 10, 1949, the wife was granted a decree nisi by Mr. Commissioner GRAZEBROOK, K.C. The decree was made absolute on Nov. 24, 1949. The wife did not include in her petition a prayer for maintenance but on Feb. 26, 1959, she filed notice of application for maintenance and on May 20, 1959, she filed an affidavit in support in which she prayed for leave to make the application out of time. The husband filed an affidavit in answer contending that the court had no jurisdiction to entertain the wife's application since the marriage had been dissolved by a court of competent jurisdiction in Czechoslovakia on Jan. 19, 1938, and that accordingly the decree of the English court was a nullity. The registrar rejected this contention and further held that "having regard to s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, the wife did not require leave to make her application for maintenance out of time", and he ordered the application to be adjourned with leave to the husband to file a further affidavit. On Oct. 12, 1959, Mr. Registrar FORBES gave his reasons in writing for holding that the wife was entitled to proceed with her application for maintenance, stating the conclusion quoted above and reasons concerning estoppel of the husband from maintaining that the decree was invalid. On Oct. 16, 1959, the husband gave notice of appeal on the following grounds: F G H I

> "(i) the [wife] has not obtained leave of a judge to apply for maintenance herein pursuant to r. 3 (3) proviso (ii) of the Matrimonial Causes Rules, 1957; (ii) there is no jurisdiction in the court to entertain an application for maintenance, there having been no marriage subsisting between the parties

A at the date of the filing by the [wife] of her petition for dissolution of marriage, or at any material time; (iii) there was no jurisdiction in the court to dissolve the marriage between the parties, there having been no marriage subsisting between the parties at any material time, whereby the decree in fact pronounced by the court was of no legal effect."

S. Goldblatt for the husband.

B *A. B. Ewbank* for the wife.

Cur. adv. vult.

Nov. 27. **MARSHALL, J.:** From the report of Mr. Registrar FORBES it is clear that he based his decision that the wife was entitled to proceed with her application for maintenance on two principal conclusions. First, that having regard to s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, C the wife was now under no obligation to obtain leave to file her present application for maintenance out of time, and secondly, that the husband was now estopped from asserting that the decree granted to the wife by this court was a nullity. It may be that the registrar's decision on estoppel was to some degree coloured by the view expressed in his report, that it would be exceeding the powers exercisable by a registrar on an application for ancillary relief to hold D that a decree absolute of this court is a nullity whatever the evidence of the husband may be. With this view I find myself in considerable sympathy. The argument addressed to the registrar on behalf of the husband was repeated before me, involving of necessity the proposition that the decree pronounced in this action was a nullity. It was far more appropriate to an action for a declaration in the High Court and in my judgment it would have been more satisfactory E if that course had been followed.

The facts of the case are unusual. On July 10, 1935, the petitioner, Hedvika Pachner, married Jindrich Pachner at the Town Hall, Prague. At the time both were nationals of and domiciled in Czechoslovakia. They were both educated people. The wife was twenty-five and single, and was an actress and a member of the Svando Theatre. The husband was twenty-eight, a widower, F and a partner in a chemical firm in Prague. The affidavit sworn by the husband and filed on Aug. 17, 1959, supported by two affidavits sworn by one Imrich Tarjan, an expert in Czechoslovakian law and filed on Aug. 17, 1959, and by leave on Nov. 9, 1959, respectively, together with documents exhibited thereto, were read before me.

From those affidavits I am satisfied (i) that, after living together for a little G over two years, on Sept. 2, 1937, the wife filed in the civil district court of Prague a petition for a decree of separation of bed and board in respect of the marriage of July 10, 1935, based on the guilt of both parties. The wife's petition set out her case in the following terms

> "We are both Czechoslovak citizens . . . Our marriage was at first happy, H later on, however, a deep disruption of matrimonial relations arose, for which reason we cannot in fairness be expected to continue married life together. The disruption is not due to predominant guilt of either party. The [husband] has rudely insulted my honour on several occasions and used terms of abuse against me, the mildest of which were 'silly goose', 'you immoral, dissolute woman' and the like. He did not have any I friendly word for me in the course of our past life together and in the course of time complete mutual estrangement and coldness has arisen, for which reason there is no solution other than a separation. Our mutual property position also contributes to the disagreement, and I have reached the conviction that with so deep a disruption no improvement can be expected."

(ii) After hearing the parties by a final judgment dated Oct. 5, 1937, the civil district court of Prague granted a separation from bed and board in respect of the marriage by reason of the guilt of both parties. (iii) In accordance with the law of Czechoslovakia the husband applied to the civil district court of Prague for a decree of divorce and on Jan. 19, 1938, the same court pronounced a final decree of divorce in respect of the said marriage of July 10, 1935, which became absolute on Mar. 2, 1938. (iv) Under the law of Czechoslovakia such final decree of divorce would not have become absolute on Mar. 2, 1938, as the documents exhibited to the affidavit of Imrich Tarjan filed on Nov. 9, 1959, show, unless and until the court had been satisfied that a copy of a decree of divorce had been served on the wife. (v) At the time of the proceedings referred to in (i) to (iv) above the husband was living in Prague, Czechoslovakia which was then his permanent home and both he and the wife had retained their Czechoslovak nationality. (vi) Both the wife and the husband were Jewish and as a result of political developments in Czechoslovakia and later the outbreak of war sometime in 1939 the wife came to England. The husband, who was then in the Czechoslovak forces in England, joined the wife in 1940. (vii) They resumed cohabitation and by representing to the Czechoslovak Army authorities that no final decree of divorce had been obtained but only a separation order the husband obtained a marriage allowance in respect of the wife during his period of service in the forces. (viii) They continued to live together until April, 1948, when the husband left the matrimonial home at 165 Sutherland Avenue, London, W.9.

(ix) On June 15, 1949, the wife filed a petition for the dissolution of her marriage of July 10, 1935, in Prague on the ground of the adultery of the husband. The petition contained no claim for maintenance. (x) The husband signed an acknowledgment of service, but entered no appearance and filed no answer. When interviewed on July 10, 1949, by an inquiry agent making inquiries on behalf of the wife he made a written confession as to his adultery and added the words " I have no intention of returning to live with my wife ". (xi) The petition, which was put in the undefended list, came on Oct. 10, 1949, before Mr. Commissioner GRAZEBROOK, K.C., who, after hearing evidence from a Czechoslovak lawyer, the wife and an inquiry agent, pronounced a decree nisi of dissolution of the marriage of July 10, 1935. During her evidence the wife swore that the marriage was happy down to 1945. She made no reference to any proceeding in Prague whether for a separation or for a decree of divorce. (xii) The decree was made absolute on Nov. 24, 1949.

(xiii) On Feb. 26, 1959, the wife filed a notice of application for ancillary relief seeking " such weekly or monthly sums as may be just by way of maintenance ". On May 20, 1959, the wife filed her affidavit praying " for leave to file an application for maintenance notwithstanding the fact that the time for so doing has expired."

The delay of between nine and ten years between Nov. 24, 1949, and Feb. 26, 1959, when the first claim for ancillary relief by way of maintenance was made has given rise to a difficult legal problem. The decree absolute was made when the Matrimonial Causes Act, 1937 (1), was in operation and the Matrimonial Causes Rules, 1947 (2), were in force. The Act of 1937 was repealed by the Matrimonial Causes Act, 1950 (3), which came into operation on Jan. 1, 1951. The Matrimonial Causes Rules, 1947, had been replaced by other rules and at the time when the claim for ancillary relief by way of maintenance was first made the Matrimonial Causes Rules, 1957 (4), as amended, were in operation.

Under r. 3 (2) of the Rules of 1947 every application for ancillary relief had to be made by notice in accordance with Form 2 issued out of the Divorce Registry and although by r. 4 (2) a wife petitioner could include in her petition a claim for maintenance she was under no obligation to do so. By r. 44 (1) if no prayer for maintenance had been included in the petition no application for maintenance could be made later than two months after the final decree except by leave.

Under the Rules of 1957 which came into operation on Apr. 30, 1957, and have been amended by the Rules of 1958 (5), the position with regard to claims for maintenance had changed materially. The Matrimonial Causes Rules, 1947, had been repealed by the Matrimonial Causes Rules, 1950 (6), which came into operation on Jan. 1, 1951. By r. 3 (3) of the Rules of 1957:

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(1) 1 Edw. 8 & 1 Geo. 6 c. 57. (2) S.I. 1947 No. 523. (3) 14 Geo. 6 c. 25.

(4) S.I. 1957 No. 619. As to the amendments see Matrimonial Causes (Amendment) Rules, 1958 (S.I. 1958 No. 2082).

(5) S.I. 1958 No. 2082.

> "Every application for ancillary relief, being an application . . . (c) for the payment, on a decree for divorce . . . of . . . maintenance . . . shall be made in the petition . . ."

subject to the proviso that

> "(ii) a judge may give leave for an application for ancillary relief which should have been made in the petition . . . to be made subsequently, either by notice in accordance with Form 2 issued out of the Divorce registry or at the trial."

It will be seen that under both the Rules of 1947 and of 1957, whichever applied, leave whether by a registrar under the Rules of 1947 (7), or by a judge under the Rules of 1957 (8) would be required before this application for maintenance could proceed.

Mr. Registrar FORBES has, however, held that by reason of s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, the wife was not now under any obligation to obtain leave to file her present application for maintenance out of time. Section 1 (1) reads as follows:

> "Any power of the court, under the enactments mentioned in the next following subsection, to make an order on a decree for divorce . . . shall (subject as mentioned in sub-s. (3) of this section) be exercisable either on pronouncing such a decree or at any time thereafter."

The relevant enactments mentioned in sub-s. (2) are s. 19 (2) and (3) of the Matrimonial Causes Act, 1950. Section 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, continues:

> "(3) (b) nothing in sub-s. (1) of this section shall be construed as affecting the provisions of s. 29 of the Act of 1950 as to the commencement of proceedings for an order under [s. 19 (2) and (3) of the Act of 1950] or as to the making or effect of such an order.
>
> "(4) In accordance with the preceding provisions of this section, the provisions of the Act of 1950 specified in the schedule to this Act [these included the said s. 19 (2) and (3)] shall have effect subject to the amendments specified in that schedule.
>
> "(5) Nothing in this section, or in any amendment made by this section in any of the enactments referred to therein, shall be construed as requiring the court, in determining any application for an order under any of those enactments, to disregard any delay in making or proceeding with the application."

As thus amended s. 19 (3) of the Matrimonial Causes Act, 1950, in its relevant parts reads as follows (9):

> "Subject to the provisions of the said s. 29, on pronouncing a decree nisi for divorce . . . or at any time thereafter, whether before or after the decree has been made absolute, the court may, if it thinks fit, by order

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(6) S.I. 1950 No. 1940.

(7) See r. 3 (3) of the Rules of 1947. Rule 44 (1) of the Matrimonial Causes Rules, 1944 (S.I. 1944 No. 389) expressly stated that an application out of time could only be made "by leave of a judge" but the words "of a judge" were omitted from r. 44 (1) of the Rules of 1947.

(8) See r. 3 (3) proviso (ii).

(9) See the Schedule to the Matrimonial Causes (Property and Maintenance) Act, 1958; 38 HALSBURY'S STATUTES (2nd Edn.) 453.

> direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable . . ." A

Finally the relevant part of s. 29 of the Matrimonial Causes Act, 1950, is in the following terms:

> " When a petition for divorce . . . has been presented, proceedings under s. 19 . . . may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition." B

Having considered the circumstances of the present application for maintenance of the wife I have come to the following conclusions: (i) The wife having delayed making her application until Feb. 26, 1959, the relevant provisions C under which it must now be decided are s. 19 of the Matrimonial Causes Act, 1950, as amended by s. 1 of the Matrimonial Causes (Property and Maintenance) Act, 1958, and s. 29 of the Act of 1950. (ii) That the rules to be applied are the Matrimonial Causes Rules, 1957, as amended, they being the only rules in operation at the time of the making of her application. (iii) That although the D long delay in the making of her application does not of necessity debar her from proceeding she can only do so with the leave of a judge sought by way of summons in accordance with r. 3 (3) proviso (ii) of the Matrimonial Causes Rules, 1957, as amended. I have not overlooked r. 83 of the Rules of 1957, but in my judgment apart from the fact that that rule does not assist or apply in this case as the proceedings were started after these rules came into operation they also cannot E override the provisions of the section of the Act of Parliament to which I have referred.

Having regard to this conclusion it would not be appropriate for me in these proceedings to deal with the other two points raised on this appeal. They may well have to be considered if and when leave of a judge to proceed is sought hereafter. The husband's appeal from the decision of Mr. Registrar FORBES F dated Oct. 12, 1959, is accordingly allowed.

Appeal allowed.

Solicitors: *A. Oldschool & Co.* (for the husband); *R. H. Marcus* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

A

Re PHILPOT.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Hilbery and Pearson, JJ.), December 11, 1959.]

Criminal Law—Practice—Prison Commissioners' report before sentence of preventive detention—Copy to be given to offender—Whether condition precedent B *to passing of sentence—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6 *c.* 58), *s.* 21 (5).

An offender who had been sentenced to a term of preventive detention, and was then serving that sentence, claimed that he was illegally detained in prison because a copy of a report which had been made by the Prison Commissioners, for the purposes of s. 21 (4) of the Criminal Justice Act, 1948, had not C been shown to him or his legal representative before sentence was passed on him, as required by s. 21 (5).*

Held: section 21 (5) of the Criminal Justice Act, 1948, was merely directed to the procedure which should be followed, and did not make the handing of a copy of the Prison Commissioners' report to the offender, or to his counsel or solicitor, a condition precedent to the passing of a sentence D of preventive detention.

R. v. *Dickson* ([1949] 2 All E.R. 810) explained.

[As to the refusal of a writ of habeas corpus in criminal cases, see 11 HALSBURY'S LAWS (3rd Edn.) 35, para. 62.

As to the Prison Commissioners' report regarding a sentence of preventive detention on an offender, see 10 HALSBURY'S LAWS (3rd Edn.) 512, para. 930.

E For the Criminal Justice Act, 1948, s. 21 (4), (5), see 28 HALSBURY'S STATUTES (2nd Edn.) 372.]

Cases referred to:

Featherstone, Re, (1953), 37 Cr. App. Rep. 146; 3rd Digest Supp.

Kinally v. *Home Office,* (July 24, 1959), unreported.

F *Practice Note,* [1959] 2 All E.R. 734; [1959] 1 W.L.R. 849; sub nom. *R.* v. *Wintle,* 43 Cr. App. Rep. 191.

R. v. *Dickson,* [1949] 2 All E.R. 810; [1950] 1 K.B. 394; 113 J.P. 534; 34 Cr. App. Rep. 9; 2nd Digest Supp.

Motion for habeas corpus.

On July 10, 1953, at Worcester County Quarter Sessions, the applicant, G Joseph Philpot, was convicted of attempted shopbreaking and was sentenced to nine years' preventive detention. He was at present serving that sentence in Parkhurst Prison. Counsel for the applicant now moved for a writ of habeas corpus on the ground that his detention was unlawful because a copy of the Prison Commissioners' report was not shown to him or to his counsel or solicitor before sentence was passed on him, as required by s. 21 (5) of the Criminal H Justice Act, 1948.

Neil Butter for the applicant.

J. R. Cumming-Bruce for the Governor of Parkhurst Prison.

LORD PARKER, C.J.: In these proceedings counsel moves for a writ of habeas corpus on behalf of one Joseph Philpot now undergoing imprisonment in Her Majesty's prison at Parkhurst. The applicant was sentenced as long ago as I July 10, 1953, to a term of preventive detention following on his conviction with two other persons of attempted shopbreaking. His complaint, which he has been voicing from time to time since 1954, is that he was not shown a copy of the Prison Commissioners' report.

Let me say at once that there are many difficulties in his way in this application. For one thing, it is almost impossible for this court to say with any certainty today whether on a certain day in 1953 a copy of the Prison Commissioners' report was or was not handed to him or to his legal representative. Secondly, it is a well-known principle that this court does not in the ordinary way grant a writ of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction: see, in particular, the judgment of the Divisional Court in *Re Featherstone* (1). For my part, I will assume for the purposes of these proceedings that no report of the Prison Commissioners was ever served on or given to the applicant or his legal representative, and I will also assume that, contrary to what my impression is at the moment, this court has jurisdiction to entertain the application.

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* The terms of s. 21 (5) are printed at p. 166, letter C, post.

Section 21 (5) of the Criminal Justice Act, 1948, provides:

> " A copy of any report or representations in writing made to the court by the Prison Commissioners for the purposes of the last foregoing subsection shall be given by the court to the offender or his counsel or solicitor."

In this case it appears from the affidavit evidence that in fact a report was made, and, as I have said, I am assuming for the purpose of this application that a copy was not given to the applicant or his counsel or solicitor. The sole question, and the short question, is whether the words " shall be given " in s. 21 (5) are merely directed to the procedure which should be followed, or whether they are imperative and make it a condition precedent to a sentence of preventive detention that the copy should be given. For my part, I am quite satisfied that those words are directed only to the procedure to be followed. They are, as it seems to me, in direct contrast to the words used in s. 23 (1), which provides for a notice being served of the intention to prove previous convictions. There the words used are: " . . . no account shall be taken of any previous conviction or sentence unless notice has been given to the offender . . ." In other words, s. 23 (1) is making it abundantly clear that the qualifying convictions which are necessary before a sentence of preventive detention is given cannot be given in evidence at all unless a condition precedent is complied with, namely, the serving of the requisite notice.

Reliance, however, was put on the decision of the Court of Criminal Appeal in *R.* v. *Dickson* (2). In that case the appellant had been sentenced to ten years' preventive detention, but no evidence had been given that the notice had been served on him. It had in fact been served on him and his signature had been obtained to it, but at the trial no evidence was given that it had been served, nor was his signature proved, nor was he asked whether he admitted the convictions set out in it. The decision in *R.* v. *Dickson* (2) relates, as I read it, solely to the question of the notice required by s. 23. It is true that in the statement of the facts in the report (3), it is said that " The appeal was on the ground of alleged failure . . . to carry out the requirements of s. 21 ", that is, the handing of the Prison Commissioners' report. It is quite clear, however, from reading the arguments and the judgment that that is a mistake, and the appeal was on the sole ground of the alleged failure at the trial to carry out the requirements of s. 23. However, there is no doubt that, in giving the judgment of the court, Lord Goddard, C.J., did use words which, taken out of their context, would appear to convey that s. 21 (5) was imperative and was something which had to be done before an offender qualified for and could be sentenced to preventive detention. It is perhaps only necessary to refer to one passage, where he said (4):

> " The court thinks this is a good opportunity for stating what, in its opinion, is the proper procedure to be adopted by all courts in regard to proving the matters which are required to qualify an offender to receive a sentence of corrective training or of preventive detention."

Lord Goddard, C.J., then went on to say that that procedure should include the handing to the offender or his counsel of a copy of the Prison Commissioners' report. The truth of the matter, as I see it, is that that was merely a decision in regard to s. 23, but that an opportunity was there taken by Lord Goddard to say what was the proper procedure, as a matter of routine, in regard to copies of the Prison Commissioners' report. For my part, I am quite satisfied that he was not treating or intending to treat s. 21 (5) as setting out a condition precedent to a sentence of preventive detention.

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(1) (1953), 37 Cr. App. Rep. 146. (2) [1949] 2 All E.R. 810; [1950] 1 K.B. 394.
(3) I.e., the report in [1950] 1 K.B. at p. 395.
(4) [1949] 2 All E.R. at p. 812; [1950] 1 K.B. at p. 397.

The same view was taken by Glyn-Jones, J., in an unreported case, *Kinally* v. *Home Office* (5), where, in regard to Lord Goddard's judgment, he said:

> " By those words [that the prisoner or counsel must be handed a copy of the Prison Commissioners' report] Lord Goddard was not laying down conditions precedent to jurisdiction; he was merely giving directions as to a businesslike way of complying with the proper procedure laid down by the statute."

For my part, I entirely agree. That, however, does not mean that the provisions of the subsection should not be complied with. Indeed, in *R.* v. *Dickson* (6) and again more recently in the Court of Criminal Appeal in *Practice Note* (7), the court has been anxiously concerned to see that a procedure is adopted whereby the handing of the Prison Commissioners' report, or, in the case of Borstal, the Borstal Commissioners' report, is recorded in some way on the shorthand note. The point is constantly being taken by prisoners that a copy was never given to them or to their legal representatives, and, unless there is something recorded on the transcript, it is almost impossible for the court to say whether it was done or not. But neither *R.* v. *Dickson* (6) nor *Practice Note* (7) are in any way authorities for saying that compliance with s. 21 (5) is a condition precedent to a sentence of preventive detention.

The matter is, I think, made even clearer when one realises that it is not in every case that there has to be a Prison Commissioners' report. Section 21 (4) merely says:

> " Before sentencing any offender to corrective training or preventive detention, the court shall consider any report or representations which may be made to the court by or on behalf of the Prison Commissioners . . ."

In a case where a report of that sort is not of itself a condition precedent to a sentence of preventive detention, it seems to me all the less reason for saying that the handing of a copy to the offender is itself a condition precedent. Accordingly, in my judgment this application fails and should be dismissed.

HILBERY, J.: I agree. I only add a word or two because I was a member of the court in *R.* v. *Dickson* (6), when Lord Goddard, C.J., giving the judgment of the court, referred to the handing of a copy of the Prison Commissioners' report and when it should take place. In that case, if the argument is looked at (8), it is perfectly clear, and it is in accordance with my recollection, that the whole case depended on a contention that there was no evidence that the notice of an intention to prove previous convictions was served on the appellant and that the provisions of s. 23 (1) of the Criminal Justice Act, 1948, had not been observed. It was submitted that, in the absence of an admission of those previous convictions by the appellant, the determination of the question whether those previous convictions had been suffered by the appellant should have been left to the jury. If the argument is looked at, it will be seen that counsel for the Crown admitted (8) that there was certainly no evidence that the notice had been served on the appellant. The whole case turned on whether the service of the notice of intention to prove previous convictions required by s. 23 (1) was a condition precedent to a sentence of preventive detention or corrective training being passed. It is perfectly true that the court gave a direction as to the procedure which should be followed, but I think that it is important to observe that, if the language of LORD GODDARD, C.J., in giving that direction is looked at carefully, it will be seen that in the first part of it he deals with matters that require proof. He said (9):

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(5) (July 24, 1959), unreported (a very brief account appears in " The Times ", July 25, 1959).

(6) [1949] 2 All E.R. 810; [1950] 1 K.B. 394.

(7) [1959] 2 All E.R. 734.

(8) [1950] 1 K.B. at p. 396.

> "The court thinks this is a good opportunity for stating what, in its opinion, is the proper procedure to be adopted by all courts in regard to proving the matters which are required to qualify an offender to receive a sentence of corrective training or of preventive detention."

He is dealing with proof of matters necessary to qualify and the procedure to be adopted concerning proof of those matters, and then he says (9):

> "After a plea or verdict of Guilty has been returned, a police officer should be called by counsel for the prosecution who should prove that he has served a notice on the offender as provided by s. 23 (1) of the Act three days before the trial. When that has been proved the clerk of assize or the clerk of the peace, as the case may be, should put the contents of that notice to the offender and get his admission or denial in open court."

LORD GODDARD, C.J., was there dealing with the matters which must be proved. Then he gave a direction, and I think, speaking as one of the court, clearly intending, as I for my part certainly intended, that it should be read and understood as a direction, that a copy of the Prison Commissioners' report should be handed to the offender. Stress is laid on the word "must" (10), but I think that it was never meant to imply any more than that, as a matter of procedure and no more, that course was to be adopted. I think that that explanation, if explanation is needed, is all that I need add to what has fallen from my Lord, and I only ventured to add it as I was a member of the court in giving the judgment in *R.* v. *Dickson* (11).

It has been called to our attention that, in *Kinally* v. *Home Office* (12), GLYN-JONES, J., clearly indicated that that was the right interpretation of the judgment in *R.* v. *Dickson* (11) and what LORD GODDARD, C.J., intended to convey. I agree that this application fails, but I desire to emphasise that we are assuming for the purpose of giving this judgment that the application could be made though the applicant is in execution.

PEARSON, J.: I agree and have nothing to add.

Application refused.

Solicitors: *Official Solicitor* (for the applicant); *Treasury Solicitor* (for the Governor of Parkhurst Prison).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(9) [1949] 2 All E.R. at p. 812; [1950] 1 K.B. at p. 397.

(10) In [1949] 1 All E.R. at p. 812, letter C, LORD GODDARD, C.J., is reported as saying: "Then the offender or his counsel should be handed a copy of the Prison Commissioners' report." But in [1950] 1 K.B. at p. 398, the words "must be" appear instead of the words "should be". (11) [1949] 2 All E.R. 810; [1950] 1 K.B. 394.

(12) (July 24, 1959), unreported.

SCHNEIDER *v.* EISOVITCH. SAME *v.* SAME.

[QUEEN'S BENCH DIVISION (Paull, J.), December 3, 4, 8, 1959.]

Damages—Remoteness of damage—Mental shock—Husband killed in car accident—Wife in same car but rendered unconscious by accident—Wife later told, in hospital, of husband's death—Whether damages recoverable for shock from hearing of accident.

Damages—Measure of damages—Expenses of services freely given—When recoverable as special damage.

The plaintiff and her husband, while on holiday in France, were travelling together in a car driven by the defendant when, owing to the defendant's negligent driving, the car crashed into a tree, the husband was killed and the plaintiff suffered physical injuries rendering her unconscious. On hearing of the accident the plaintiff's brother-in-law and his wife at once flew from England to France with the intention of helping the plaintiff to bring her husband's body back to England and to return to England herself. In deciding to go to France the plaintiff's relatives acted on their own initiative, without any request from the plaintiff who, at that time, was still recovering consciousness. They stayed in France for five days and then accompanied the plaintiff to England. The plaintiff could not speak French, and if her relatives had not voluntarily helped her she would have had to employ a nurse to accompany her to England and someone to arrange to transport her husband's body there. The plaintiff considered that she was under a moral duty to pay, and undertook to pay, out of any damages that she recovered the expenses incurred by her brother-in-law and his wife.

After recovering consciousness in the hospital to which the plaintiff was taken after the accident, she was told of her husband's death. She suffered shock as a result of this in addition to the shock that physical injury in the accident had caused her. Subsequently the plaintiff suffered from depression which increased as she lived with her mother and two children without outside interests; she contracted neuro-dermatitis after the accident, which first got better during a period when she helped in a shop, and later got worse.

In an action by the plaintiff for damages for personal injuries in which the defendant admitted liability,

Held: (i) reasonable expenses of services rendered necessary as a consequence of a tort were recoverable as special damage, although the services were freely given and without request, if the plaintiff undertook to pay to the person who rendered the services the sum so awarded (see p. 174, letters C to F, post); therefore the expenses of the plaintiff's brother-in-law and his wife would be included in the amount awarded to the plaintiff for special damage.

Dennis v. *London Passenger Transport Board* ([1948] 1 All E.R. 779) and dictum of GODDARD, J., in *Allen* v. *Waters & Co.* ([1935] 1 K.B. at p. 215) applied.

(ii) the plaintiff's shock at hearing of her husband's death in the accident, though separated from the accident by the period of her unconsciousness, was still the direct consequence of the defendant's negligence, and, as there was negligence towards the plaintiff (as well as towards her husband), the damages that she could recover for the negligence towards her included

A damages for shock at her husband's death (see p. 175, letter D, post), but did not include damages for her subsequent nervous state in so far as it was attributable to mental strain in adjusting her life to altered conditions after her husband's death (see p. 175, letter F, post).

Observations on deduction from damages under the Fatal Accidents Acts, 1846 to 1959, where there is no balance in favour of deceased's estate B if matters that are to be disregarded in assessing damages under the Acts are excluded (see p. 176, letters D to F, post).

[As to special damages recoverable in a claim for damages for personal injury, see 11 HALSBURY'S LAWS (3rd Edn.) 256, para. 427.

As to remoteness of damage in negligence claims and as to damages for emotional shock, see 11 HALSBURY'S LAWS (3rd Edn.) 278, 279, paras. 459, 460.] C

Cases referred to:

Allen v. *Waters & Co.*, [1935] 1 K.B. 200; 104 L.J.K.B. 249; 152 L.T. 179; 99 J.P. 41; Digest Supp.

Dennis v. *London Passenger Transport Board*, [1948] 1 All E.R. 779; 36 Digest (Repl.) 202, *1068*. D

Hambrook v. *Stokes Brothers*, [1925] 1 K.B. 141; 94 L.J.K.B. 435; 132 L.T. 707; 36 Digest (Repl.) 196, *1035*.

Hay (*or Bourhill*) v. *Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 36 Digest (Repl.) 16, *66*.

Polemis & Furness, Withy & Co., Re, [1921] 3 K.B. 560; sub nom. *Polemis* v. *Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154; 36 Digest E (Repl.) 38, *185*.

Actions.

In these consolidated actions the plaintiff, Betty Schneider, suing in her own right, claimed damages for personal injuries arising from the negligent driving of the defendant, Lazarus Eisovitch, and suing as administratrix of the estate of F her husband, Raphael Samuel Schneider, claimed, for the benefit of herself and her two children under the Fatal Accidents Acts, 1846 to 1908, damages in respect of the death of her husband resulting from the defendant's negligence. Negligence was admitted by the defendant. The questions arose in the action brought by the plaintiff in her own right whether the plaintiff was entitled to G recover damages for shock suffered from her husband's death and to recover expenses incurred by her brother-in-law and his wife in going to France, where the accident occurred, to help the plaintiff and bring her back to England. The facts are set out in the judgment.

Martin Jukes, Q.C., and *F. B. Purchas* for the plaintiff.

Eric Myers for the defendant. H

Cur. adv. vult.

Dec. 8. **PAULL, J.**, read the following judgment: There are two actions before me: one by the plaintiff, Betty Schneider, in her own right and the other by her as the widow and administratrix of her late husband, Raphael Samuel Schneider. In each case, the defendant is Lazarus Eisovitch. I

In May, 1955, Mr. and Mrs. Schneider and Mr. and Mrs. Eisovitch were on holiday together in France having arranged to go to the South of France together in a motor car belonging to a Mr. Taylor, the brother of the plaintiff's husband. On May 14, 1955, the defendant was driving that motor car along the road between Lyons and Paris with his wife and Mr. and Mrs. Schneider as passengers. For some reason which is unknown to me, but which apparently involved a small child coming on to the road, the motor car left the road and crashed into a tree and a ditch alongside the road. As a result of that crash Mr. Schneider was thrown out of the car and instantly killed and the plaintiff was rendered unconscious. It is not disputed that that accident was caused by the negligence of the defendant. The plaintiff was taken to a hospital nearby in a place called Villefranche and did not recover consciousness until after she was in hospital. Her injuries were surprisingly slight considering the way in which the accident happened. She had a Colles fracture of the left wrist; she had two small cuts on her leg each involving one stitch and had very severe bruising all over the left side of her head and round the left eye. In addition she had a severe blow on the temporal bone which probably was the cause of the concussion from which she suffered. Having recovered consciousness she was informed of the fact that her husband had been killed and there is no doubt whatsoever that the shock of that information coming on the top of the shock which she suffered owing to her physical injuries has had quite serious consequences.

✓ When Mr. Taylor heard of the accident and heard that his brother had been killed and his sister-in-law (the plaintiff) was lying in a French hospital apparently seriously injured, he and Mrs. Taylor at once flew out to her assistance. It is admitted by counsel for the defendant that that visit was not made because Mr. Taylor's motor car was smashed (that would have been seen to by a motoring organisation or the insurance company concerned) but because Mr. Taylor felt that the situation so far as his sister-in-law, the plaintiff, was concerned was such that help must be afforded to her in the double task of her bringing back her husband's body to England and returning to England herself. Mr. and Mrs. Taylor remained in Villefranche for some five days and then accompanied the plaintiff back to England. I have no doubt that in the circumstances it was necessary for someone to help the plaintiff and that if Mr. and Mrs. Taylor had not flown out on their own initiative either the plaintiff would have telegraphed asking them to come or alternatively the plaintiff would have had to make arrangements for a nurse to accompany her home and also to employ somebody to see about the arrangements for transporting the coffin to England. The plaintiff could not talk French and was therefore in an impossible position, injured as she was, unless some assistance were given to her.

Having arrived home the plaintiff came under the care of Dr. Paul. She was, in Dr. Paul's words, in quite a bad physical condition. The wrist had to be re-broken and re-set. The physical signs of injuries, however, cleared up in about three to four months. The mental signs did not. The whole of the episode produced considerable shock due to two factors, the accident itself and the subsequent knowledge obtained in hospital that her husband had been killed while sitting alongside her. The result of that shock was perpetuated by her day-to-day feeling of loss and the consequent upheaval in her life. She developed neuro-dermatitis (that is, dermatitis brought about by mental shock) affecting her face, ears, scalp and neck, and later her chest. The original attack died down fairly shortly but continued to exist in a mild form with a " flare-up " every now and again. It went on longer than might be expected and was worse than would be expected even taking into consideration the shock of the accident and the shock of her husband's death. She became depressed; the depression continued, varying in intensity, and has lately got worse. In addition to Dr. Paul, she has seen a dermatologist and has also been under a psychiatrist, Dr. Doris Small. Both gave evidence before me.

In order to understand the plaintiff's mental condition, it is necessary to go into the history of the plaintiff and her late husband. The plaintiff is a naturally somewhat highly strung woman who married Mr. Schneider in June, 1953, the plaintiff being thirty-eight and her late husband being forty-five. Both she and her late husband had been married previously, both the earlier marriages having A been dissolved. The accident happened within two years of the marriage. During that time the marriage had been a happy one, and I have no doubt that the plaintiff must have felt that she had achieved happiness and security. Her husband was a kosher butcher who had started business on his own account after the war in 1946 and the plaintiff in the early days of their marriage helped to look after the desk side of the business, she having been accustomed before B marriage to that sort of work. From shortly before the birth of their son in April, 1954, the plaintiff ceased to work in the shop. Shortly after that birth the plaintiff and her husband adopted a girl three years older than their son. The plaintiff, her husband, the two children, and the plaintiff's mother, formed the family and lived together, the plaintiff keeping house. C

After the husband's death his father, who also had been a kosher butcher but had lost his Ministry of Food licence during the war and since the war had helped in his son's shop, took over his son's business. For a time the plaintiff helped in the desk and during that time her mental condition improved. Then the business was sold, and the plaintiff had no outside interests. There is no doubt that the plaintiff, without a husband to help her, has found life difficult. D The psychiatrist, Dr. Small, in her report uses the phrase that the plaintiff has developed a considerable unconscious hostility towards her mother on whom she is emotionally dependent. As far as I can gather, all that means is that without a man's help she finds life difficult when she, two young children and an elderly mother all live together and she has no outside interests to take her mind off her tragedy. E

With this statement of facts I come to the questions raised in the action for damages for her own injuries. Two interesting problems arise. These are: (i) Is the plaintiff entitled to recover the expenses of Mr. and Mrs. Taylor (1), amounting to £110? (ii) To what extent ought I to take into account in assessing general damages the element of shock and its consequences?

Counsel for the defendant contends that I cannot allow any part of the expenses F of Mr. and Mrs. Taylor. He points out that there was no request by the plaintiff to them to come to her assistance. There could not be. They left England when the plaintiff was either unconscious or nearly so. There can, therefore, says counsel, be no implied contract to pay their expenses. That is admitted by the plaintiff who says that she agrees that the Taylors cannot demand payment from her, but she feels under a moral duty to repay them out of any damages. G If I allow the expenses she undertakes to pay the money over to Mr. and Mrs. Taylor. Counsel says that that is not enough; the law only recognises legal liabilities and can recoup the plaintiff only in respect of sums that she has in law to pay for any assistance given to her. In any event, says counsel, there was no necessity for them to go to the plaintiff's assistance. H

At first, I felt that there was a great deal to be said in favour of counsel for the defendant's argument. How can one make the defendant pay a sum incurred voluntarily by a third party? The more I have thought about the matter, however, the more uncertain I have become that this is right. The plaintiff, particularly as she speaks no French, had of necessity to have help. She was entitled to hire help. When Mr. and Mrs. Taylor arrived she could I have refused their services, while still treating them as friends, and hired an English speaking nurse to accompany her home and an English speaking man to arrange the innumerable details necessary before her husband's body could be brought back to England. To accept instead the voluntary services of Mr. and Mrs. Taylor was, to say the least, reasonable and if she had said at the time "If you help me and save me the expense of hiring services I will repay you your fares ", there would have been a legal liability to pay. Must the rights of a plaintiff lying seriously ill depend on whether or not those words are used? Can the defendant now object to pay simply because those words were not uttered? That must depend on whether the liability of the defendant is limited to reimbursing only strictly legal liabilities of the plaintiff or whether among the consequences for which the defendant must pay can be included a friend's out-of-pocket expenses for rendering necessary assistance. If I am negligently knocked down and rendered unconscious, may I not recover from the person responsible a sum paid to reimburse a friend who voluntarily hired and paid for a car to take me to a hospital while I was unconscious? Yet legally I could refuse to pay.

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(1) The plaintiff's brother-in-law and his wife.

Counsel for the plaintiff has drawn my attention to two cases which I think assist me. In *Allen* v. *Waters & Co.* (2) a landlord negligently failed to keep premises in proper repair. A tenant's wife was injured and the London County Council claimed against the tenant the cost of the wife being an in-patient in one of their hospitals. The tenant and his wife sued the landlord in negligence and the tenant claimed the sum claimed by the London County Council. A question arose whether in the particular circumstances the London County Council had a legal right to the sum claimed. The county court judge had included the amount in the damages awarded. LORD HANWORTH, M.R., and ROMER, L.J., thought that the London County Council had the right to recover the sums. GODDARD, J., thought that they had not. I do not think that the headnote is accurate in respect of the first finding which reads as follows (2):

> " (by the whole Court of Appeal) that whether or not the hospital expenses were recoverable by the council from the tenant, more than six months having elapsed since the discharge of the patient from hospital, the county court judge was entitled in assessing the special damages to take these expenses into account and to award their amount for payment over to the council."

What the Master of the Rolls said was that it was immaterial that the plaintiff had not actually paid the sum to the hospital since there was a legal liability to pay the sum. In that judgment ROMER, L.J., concurred. GODDARD, J., however, went further. Having found that there was no legal liability on the part of the plaintiff to pay the London County Council since the London County Council had not claimed the sum from the plaintiff within six months of the claim arising, he goes on to say (3):

> " Whether or not the hospital charges can properly be included in the damages awarded to the husband does not seem to me to be a question to be determined by the decision of the county council at any particular time not to call on him to pay because he is unable to or, at least, unable to unless he can recover the money from somebody else. I do not think that the right view depends on whether the remedy against the husband is barred, or the people who have the right to recover the hospital charges have or have not yet determined to sue for them, but whether in sending the woman to hospital a reasonable and proper thing was done. If it was, and if an expense has been incurred by doing so, I think it is right that the wrongdoer should bear that cost. Any sum which is now recovered by the husband will be held by him for the hospital and will have to be paid by him to the hospital . . . For these reasons I think that the money is properly recoverable and that the county court judge was right, in the result, in making the order which he did."

I do not think GODDARD, J.'s words cover this case as in that case there was originally a legal liability subject to a time limit within which the sum had to be claimed; but at least it shows that in his judgment these matters are not to be judged by the test of strict legal liability.

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(2) [1935] 1 K.B. 200.

(3) [1935] 1 K.B. at p. 215.

The other case is *Dennis* v. *London Passenger Transport Board* (4), where it was held that although the plaintiff had received the equivalent of his wages by way of pension and sick pay he could nevertheless recover his wages if he undertook to repay the sick pay and the pension as when he received the sick pay and the pension he was told he would be expected to return the money if he recovered compensation from a third party. In the course of his judgment, DENNING, J., said (5):

> ". . . a wrongdoer is not to be allowed to reduce damages by the fact that other persons have made up to the plaintiff his wages . . ."

He held that the plaintiff could recover his wages on an undertaking to repay the sums received, although there was no legal liability to repay.

In my judgment, strict legal liability is not the be-all and end-all of a tortfeasor's liability. A plaintiff cannot claim a sum of money because he would like to pay a friend for his services. That would alter the character of the services given. The services must be treated as friendly services given freely by a friend. But to pay out-of-pocket expenses in respect of necessary services freely given does not alter the character of the services. I do not think the test is whether there is a moral duty to pay. Before such a sum can be recovered the plaintiff must show first that the services rendered were reasonably necessary as a consequence of the tortfeasor's tort; secondly, that the out-of-pocket expenses of the friend or friends who rendered these services are reasonable bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted, and, thirdly, that the plaintiff undertakes to pay the sum awarded to the friend or friends. On the whole, after some doubt as to the second of these three conditions, I think the sum claimed does fulfil the three conditions. The special damage therefore will include the £110 claimed in respect of the expenses of Mr. and Mrs. Taylor and will amount in all to £244 15s.

The next problem arises from the element of shock. There were three factors which went to producing in the plaintiff the mental condition to which I have referred which in turn produced the recurrent attacks of neuro-dermatitis. These factors were (i) the shock of the accident itself which resulted in the physical injuries to the plaintiff; (ii) the shock of discovering in hospital that her husband who had been with her had been killed by the same accident; (iii) the continuing mental strain of having to adjust her life after her husband's death. I have no doubt that (i) is allowable; I have no doubt that (iii) is not allowable; but what about (ii)?

Counsel for the defendant says that this cannot be allowable as it was the result of what someone told her. It was not, says counsel, the accident itself since the plaintiff was rendered instantly unconscious and he referred to the well-known cases of *Hambrook* v. *Stokes Brothers* (6) and *Hay* (*or Bourhill*) v. *Young* (7). Counsel for the plaintiff, on the other hand, says that these cases have no application to the present case which concerns not whether there was a duty towards the plaintiff but the consequences of an admitted breach of duty towards her, and referred to the equally well-known case of *Re Polemis & Furness, Withy & Co.* (8). The plaintiff in this case cannot rely on the duty of the defendant towards the plaintiff's husband, and one starts by considering what precisely was the duty of the defendant towards the plaintiff. The duty was to drive his motor car with reasonable care. If at any moment he did not do so there was a breach of that duty. If no damage ensued there was no cause of action since both breach and consequent damage must be present to establish a cause of action. Damage may consist of mental shock which may be caused without any collision at all. Equally, a collision may result in mental shock without any physical injury. It cannot be doubted and is not challenged by counsel for the defendant that if the plaintiff had not herself been injured but had seen her husband killed the resultant shock would have been actionable. It would be a direct consequence of the defendant's negligent act. If the plaintiff had been conscious after the accident but had gained the first knowledge of her husband's death by someone screaming "Raphael is dead" and then seen that fact for herself, would liability depend on whether the hearing or the sight produced the shock? Would not each equally have been a direct and natural consequence of the negligent act? Approached in this way, it seems to me to follow that once a breach of duty is established the difference between seeing and hearing is immaterial. Hearing can be just as direct a consequence as seeing. The fact that owing to unconsciousness in this case a period of time elapsed before the news was heard makes no difference provided the news was a consequence which flowed directly from the breach of duty towards the plaintiff, any more than it makes any difference that an operation takes place after an interval of time. The fact that the defendant by his negligence caused the death of the plaintiff's husband does not give the plaintiff a cause of action for the shock caused to her, but the plaintiff having a cause of action for the negligence of the defendant may add the consequences of shock caused by hearing of her husband's death when estimating the amount recoverable on her cause of action.

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(4) [1948] 1 All E.R. 779.
(5) [1948] 1 All E.R. at p. 779.
(6) [1925] 1 K.B. 141.
(7) [1942] 2 All E.R. 396; [1943] A.C. 92.
(8) [1921] 3 K.B. 560.

Counsel for the plaintiff contended that this means that the plaintiff can recover in respect of her mental condition and neuro-dermatitis as it has gone on up to today on the ground that it is all part of the shock caused by her husband's death. I do not think that is so, although, of course, her husband's death has all the time played a part in that condition. Her mental condition and her neuro-dermatitis improved while she worked in the shop for her father-in-law and got worse after the shop was sold, caused, as I have said, by home difficulties. It is extremely difficult to divide up the consequences of the shock; one cannot hope to achieve more than a very rough and ready division, but I must do my best. In all, I award to the plaintiff the sum of £894 15s. To assist the parties in case there is an appeal, that sum is made up as follows: Special damage (to include the £110 (9)) £244 15s. Physical injuries £250. Consequences of shock £400. If I had found against the plaintiff on the issue of shock from the knowledge of her husband's death, the £400 would have been £125. If I had found in the plaintiff's favour in respect of the whole of her mental condition and neuro-dermatitis to date, I should have increased the £400 to £850.

[HIS LORDSHIP then went on to consider the second action in which the plaintiff, as administratrix of her husband's estate, claimed on behalf of herself and her two children (aged five and eight years) damages under the Fatal Accidents Acts, 1846 to 1908. In respect of the plaintiff's claim, as administratrix, under the Law Reform (Miscellaneous Provisions) Act, 1934, the defendant had paid into court damages of £500. The deceased was forty-seven years of age when he died. He carried on business as a kosher butcher in Brighton, and while the profits of the business averaged, according to the accounts, between £700 and £500 per annum they were decreasing during the last two and a half years of the deceased's life. However, it was not right to treat the business as a dying one since in Brighton, where there was a fairly large Jewish population and several hotels which served kosher food, there were only three butchers licensed to sell kosher meat, and new licences were not granted unless an old one expired or was taken away. Moreover the deceased had given the plaintiff £15 a week for housekeeping from which she had paid the household cash accounts; she had kept any money that was left over at the end of the week. Out of the housekeeping money which she was allowed to keep, the plaintiff kept her mother, who lived with her and the deceased, and for this reason no deduction would be made for the mother's keep. In addition to the plaintiff's housekeeping money, the deceased and his father had drawn sufficient money from the business to satisfy their needs. The return from the business had been, therefore, sufficient to produce these sums. In these circumstances, bearing in mind that possibly the business might have become unsuccessful, HIS LORDSHIP assessed the dependancy at £600 per annum and assessed the number of years by which to multiply that dependancy at twelve years. In the result damages of £7,200 would be awarded under the Fatal Accidents Acts.

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(9) Viz., the expenses incurred by Mr. and Mrs. Taylor, see p. 174, letter F, ante.

It was submitted that from the sum of £7,200 there must be deducted £549 since after the deceased's death his father took the business over, paying nothing for it but discharging all the debts and the debts exceeded the money due by £549, a sum which, it was argued, the plaintiff would have had to pay if the business had not been taken over. HIS LORDSHIP did not think that argument was a valid one. If one disregarded the various factors which had to be disregarded in assessing an award under the Fatal Accidents Acts, 1846 to 1959, such as insurance, the estate was a bankrupt estate, although it was not bankrupt when these factors were taken into consideration. HIS LORDSHIP did not think that any sum was deductible from the amount awarded unless there was a balance in favour of the estate after disregarding the factors which had to be disregarded. Accordingly, the only sum to be deducted from the £7,200 was the sum of £500 which had been paid in respect of damages due under the Act of 1934.]

Judgment for the plaintiff in her own right for £894 15s. Judgment for the plaintiff under the Fatal Accidents Acts for £6,700.

Solicitors: *F. H. Carpenter & Oldham*, Brighton (for the plaintiff); *Neil Maclean & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

KIRIRI COTTON CO., LTD. *v.* DEWANI.

[Privy Council (Lord Denning, Lord Jenkins and Mr. L. M. D. de Silva), November 2, December 14, 1959.]

Mistake—Mistake of law—Money paid under mistake—Recovery—Parties not in pari delicto.

Privy Council—Eastern Africa—Rent restriction—Premium—Illegality—Premium paid under mistake of law—No statutory means of recovery—Whether tenant entitled to recover—Uganda Rent Restriction Ordinance (Laws of Uganda 1951 *c.* 115), *s.* 3 (2).

In May, 1953, the tenant, in order to obtain a sub-lease of a flat at Kampala, Uganda, paid a premium to the landlord. The sub-lease was granted. By the Uganda Rent Restriction Ordinance, s. 3 (1)* no owner or lessee of a dwelling-house or premises could let such dwelling-house or premises at a rent which exceeded the standard rent; and by s. 3 (2)*, any person who, in consideration of (inter alia) the sub-letting of a dwelling-house or premises asked for, solicited or received a premium, whether before or after the grant of a tenancy was guilty of an offence and liable to a fine. There was, however, no provision in the ordinance enabling a premium to be recovered back. No standard rent had been fixed for the flat because it was a new flat, and there was no evidence to show that the premium was extortionate. Neither party thought that there was anything illegal in the premium being received. The tenant claimed to recover the premium as being illegal because it was in contravention of s. 3 (2) of the ordinance.

Held: the duty of observing the law being placed by s. 3 (2) on the shoulders of the landlord for the protection of the tenant, the parties were not in pari delicto, and, therefore, though the illegal transaction was an executed transaction, the tenant was entitled at common law to recover the premium as money had and received to the use of the tenant.

Principle stated by Lord Ellenborough, C.J., in *Langton* v. *Hughes* ((1813), 1 M. & S. at p. 596) considered and distinguished.

Observations on the cause of action for the recovery of money paid under mistake of law (see p. 181, letters D to G, post).

Appeal dismissed.

[**Editorial Note.** The Uganda Rent Restriction Ordinance, s. 3 (2), corresponds to the United Kingdom Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) and (6) (replacing the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8 (1) and (2)), but there is no corresponding provision in the Uganda Ordinance to s. 2 (5) of the Act of 1949, whereby illegal premiums can be recovered.

As to prohibition of premiums on the grant of a tenancy, see 23 Halsbury's Laws (3rd Edn.) 798-800, para. 1576; and for cases on the subject, see 31 Digest (Repl.) 688-690, *7794-7807*.]

Cases referred to:

Browning v. *Morris*, (1778), 2 Cowp. 790; 98 E.R. 1364; 12 Digest (Repl.) 322, *2485*.

Evanson v. *Crooks*, (1911), 106 L.T. 264; 28 T.L.R. 123; 12 Digest (Repl.) 319, *2458*.

Fibrosa Spolka Akcyjna v. *Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All E.R. 122; [1943] A.C. 32; 111 L.J.K.B. 433; 167 L.T. 101; 12 Digest (Repl.) 448, *3383*.

Green v. *Portsmouth Stadium, Ltd.*, [1953] 1 All E.R. 642; [1953] 1 W.L.R. 487; *revsd.* C.A., [1953] 2 All E.R. 102; [1953] 2 Q.B. 190; [1953] 2 W.L.R. 1206; 3rd Digest Supp.

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* The terms of s. 3 (1) and (2) are set out at p. 179, letter D, post.

Harse v. *Pearl Life Assurance Co.*, [1904] 1 K.B. 558; 73 L.J.K.B. 373; 90 L.T. 245; 12 Digest (Repl.) 321, *2477*.

Hastelow v. *Jackson*, (1828), 8 B. & C. 221; 6 L.J.O.S.K.B. 318; 108 E.R. 1026; 25 Digest 406, *95*.

Herman v. *Jeuchner*, (1885), 15 Q.B.D. 561; 54 L.J.Q.B. 340; 53 L.T. 94; 49 J.P. 502; 12 Digest (Repl.) 266, *2052*.

Johnson v. *Youden*, [1950] 1 All E.R. 300; [1950] 1 K.B. 544; 114 J.P. 136; 2nd Digest Supp.

Langton v. *Hughes*, (1813), 1 M. & S. 593; 105 E.R. 222; 12 Digest (Repl.) 303, *2327*.

Lowry v. *Bourdieu*, (1780), 2 Doug. K.B. 468; 99 E.R. 299; 12 Digest (Repl.) 318, *2446*.

Moses v. *Macferlan*, (1760), 2 Burr. 1005; 1 Wm. Bl. 219; 97 E.R. 676; 12 Digest (Repl.) 257, *1987*.

Petherpermal Chetty v. *Muniandi Servai*, (1908), 35 L.R.I.A. 98.

R. v. *Godinho*, (1950), 17 E.A.C.A. 132.

Rogers v. *Ingham*, (1876), 3 Ch.D. 351; 35 L.T. 677; 35 Digest 93, *25*.

Sharp Brothers & Knight v. *Chant*, [1917] 1 K.B. 771; 86 L.J.K.B. 608; 116 L.T. 185; 31 Digest (Repl.) 688, *7797*.

Smith v. *Bromley*, (1760), 2 Doug. K.B. 696; 99 E.R. 441; 12 Digest (Repl.) 315, *2425*.

Taylor v. *Bowers*, (1876), 1 Q.B.D. 291; 46 L.J.Q.B. 39; 34 L.T. 938; 12 Digest (Repl.) 316, *2438*.

Whiteley (*William*), *Ltd.* v. *R.*, (1909), 101 L.T. 741; 26 T.L.R. 19; 12 Digest (Repl.) 105, *621*.

Appeal.

Appeal by the landlord, Kiriri Cotton Co., Ltd., from an order of the Court of Appeal for Eastern Africa (O'Connor, P., Forbes, J.A., and Keatinge, J.), dated Apr. 18, 1958, affirming a decree of the High Court of Uganda (Lyon, J.), dated Sept. 24, 1957. The facts are set out in the judgment of the Board.

Elwyn Jones, Q.C., *E. P. Wallis-Jones* and *C. B. Patel* for the appellant, the landlord.

L. G. Scarman, Q.C., and *C. F. Dehn* for the respondent, the tenant.

LORD DENNING: The respondent, the plaintiff, Ranchhoddas Keshavji Dewani, is an Indian merchant living at Kampala in Uganda. The appellant, the defendant, is the Kiriri Cotton Co., Ltd. which owns a block of flats in Salisbury Road, Kampala. The plaintiff claims the sum of 10,000 shillings as money received by the defendant company for the use of the plaintiff. The High Court of Uganda (Lyon, J.) gave judgment for the plaintiff for that amount with costs. The Court of Appeal for Eastern Africa (O'Connor, P., Forbes, J.A., and Keatinge, J.) affirmed the decision. The defendant company appeals to Her Majesty in Council. The facts are simple. The plaintiff came to Kampala in March, 1953, and looked for somewhere to live. At the end of May, 1953, he took a flat in Salisbury Road but he had to pay 10,000 shillings premium. He now says that this premium was illegal because it was in contravention of the Rent Restriction Ordinance, and he claims the return of it. The oral evidence is so short that their Lordships set it out in full. Only the plaintiff gave evidence. He said:

> "I came to Kampala, Uganda, in 1953—March. I lived with a brother for one and a half months. I took a flat but I had to pay key money. I was searching for sometime. I got a flat at Kololo but after 2-3 days I had to leave, as I had trouble with a co-tenant. Then I got in touch with C. B. Patel, after having difficulty. I borrowed 10,000/- from the company as my brother was a director.
>
> "Cross-examination: I paid the money by borrowing the money."

A It is apparent from this evidence, as the trial judge said, that, during the negotiations for the flat, the plaintiff was at a disadvantage. He was having difficulty in obtaining accommodation—and he only got the flat by paying a premium of 10,000 shillings, which he borrowed for the purpose. He took it under a sub-lease dated Sept. 17, 1953. This was prepared by lawyers. It contained provisions whereby the defendant company, in consideration of the B sum of 10,000/- paid by the plaintiff by way of premium, sub-leased to him Flat No. 1 on the first floor for residence only, having three rooms, one kitchen, one bathroom and one lavatory. The term was seven years and one day from May 31, 1953. The rent was 300/- a month payable monthly in advance. And there were several covenants on either side.

Their Lordships desire to point out at once that neither party thought that C they were doing anything illegal. The lease was for more than seven years and it was thought that, on a lease for that length of time, there was nothing wrong in asking for a premium or receiving it. This was an easy mistake to make as will be seen if one reads s. 3 (1) and (2) of the Rent Restriction Ordinance:

> "(1) No owner or lessee of a dwelling-house or premises shall let or D sub-let such dwelling-house or premises at a rent which exceeds the standard rent.
>
> "(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a persons asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made E before the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000 or imprisonment for a period not exceeding six months or to both such fine and imprisonment:
>
> "Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:
>
> F "And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

Anyone reading the last proviso to that section—without more—might well think that a premium could be charged on the lease of this flat for seven years G and one day. He would readily assume that the word "premises" included a flat. But he would be wrong. For if he took pains to look back to the definition s. 2 he would find that, in this ordinance, the word "premises" refers only to business premises and not to residential flats at all. And so this proviso does not apply to this flat—because by the very terms of the sub-lease it was let "for residence only". Their Lordships ought, perhaps, to set out the material words H of the definition section (1) which produces this result—it says that—

> "'dwelling-house' means any building or part of a building let for human habitation as a separate dwelling . . .
>
> "'premises' means any building or part of a building let for business, trade, or professional purpose or for the public service . . ."

I It was owing to the failure of the lawyers to refer to those definitions—or at any rate to appreciate the importance of them—that the mistake arose.

Their Lordships also think it right to point out that there was no evidence to show whether the premium of 10,000/- was extortionate or not. Their Lordships were told that no standard rent had been fixed for this flat because it was a new flat. It is obvious that, if the standard rent were to be fixed at, say, 450/- a month for seven years, there would be nothing extortionate in a premium of 10,000/- down and a rent of 300/- a month thereafter; for it would A come in the long run to much about the same. Nevertheless, no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate, the fact remains that the defendant company received a premium contrary to the provisions of the ordinance; and the question is whether the plaintiff can recover it back—remembering always that there is nothing in the Uganda Ordinance, comparable to the English Acts, enabling a premium to be recovered B back.

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(1) Viz., s. 2 of the ordinance.

This omission in the ordinance was considered to be decisive by the Court of Appeal for Eastern Africa in a case a few years ago called *R.* v. *Godinho* (2). The court was then differently constituted from what it is now. The judges argued in this wise (3):

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> " We do not know the reason, but the Uganda legislature in its wisdom has included in the ordinance no provision comparable to s. 8 (2) of the Rent Restriction Act of 1920 . . . Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself has committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he D could not go to a civil court with clean hands and the principle stated by LORD ELLENBOROUGH in *Langton* v. *Hughes* (4) would have application. ' What is done in contravention of . . . an Act of Parliament, cannot be made the subject-matter of an action '."

In considering the validity of this reasoning, their Lordships would point out that the observation of LORD ELLENBOROUGH, C.J., was made in a case where E a party was seeking the aid of the court in order positively to enforce an illegal contract. It should be confined to cases of that description. His observation has no application to cases such as the present where a party is seeking to recover money paid or property transferred under an illegal transaction. In such cases, the general principle was stated by LITTLEDALE, J., in *Hastelow* v. *Jackson* (5):

> " If two parties enter into an illegal contract, and money is paid upon F it by one to the other, that may be recovered back before the execution of the contract, but not afterwards."

In accordance with this principle, so long as the illegal transaction has not been fully executed and carried out, the courts have in many cases shown themselves ready to entertain a suit for recovery of the money paid or property G transferred. These were cases in which it appeared to the court that, even though the transaction was illegal, nevertheless it was better to allow the plaintiff to resile from it before it was completed, and to award restitution to him rather than to allow the defendant to remain in possession of his illegal gains: see *Taylor* v. *Bowers* (6), which was approved by their Lordships' Board in *Petherpermal Chetty* v. *Muniandi Servai* (7). But so soon as the illegal transaction has been H fully executed and carried out, the courts will not entertain a suit for recovery: see *Herman* v. *Jeuchner* (8), unless it appears that the parties were not in pari delicto (see *Lowry* v. *Bourdieu* (9) by LORD MANSFIELD).

It is clear that, in the present case, the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the I plaintiff must show that he was not in pari delicto with the defendant company. That was, indeed, the way he put his claim in the pleadings. After setting out the lease, the payment of the premium and the entry into occupation, the statement of claim proceeded simply to say:

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(2) (1950), 17 E.A.C.A. 132. (3) (1950), 17 E.A.C.A. at p. 134.
(4) (1813), 1 M. & S. at p. 596. (5) (1828), 8 B. & C. at p. 226.
(6) (1876), 1 Q.B.D. 291. (7) (1908), 35 L.R.I.A. 98. (8) (1885), 15 Q.B.D. 561.
(9) (1780), 2 Doug. K.B. at p. 472.

> "By virtue of the provisions of sub-s. (2) of s. 3 of the Rent Restriction Ordinance the receipt of the said sum of Shs. 10,000/- by the defendant from the plaintiff . . . was illegal, but the plaintiff is entitled to recover the same since he (the plaintiff) was not in pari delicto with the defendant. The plaintiff claims the sum of Shs. 10,000/- as money received by the defendant for the use of the plaintiff."

The issue thus becomes—Was the plaintiff in pari delicto with the defendant company? Counsel for the defendant company said they were both in pari delicto. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True, it was paid under a mistake of law, but that was a mistake common to them both. They were both equally supposed to know the law. They both equally mistook it and were thus in pari delicto. In support of this argument, the defendant company referred to such well-known cases as *Harse* v. *Pearl Life Assurance Co.* (10); *William Whiteley, Ltd.* v. *R.* (11); *Evanson* v. *Crooks* (12), and particularly to *Sharp Brothers & Knight* v. *Chant* (13). Their Lordships cannot accept this argument. It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. JAMES, L.J., pointed that out in *Rogers* v. *Ingham* (14). If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other—it being imposed on him specially for the protection of the other—then they are not in pari delicto and the money can be recovered back: see *Browning* v. *Morris* (15) by LORD MANSFIELD. Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not in pari delicto and the money can be recovered back: see *Harse* v. *Pearl Life Assurance Co.* (16), by ROMER, L.J. These propositions are in full accord with the principles laid down by LORD MANSFIELD relating to the action for money had and received. Their Lordships have in mind particularly his judgment in *Smith* v. *Bromley* (17) in notis, which he delivered when he sat at Guildhall in April, 1760; and his celebrated judgment three or four weeks later, on May 19, 1760, in *Moses* v. *Macferlan* (18) when he sat in banco. Their Lordships were referred to some cases thirty or forty years ago where disparaging remarks were made about the action for money had and received; but their Lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract. If it were, none such could be imputed here, as their Lordships readily agree. It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. This was explained by LORD WRIGHT in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* (19). All the particular heads of money had and received, such as money paid under a mistake of fact, money paid under a consideration that has wholly failed, money paid by one who is not in pari delicto with the defendant, are only instances where the law says the money ought to be returned.

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(10) [1904] 1 K.B. 558. (11) (1909), 101 L.T. 741. (12) (1911), 106 L.T. 264.
(13) [1917] 1 K.B. 771. (14) (1876), 3 Ch.D. at p. 355.
(15) (1778), 2 Cowp. at p. 792. (16) [1904] 1 K.B. at p. 564.
(17) (1760), 2 Doug. K.B. 696. (18) (1760), 2 Burr. 1005.
(19) [1942] 2 All E.R. at pp. 136, 137; [1943] A.C. at pp. 62-64.

In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant " key-money ". Section 3 (2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not on the tenant. It is imposed on the " person who asks for, solicits or receives any sum of money ", but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see *Johnson* v. *Youden* (20) and s. 3 of the Rent Restriction (Amendment) Ordinance, 1954), but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the ordinance on the shoulders of the landlord for the protection of the tenant; and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to " jump the queue ", or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.

Seeing, then, that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law; and it is not necessary to find a remedy given by the ordinance, either expressly or by implication. The omission of a statutory remedy does not, in cases of this kind, exclude the remedy by money had and received. That is amply shown by the numerous cases to which their Lordships were referred, such as those arising under the statutes against usury, lotteries and gaming, in which there was no remedy given by the statute but, nevertheless, it was held that an action lay for money had and received. It was accepted, too, by PARKER, J., in his considered judgment in *Green* v. *Portsmouth Stadium, Ltd.* (21); and his decision was only reversed by the Court of Appeal because they thought the statute there was of a different kind. It was not intended to protect bookmakers from the demands of racecourse owners but was rather for the regulation of racecourses. There was nothing in that case to show that the plaintiff was not in pari delicto with the defendants.

Their Lordships find themselves in full agreement with the judgment of the High Court of Uganda and of the Court of Appeal for Eastern Africa and will humbly advise Her Majesty that this appeal should be dismissed. The defendant company must pay the costs.

Appeal dismissed.

Solicitors: *Hale, Ringrose & Morrow* (for the appellant, the landlord); *A. F. & R. W. Tweedie* (for the respondent, the tenant).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(20) [1950] 1 All E.R. 300; [1950] 1 K.B. 544.

(21) [1953] 1 All E.R. 642; *revsd.* C.A., [1953] 2 All E.R. 102; [1953] 2 Q.B. 190.

Re VERNAZZA.

[Court of Appeal (Ormerod, Willmer and Harman, L.JJ.), December 2, 1959.]

Vexatious Proceedings—Instituting "vexatious legal proceedings"—Habitually and persistently and without any reasonable ground—Action instituted after Court of Appeal stated that there was no reason therefor—Subsequent proceedings by summonses in winding-up and by way of appeal, and further action—What may constitute "institution" of legal proceedings—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 49), *s.* 51 (1).

Statute—Retrospective operation—Pending proceedings—Alteration of law after judgment and before appeal—Duty of the Court of Appeal—Vested substantive right not to be interfered with—Distinction for matters of procedure—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 49), *s.* 27 (1)—*Supreme Court of Judicature (Amendment) Act,* 1959 (7 *&* 8 *Eliz.* 2 *c.* 39), *s.* 1 (1).

In 1937 a plaintiff agreed to compromise his action for breach of a contract of service against a company under which judgment was given against him and he took out £400 paid into court by the company. He subsequently gave notice of appeal, but his appeal was dismissed with costs, the presiding lord justice in the Court of Appeal stating that he had no grounds whatever for setting aside a settlement made by his counsel with his knowledge and authority. His petition for leave to appeal to the House of Lords was refused. In June, 1938, he began a second action against the company, seeking to set aside the judgment in the first action, and after various proceedings in that action and after it had lain dormant after 1940, it was struck out for want of prosecution in 1957. His appeal to the Court of Appeal against this decision was dismissed and his petition for leave to appeal to the House of Lords was refused. In 1958 he brought a further action to set aside the judgment in the first action and this also was dismissed as frivolous and vexatious and an abuse of the process of the court. Meanwhile, the company having gone into voluntary liquidation in 1937, he had sent in a proof of debt in respect of his claim and, on its rejection, he sought by successive summonses to have the proof allowed (1938), to obtain a declaration that the liquidator was guilty of misfeasance and breach of trust (1938), again to have his proof allowed (1949), and, on the dismissal of his second action for want of prosecution in 1957, to have these summonses heard, they having been adjourned pending the hearing of the action. All the summonses were dismissed with costs. On a motion by the Attorney-General, the Queen's Bench Divisional Court made an order under s. 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, that the plaintiff should not be allowed to institute any further legal proceedings without the leave of the court. On appeal, and on a cross-notice by the Attorney-General seeking a variation of the order to provide also that the plaintiff should not be allowed to continue any legal proceedings begun before the making of the order without such leave, by virtue of s. 1 (1) of the Supreme Court of Judicature (Amendment) Act, 1959, which had come into force on May 14, 1959, after the making of the order,

Held: (i) the order of the Divisional Court must be upheld because there was abundant evidence on which it could find that the plaintiff had "habitually and persistently and without any reasonable ground instituted vexatious legal proceedings", within s. 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, the action of 1938 being plainly vexatious as it was brought soon after the statement in the Court of Appeal that the plaintiff had no ground for setting aside the settlement

previously reached, and the later proceedings affording evidence of habit A
and persistence.

(ii) (Harman, L.J., dubitante): the cross-notice must be dismissed,
since the right of the appellant with regard to existing proceedings at the
time of the order of the Divisional Court was a vested substantive right,
not a matter of procedure, and the order should not be varied to take
account of a subsequent change in the law by the Supreme Court of B
Judicature (Amendment) Act, 1959, and thereby deprive the appellant
of a right remaining vested in him at the time of the order.

Dictum of Lord Wright, M.R., in *Re Debtor, Ex p. Debtor* ([1936] Ch.
at p. 242) applied. *Quilter* v. *Mapleson* ((1882), 9 Q.B.D. 672) distinguished.

Per Ormerod and Willmer, L.JJ.: the meaning of the words "instituted
. . . legal proceedings" in s. 51 (1) of the Supreme Court of Judicature C
(Consolidation) Act, 1925, was not confined to the beginning of an action
by originating process but was not so wide as to extend to any step whatsoever
in an action which, if taken, would lead to the grant of relief (see
p. 187, letter I, and p. 191, letter E, post); *semble* the bringing of an
appeal to the Court of Appeal is the institution of legal proceedings within
that subsection (see p. 188, letter B, and p. 191, letter F, post). D

Quaere (per Ormerod, L.J.) whether petitions for leave to appeal to
the House of Lords are the institution of legal proceedings within the
meaning of the Supreme Court of Judicature (Consolidation) Act, 1925,
s. 51 (1) (see p. 188, letter A, post).

Decision of the Divisional Court ([1959] 2 All E.R. 200) affirmed and
cross-notice dismissed. E

[As to vexatious actions, see 1 Halsbury's Laws (3rd Edn.) 19, para. 29.

As to change of law during proceedings, see 30 Halsbury's Laws (3rd Edn.)
470, para. 886; and for cases on the subject, see Digest (Practice) 784, 785,
3474-3478.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (1),
see 18 Halsbury's Statutes (2nd Edn.) 488.] F

Cases referred to:

Colonial Sugar Refining Co. v. *Irving*, [1905] A.C. 369; 74 L.J.P.C. 77; 92
L.T. 738; 8 Digest (Repl.) 810, *625*.

Debtor, Re, Ex p. Debtor (*No. 490 of 1935*), [1936] Ch. 237; 105 L.J.Ch. 129;
154 L.T. 44; Digest Supp.

Quilter v. *Mapleson*, (1882), 9 Q.B.D. 672; 52 L.J.Q.B. 44; 47 L.T. 561; G
47 J.P. 342; 42 Digest 696, *1111*.

Suche (*Joseph*) *& Co., Ltd., Re*, (1875), 1 Ch.D. 48; 45 L.J.Ch. 12; 33 L.T.
774; 42 Digest 706, *1236*.

Appeal and Cross-Notice.

On Feb. 19, 1959, the respondent Attorney-General brought proceedings by
way of originating motion, seeking an order under s. 51 (1) of the Supreme H
Court of Judicature (Consolidation) Act, 1925, that no legal proceedings should
be instituted by the appellant, Mr. Anthony Vernazza, without leave of the
High Court, by reason of his having habitually and persistently and without
any reasonable ground instituted vexatious legal proceedings. On Apr. 9,
1959, a Queen's Bench Divisional Court (Lord Parker, C.J., Donovan and
Salmon, JJ.), made the order prayed for ([1959] 2 All E.R. 200). The appellant I
appealed to the Court of Appeal. The Attorney-General, by a cross-notice,
asked for the order to be varied to preclude, by virtue of the Supreme Court of
Judicature (Amendment) Act, 1959, s. 1 (1), the continuance, without leave, of
any proceedings already commenced by the appellant. The facts appear in the
judgment of Ormerod, L.J. (p. 185, post).

Arthur Bagnall for the appellant.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *J. R.
Cumming-Bruce* for the respondent.

ORMEROD, L.J.: This is an appeal from a judgment of the Divisional Court given on Apr. 9, 1959, ordering that the appellant, Mr. Vernazza, should be treated as a vexatious litigant and should not be allowed to institute any further proceedings without the consent of the court. There is also, by leave of the court, a cross-notice on the part of the Attorney-General asking that the order of the Divisional Court should be varied by making an order applicable to existing proceedings as provided by the amending Act of 1959.

The circumstances in which this case came before the Divisional Court are shortly these. So long ago as 1935, the appellant was employed, or had been employed, by a company, Baburizza & Co., Ltd., and had been dismissed by them. On July 11, 1935, he issued a writ claiming damages for breach of contract of service. The action came on for hearing on June 16, 1937, before Swift, J. The defendants had paid into court a sum of £400, and, on the advice of the appellant's counsel, according to the evidence which was before the Divisional Court, he agreed to compromise that action, and, as a result, the action was withdrawn. There was no order for the payment of costs by the appellant and he was allowed to take out the sum of £400 which had been paid into court by the defendants. That, to all intents and purposes, was the end of the action, but apparently the appellant was not satisfied, and on July 28, 1937, he gave notice of appeal. That appeal came before this court, consisting of Greer, Slesser and Clauson, L.JJ., on Mar. 10, 1938, and was dismissed with costs. In the course of the discussion Greer, L.J., said to the appellant:

> "We have heard what you say, and you have no grounds whatever and have established no grounds whatever for setting aside a settlement which with your knowledge and with your authority was made by your counsel and there is an end of this appeal. The appeal will be dismissed with costs."

In spite of those words of Greer, L.J., the appellant persisted in the matter and petitioned the House of Lords for leave to appeal. That petition was duly heard and leave was refused. That might be thought to put an end to the matter and to satisfy the appellant, but, on June 2, 1938, he started new proceedings in the Chancery Division against the company by a writ asking that the judgment of Swift, J., be set aside, apparently on the ground that the compromise of the action had not been entered into with his consent. In the course of those proceedings, on Nov. 20, a statement of claim had been delivered which was ordered by Farwell, J., to be struck out as being vexatious. A second statement of claim was considered on Feb. 8, 1939, by Crossman, J., and the appellant was given leave to amend certain parts of the statement of claim and other parts were struck out. On June 20, 1939, a summons to strike out the defence in that action was heard by Farwell, J., and on that no order was made except that the appellant should pay the costs of the application. So the matter went on. There were various other proceedings going on to June, 1940, and then the matter remained dormant for seventeen years until June 25, 1957, when a summons was taken out by the defendant company to dismiss the action for want of prosecution. That came on in October, 1957, before Harman, J., and the action was dismissed for want of prosecution. The appellant appealed to the Court of Appeal and that appeal was dismissed. He then petitioned the House of Lords for leave to appeal and that petition was refused.

Then, on July 24, 1958, once again he commenced proceedings against the company by writ again asking for the judgment of Swift, J., to be set aside, apparently on exactly the same grounds as set forth in his previous action. That was dismissed by Wynn-Parry, J., as being frivolous and vexatious and an abuse of the process of the court. Apparently, there was no appeal against that decision. It will be seen from this that by July, 1958, there had been two separate actions to set aside the judgment of Swift, J., one of which had lain dormant for some seventeen years and both of which had been instituted after

Greer, L.J., had intimated in the clearest possible terms that there was no ground of appeal from the original order of Swift, J., made in the action which was compromised.

That is not the whole of the activities of the appellant. The company against which he was proceeding went into voluntary liquidation in 1937. In the meantime, on Feb. 10, 1938, he proceeded by originating summons against the company, having already sent in his proof of debt which had been rejected by the liquidator. By his originating summons he asked that the liquidator's rejection of his proof of debt be reversed and that the proof be allowed. That matter stood over pending the hearing of the action which had been started in the Chancery Division. Then, on Nov. 12, 1938, he asked for a declaration that the liquidator was guilty of misfeasance and breach of trust. That summons again stood over. On Mar. 7, 1949, he applied to the court to have his proof allowed in full, and that application also was adjourned pending the hearing of the Chancery action. Then, after that action had been dismissed for want of prosecution, in October, 1957, he applied for all the summonses which had been adjourned to be heard, and they came before Vaisey, J., on Dec. 1 and 2, 1958, and were all dismissed with costs. Those, as far as I can follow the facts, are the bare bones of the story of the various proceedings which this appellant has instituted against this company since the original action in July, 1935.

In consequence of that, the matter came before the Divisional Court of the Queen's Bench Division on Apr. 9, 1959, on a summons by the Attorney-General asking that this appellant should be declared to be a vexatious litigant. In the course of his judgment, Lord Parker, C.J. said (1):

> "Apparently as long ago as 1935 the [appellant] was obsessed with the idea that he was owed by a company that he had served some £158,982 0s. 6d. for services rendered. He brought proceedings in the King's Bench Division claiming that sum. At the time when they came on before Swift, J., the [appellant's] leading counsel had advised him that he had no case, but thanks to some generosity on the part of the defendant company, judgment was entered by Swift, J., for the defendant but without costs on the understanding that the defendant would allow the [appellant] to take out and retain the £400 that was in court. Notwithstanding that, he persisted in this delusion. He has since brought actions in the Chancery Division and the Queen's Bench Division claiming in one form or another that that consent judgment ought to be set aside and that he is still owed this £158,000. During the course of the history of the matter the company concerned went into voluntary liquidation, and there followed in the Companies Court some five summonses, true to a large extent to retain the status quo and prevent the company distributing the assets, but all taken out under this delusion that he is owed some £158,000."

Then the learned Lord Chief Justice went on to say that, in his opinion, it was just the sort of case which the section had in mind and in which an order should be made, and accordingly an order was made.

The order was made in pursuance of s. 51 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which runs as follows:

> "If, on an application made by the Attorney-General under this section, the High Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may . . . order that no legal proceedings shall without the leave of the High Court or a judge thereof be instituted by him in any court . . ."

The submission of counsel for the appellant was that in considering the case the Divisional Court had not approached it from the proper angle. What it had done was to take what he described as a sweeping view of the various actions which the appellant had taken since 1935 and to come to the conclusion on a general survey of those matters that this was a case for an order. The submission counsel put forward was, first, that the wording of the Act dealt with actions instituted " without any reasonable ground ", and which are " vexatious legal proceedings ". Therefore he submitted that, in order to be satisfied that the conditions of the section have been complied with before an order is made, it was necessary to consider first from the objective point of view whether the proceedings were instituted without any reasonable ground, and therefore each separate action should be considered and decided on accordingly. Secondly, the question should be considered whether they were vexatious, and that was a subjective matter and really had to be decided by considering whether the appellant was acting maliciously or otherwise than in good faith.

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(1) [1959] 2 All E.R. at p. 201.

In my opinion that submission is not the right way to look at the matter. The words of the section are " without any reasonable ground instituted vexatious legal proceedings ". They are referring to legal proceedings, and the question is, not whether they have been instituted vexatiously, but whether the legal proceedings are in fact vexatious. I suppose most proceedings are vexatious to the persons against whom they are directed, and therefore the further question has to be considered whether, though they may be vexatious, they have been brought without any reasonable ground. That is a matter for the court to decide. But if, in the opinion of the court, the proceedings are vexatious and there is no reasonable ground for bringing them, then they are within the category at which this section aims. The second contention made by counsel for the appellant on the question was that in the present case there was no sufficient evidence that any proceedings which had been brought by this appellant were " persistently " vexatious. He submitted that the proper construction of the words " instituted legal proceedings " must be the commencement of an action by a writ or other proper procedure, and that nothing else could be regarded as the institution of proceedings. In that sense he said that in this particular case the two actions in the Chancery Division, brought to set aside the judgment of SWIFT, J., were proceedings which had been instituted within the meaning of this section but that any of the other matters, such as the various summonses in the liquidation, not being actions which had been commenced by writ, were merely incidental to the actions already commenced, or, as he put it, instituted. He said that, in those circumstances, while prepared to agree that the second action which the appellant commenced against the company to set aside the judgment of SWIFT, J., was vexatious, it was the only one properly to be so described, and therefore, in the circumstances, not sufficient to justify this order being made.

The Attorney-General on the other hand submitted that the term " instituted proceedings " carried a very much wider construction than the construction for which counsel for the appellant contended. His submission was that taking any step in an action was the institution of proceedings. His junior counsel in the course of his submission to the court said that it was a step taken which, if successful, would set in train the machinery of the court with the effect that the court would grant relief or compel the other party to take a procedural step. That, of course, puts an extremely wide construction on the section, and would operate to bring within its ambit even a summons for directions. I am not prepared to put so wide a construction as that on the words of this subsection, but I think that the words admit of a wider construction than that for which counsel for the appellant contends, which is that the words " institution of proceedings " mean nothing more than the commencement of an action by a writ.

In this particular case various matters have been referred to which might or might not be said to constitute the institution of proceedings. Two actions by common consent are proceedings which have been instituted. There are appeals to this court and, if not appeals, petitions for leave to appeal, to the House of Lords. I think the question whether petitions to the House of Lords for leave to appeal amount to the institution of proceedings is a question which is very much in doubt. The question also arises whether an appeal to this court can be regarded as a separate institution of proceedings other than an institution of proceedings in the original action. It is probably unnecessary to decide that question here, but I lean to the view that an appeal to this court from a decision of the High Court or from any other court is the institution of a separate proceeding. But, apart altogether from the question of appeals, there are the summonses to which I have referred which were taken out in the liquidation as part of the attempt by the appellant to obtain the money which he alleged was owing to him by the company.

So far as those proceedings are concerned, counsel for the appellant says in the first place that they are not proceedings which were instituted but they are really matters of procedure. He says, further, that in any event they cannot be regarded as vexatious, because they were proceedings which it was essential that the appellant should undertake in order to keep his rights alive in the liquidation pending the trial of the action which he had begun to set aside the judgment of Swift, J. Of course, if he was justified in commencing that action and justified in conducting it as he did, it may very well be that he was justified in taking out the various summonses in the liquidation to protect his rights. On the other hand, it appears to me that it may very well be said that the action which was started by the appellant on June 2, 1938, after the petition to appeal to the House of Lords in the original action had been refused, was a vexatious action and an action for which there was no ground, that being an action by the appellant which was allowed to proceed for a period of seventeen years from 1940 to 1957.

Those are all matters which were present to the mind of the Divisional Court at the time it made its decision. Although the learned Lord Chief Justice did not say in terms that he took all those matters into consideration, I think that he indicated in his judgment that he had all those matters in mind in considering whether or not this appellant came within the definition of a vexatious litigant. I think that it is beyond question that there was ample material before the Divisional Court which would justify it in exercising its discretion in the way it did in making this order. In those circumstances, in my view, there is no justification for the submission on the part of the appellant that the Divisional Court was in error or that it approached the matter from the wrong angle. Reading the judgment of the learned Lord Chief Justice (2) I find nothing which would justify this court in interfering with the order made, and I would dismiss the appeal.

However, that is not the end of the matter, because the respondent has put in a cross-notice asking for the order of the Divisional Court to be varied by including the provisions of the Supreme Court of Judicature (Amendment) Act, 1959, s. 1 (1). That Act, which is " An Act to amend the law relating to the restriction of vexatious actions ", came into force on May 14, 1959, and it provides in s. 1 (1) that there should be inserted in sub-s. (1) of s. 51 of the Act of 1925 after the words " in any court " the words

> " and that any legal proceedings instituted by him in any court before the making of the order shall not be continued by him without such leave."

In other words, where s. 51 (1) of the Act of 1925 gave power to the court to make an order to prevent the litigant instituting further proceedings without

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(2) [1959] 2 All E.R. at p. 201.

A the consent of the court, the Act of 1959 extended that power and empowered the court to prevent the litigant from continuing any proceedings already instituted without the consent of the court. The Attorney-General has argued that, as the matter has come before the Court of Appeal, this court has power to vary the order on the ground that the Divisional Court would, if it were dealing with the matter now, have power to deal with it in that way. In support B of that submission, he relied on s. 27 (1) of the Act of 1925, which reads as follows:

> " Subject as otherwise provided in this Act and to rules of court, the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court, and for all the purposes C of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the High Court."

It was submitted that in consequence this court had power to say that, by reason of the Act of 1959, the court had power to make an order prohibiting D the appellant from continuing any proceedings which he had instituted without leave of the court. It was contended that, if the Court of Appeal had the power of the High Court, it had the power to vary the order of the Divisional Court in accordance with the Act of 1959. In support of that contention the Attorney-General referred to *Quilter* v. *Mapleson* (3), decided in 1882. That was an action to recover demised property under a proviso of re-entry for breach of a covenant E to insure. The defendant claimed relief under the statute. The plaintiff obtained judgment on July 4, 1881. On Aug. 4 the defendant appealed, and a stay of proceedings was granted and continued, so that the plaintiff never obtained possession. On Jan. 1, 1882, the Conveyancing and Law of Property Act, 1881, came into operation. After that Act had come into operation, the appeal came on to be heard, and it was held that the Conveyancing and Law of Property F Act, 1881, was not confined to breaches taking place after the Act came into operation, but extended also to breaches committed before the Act and to proceedings pending when the Act came into operation, and that, as the landlord had not obtained possession, but the action was still pending, there was jurisdiction to grant relief to the tenant under that subsection. It was also held that (3):

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> " assuming the judgment of the court below to have been correct according to the law as it then stood, the Court of Appeal could grant to the tenant the relief to which he was entitled according to the law as it stood at the hearing of the appeal, since the general orders provide that appeals shall be by way of re-hearing, and give power to the Court of Appeal not merely to make any order which ought to have been made by the court H below, but to make such further or other order as the case may require."

On the strength of that case, it was argued that the court in this case had the power to vary the order to bring it into accordance with the terms of the Act of 1959. The answer to that submission by counsel for the appellant was that such may very well be the position with regard to matters of procedure, but it I is not the position when the effect of the order would be to take away a right which was vested in a litigant. The argument was that the subject had the right to come to the court and have his complaint heard. To take away that right under s. 51 (1) of the Act of 1925 is, in effect, to deprive him of something already vested in him. For this court now to vary that order in accordance with the Act of 1959 would be further to interfere with the rights vested in the appellant.

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(3) (1882), 9 Q.B.D. 672.

Reference was made to the judgment of Lord Wright, M.R., in *Re Debtor, Ex p. Debtor* (*No. 490 of 1935*) (4):

> "Counsel for the debtor relied on *Quilter* v. *Mapleson* (5). That however was a case merely dealing with matters of procedure or remedies to which a different rule applies. It is not necessary to quote any authority for that distinction save what was said by Jessel, M.R., in *Re Joseph Suche & Co., Ltd.* (6): 'It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section [i.e., s. 10 of the Judicature Act, 1875] is within that exception. I am of opinion that it is not'."

Then later he says (7):

> "Thus while an appellate court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the court of first instance, yet with regard to substantive rights it is well established that the appellate court must give effect to the same law as that which was in force at the date of the earlier proceeding. That is recognised by R.S.C., Ord. 58, r. 4, which provides that even in cases where the proceeding in the appeal court is a re-hearing, 'the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made.' A matter of substantive right which has become res judicata cannot be upset by a subsequent general change of the law, in the absence of precise intention to make the change so retrospective being evidenced in the Act."

The submission of counsel for the appellant in this case is that this is a substantive right vested in the appellant, and, relying on the words of Lord Wright, he submits that this court should not interfere to vary this order. We were also referred to a decision of the Privy Council in *Colonial Sugar Refining Co.* v. *Irving* (8) which dealt with the right of appeal to the Privy Council, although so far as the Australian States were concerned that right of appeal had been abolished and a right of appeal to the High Court of Australia had been substituted. It was held by the Privy Council that, if the right had become vested, i.e., if at the time of the action there was a right of appeal to the Privy Council, the fact that the Act abolished such appeals did not alter the position and the appellant there had a right of appeal.

In these circumstances, I am of opinion that this cross-notice must fail. It appears to me that this is a case where a right is vested in the appellant, and that, having regard to the words of Lord Wright, M.R., the Court of Appeal should not interfere to vary an order such as this made in accordance with the law as it existed when it was made. It may be—I pass no opinion on it—that the Attorney-General may go again to the Divisional Court and obtain an order in the terms of the Act of 1959. That is a matter which is not at present before this court. I would dismiss both the appeal and the cross-notice.

WILLMER, L.J.: I am of the same opinion, and I add a few words only because of the importance of the matter which has been discussed. Mr. Bagnall's argument which he presented to us in a most persuasive manner, appeared to me to rest on two propositions, one of law relating to the construction of the Supreme Court of Judicature (Consolidation) Act, 1925, and the other of fact, neither of which I feel able to adopt. So far as the construction of the Act is concerned, he has pointed out, quite rightly, that what s. 51 (1) of the Act of 1925 is dealing with is a person who has " habitually and persistently and without any reasonable ground instituted vexatious legal proceedings." According to his argument, the words " instituted proceedings " must be given what seems to me a very narrow meaning. Virtually, counsel for the appellant would restrict those words to the commencement of a fresh action by the issue of a new writ. As I understand his argument, nothing except that is aimed at by the section of the Act.

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(4) [1936] Ch. 237 at p. 242.
(5) (1882), 9 Q.B.D. 672.
(6) (1875), 1 Ch.D. 48 at p. 50.
(7) [1936] Ch. at p. 243.
(8) [1905] A.C. 369.

Counsel's second proposition, following on that construction of s. 51 (1), is that only very few separate proceedings as so defined have been instituted by the appellant. He has submitted to us that the commencement of what I may call the action of 1938 could not be said to be vexatious or without reasonable cause. The proceedings in the Companies Court and the proceedings in relation to the estate of Mr. Petrinovic, to which my Lord has referred, according to counsel's argument, can only be regarded as by-products of the action of 1938, i.e., as steps taken merely for the purpose of preserving the status quo until the determination of that action. Thus it is only when one gets to 1958, when the appellant commenced the action in the Chancery Division which was dismissed by WYNN-PARRY, J., that counsel says there is any question of a vexatious action being commenced. That being so, the appellant has only once instituted proceedings vexatiously and therefore it cannot be said that he is a person who has " habitually and persistently " done so, and consequently the section of the Act does not apply.

As I said at the beginning, I do not feel disposed to accept either of the propositions on which that argument rests. It seems to me that the construction of the section which we are invited to adopt by counsel for the appellant is much too narrow. At the same time, I share the view already expressed by my Lord that the alternative construction suggested to us by the Attorney-General and by his junior counsel is much too wide. I do not think that this is an occasion which makes it necessary to attempt the almost impossible task of drawing an exact line between that which does and that which does not amount to " instituting " proceedings. I should have thought that there is much to be said for the view that, when one institutes an appeal in an action which has already been disposed of, one can fairly be said to be instituting proceedings, even though the title of the action and its number may be the same when it gets to the Court of Appeal as in the court below. If that is a correct view, or anything like a correct view, then it must be clear that in the twenty years or so which have elapsed since the dismissal of the original action there have been numerous occasions when proceedings have been " instituted ".

Were they then " vexatious " proceedings? It seems to me that, ever since Mar. 10, 1938, the day on which the Court of Appeal gave judgment in the original action, and the day on which GREER, L.J., made the remarks which my Lord has already read, there has been no possible reason for the institution of fresh proceedings by the appellant arising out of his claim against the company. That is enough to dispose of the submission of fact which is so important for the argument of counsel for the appellant, viz., that the institution of the action of 1938 was not vexatious. It seems to me that there was abundant evidence before the Divisional Court which would justify it in coming to the conclusion that the institution of that action, involving as it did the consequential institution of a number of other proceedings and the prosecution of a number of appeals, gave rise to the institution of vexatious legal proceedings which over the years may fairly be said to have become " habitual " and " persistent ". In such circumstances, it appears to me quite impossible to say that the Divisional Court was not well entitled to come to the conclusion which it reached.

With regard to the cross-notice put in by the Attorney-General, I confess that at first sight I was much attracted by the argument that it was competent for A this court to apply the provisions of the Act of 1959. It appeared to me that there was much force in the argument that the effect of s. 27 of the Act of 1925 was to put this court into the position of the High Court, i.e., to put us in a position in which we would stand, as it were, in the shoes of the High Court as though the High Court were sitting and giving judgment today. On that basis, it seemed to me that it would be our duty to exercise today the powers of the B High Court as they exist today. But in his argument to the contrary counsel for the appellant has persuaded me that that is a wrong view. I am satisfied, as a result of his argument, that the change of law effected by the Act of 1959, so far as the powers thereby conferred are concerned, is such as to affect the substantive rights of a man in the position of the appellant. In such circumstances, the principle stated by LORD WRIGHT, M.R., in *Re Debtor* (9), to which my C Lord has already referred, applies with full force. In the circumstances, I have come to the conclusion that it is impossible for us to do other than apply the law, and give effect to the substantive rights of the appellant as they stood at the date of the hearing before the Divisional Court. For these reasons, I agree that both the appeal and the cross-notice should be dismissed.

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HARMAN, L.J.: I agree. I desire to reserve my opinion as to what exactly may be meant by the words " institution of legal proceedings ". I am of opinion that even the narrowest view would be enough to constitute the appellant's actions vexatious litigation. There have been two writs and three originating summonses which are clearly, on any view, the institution of proceedings. They are all part of the vendetta by means of which for twenty years E this man has harassed the company, its liquidator, its principal shareholder, and his personal representative. The Divisional Court took a broad view of the matter, and I think that they were perfectly right to take such a view.

On the other point, I do not feel that LORD WRIGHT's decision is very satisfactory, because there are always two sides to a question. It seems to me that in *Quilter* v. *Mapleson* (10), SIR GEORGE JESSEL, M.R.'s case, it was F the landlord who had a vested right and lost it by a subsequent judgment; it is hard to see why it was more procedural than LORD WRIGHT's case (11). All the same, I do not think that it would be right for me to say that I should not have followed LORD WRIGHT's opinion in a matter of this kind. I, therefore, agree with my brethren on both points.

Appeal and cross-notice dismissed. Leave to appeal to the House of Lords refused to both parties.

Solicitors: *Official Solicitor* (for the appellant); *Treasury Solicitor* (for the respondent).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(9) [1936] Ch. at p. 242. (10) (1882), 9 Q.B.D. 672. (11) [1936] Ch. 237.

RIVERSTONE MEAT CO., PTY., LTD. *v.* LANCASHIRE SHIPPING CO., LTD.

[COURT OF APPEAL (Morris, Ormerod and Willmer, L.JJ.), July 10, 13, 16, 17, 20, 21, 22, 23, 27, 28, 29, November 26, 1959.]

Shipping—Seaworthiness—Due diligence to make ship seaworthy—Lloyd's Register and loadline surveys—Work entrusted to competent independent contractors—Unseaworthiness due to negligence of contractors' employee—Negligence not discoverable—Whether due diligence exercised by shipowners—Australian Sea Carriage of Goods Act, 1924, *art.* III, *r.* 1, *art.* IV, *r.* 1.

In 1953 a ship was passed through her No. 2 special survey by Lloyd's surveyors and her annual loadline survey. The work was supervised by a marine superintendent of the ship's managers on behalf of the shipowners. His experience and competence were not in question, nor was there negligence on his part. It was carried out for the shipowners by ship repairers of the highest repute. It involved opening all the ship's storm valves for inspection and the subsequent replacement of the inspection covers and tightening up of the nuts. This was done by a fitter of the ship repairers without supervision in accordance with ordinary and prudent practice, it being well within the competence of a skilled fitter, although whether the nuts had been correctly tightened up was not detectable by any subsequent visual inspection. The fitter negligently failed to secure nuts on two of the inspection covers and in the course of a voyage the ship in consequence became unseaworthy through loosening of the nuts, permitting sea water to force its way into a hold. Damage was thereby caused to cargo. The cargo owners claimed damages against the shipowners under their bill of lading incorporating the rules (i.e., the Hague Rules) in the schedule to the Australian Sea Carriage of Goods Act, 1924*, on the ground that they had failed in their duty to exercise due diligence to make the ship seaworthy as required by the rules.

Held: the shipowners were not liable in damages because—

(a) the fitter was not the servant of the shipowners but of independent contractors and

(b) the entrusting of an ocean-going ship to ship-repairers of high repute for the doing of the work of repair necessary on survey (and, per WILLMER, L.J., subject to proper superintendence by their own representative) was performance by the shipowners of the duty, imposed on them by art. III, r. 1 (a) of the Hague Rules, to exercise due diligence to make the ship seaworthy, and was not a delegation of that duty, as distinct from a delegation of the work (see p. 199, letter H, p. 202, letter E, p. 211, letter H, p. 226, letter A, and p. 220, letter C, post).

W. Angliss & Co. (Australia) Proprietary v. *Peninsular & Oriental Steam Navigation Co.* ([1927] 2 K.B. 456); *Davie* v. *New Merton Board Mills, Ltd.* ([1959] 1 All E.R. 346); dicta of LORD WRIGHT in *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* ([1934] All E.R. Rep. at p. 484), *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.* ([1939] 2 All E.R. at p. 651) and *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* ([1940] 3 All E.R. at p. 408) applied. Dicta of LORD WRIGHT and LORD MAUGHAM in *Wilsons & Clyde Coal Co., Ltd.* v. *English* ([1937] 3 All E.R. at pp. 640, 641, 646) considered.

Per WILLMER, L.J.: (i) an obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care—a concept sharply to be distinguished from the obligation, to which some relationships give rise, to see that care is taken (see p. 219, letter G, post).

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* These are the same, so far as relevant, as those contained in the schedule to the Carriage of Goods by Sea Act, 1924, and are set out at pp. 196, 197, post.

(ii) where the work to be done is of a specialised nature, outside the course of the carrier's ordinary business, it seems to me quite unreal to say that the carrier is delegating his duty to exercise due diligence; on the contrary, the very fact of employing a skilled and competent contractor may amount of itself to a performance of the duty (see p. 225, letter A, post).

(iii) reasonable care—and equally due diligence—requires that men must learn from their mistakes. It may be that in future, in the light of experience gained in this case, it will not be regarded as good practice to leave a repairers' fitter unsupervised when he is performing tasks such as that of replacing these inspection covers. It does not follow necessarily from our decision in this case that, if a similar casualty happens in the future, arising from a similar cause, the shipowners concerned, having regard to the experience now gained, will be able to show that they have exercised due diligence without proof of more than has been proved in this case (see p. 226, letters E and F, post).

Decision of McNair, J. ([1958] 3 All E.R. 261) affirmed.

[**Editorial Note.** The decision in the present case is not authority for where liability would have rested if the negligence had been that of a skilled man who was employed by the shipowners (see p. 202, letter C, post), but liability in such circumstances seems to be on the shipowners if the employee is their servant (see p. 219, letter I, post). The result might also have been different if the circumstances had been such as to show negligence on the part of the marine superintendent, who was the representative of the shipowners, or if no such representative had been appointed to supervise on their behalf (see p. 211, letter K, and p. 226, letter B, post).

As to the Carriage of Goods by Sea Act, 1924, schedule, art. III, r. 1 and art. IV, r. 2, see 30 Halsbury's Laws (2nd Edn.) 611, para. 771, 614, para. 772.

For the Carriage of Goods by Sea Act, 1924, schedule, art. III, r. 1 and art. IV, r. 2, see 23 Halsbury's Statutes (2nd Edn.) 887, 890.]

Cases referred to:

Angliss (W.) & Co. (Australia) Proprietary v. *Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; 41 Digest 474, *3054*.

Australia Star, The, (1940), 67 Lloyd's Rep. 110.

Bain v. *Fife Coal Co.*, 1935 S.C. 681; Digest Supp.

Colima, The, (1897), 82 Fed. Rep. 665.

Cranfield Bros., Ltd. v. *Tatem Steam Navigation Co., Ltd.*, (1939), 64 Lloyd's Rep. 264.

Davie v. *New Merton Board Mills, Ltd.*, [1959] 1 All E.R. 346; [1959] 2 W.L.R. 331.

Dobell & Co. v. *S.S. Rossmore Co.*, [1895] 2 Q.B. 408; 64 L.J.Q.B. 777; 73 L.T. 74; 41 Digest 429, *2697*.

Dreyfus (Louis) & Co. v. *Tempus Shipping Co., Ltd.*, [1931] All E.R. Rep. 577; [1931] A.C. 726; 100 L.J.K.B. 673; 145 L.T. 490; Digest Supp.

Francis v. *Cockrell*, (1870), L.R. 5 Q.B. 501; 39 L.J.Q.B. 291; 23 L.T. 466; 42 Digest 908, *49*.

Green v. *Fibreglass, Ltd.*, [1958] 2 All E.R. 521; [1958] 2 Q.B. 245; [1958] 3 W.L.R. 71; 3rd Digest Supp.

Grote v. *Chester & Holyhead Ry. Co.*, (1848), 2 Exch. 251; 5 Ry. & Can. Cas. 649; 154 E.R. 485; 34 Digest 161, *1262*.

Haseldine v. *Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.

Indermaur v. *Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.*, (1867), L.R. 1 C.P. 311; 36 Digest (Repl.) 46, *246*.

International Packers, Ltd. v. *Ocean S.S. Co., Ltd.*, [1955] 2 Lloyd's Rep. 218.

Irrawaddy, The, (1897), 171 U.S. 187.

Mary L. Peters, The, (1895), 68 Fed. Rep. 919.

Maxine Footwear Co., Ltd. v. *Canadian Government Merchant Marine, Ltd.,* [1959] 2 All E.R. 740; [1959] 3 W.L.R. 232.

Nord-Deutsche Lloyd v. *President, etc., of Insurance Co. of North America,* (1901), 110 Fed. Rep. 420.

Northumbrian Shipping Co., Ltd. v. *Timm (E.) & Son, Ltd.,* [1939] 2 All E.R. 648; [1939] A.C. 397; 108 L.J.K.B. 503; 160 L.T. 573; Digest Supp.

Paterson Steamships, Ltd. v. *Canadian Co-operative Wheat Producers, Ltd.,* [1934] All E.R. Rep. 480; [1934] A.C. 538; 103 L.J.P.C. 166; 151 L.T. 549; Digest Supp.

Paterson S.S., Ltd. v. *Robin Hood Mills, Ltd.,* (1937), 58 Lloyd's Rep. 33; Digest Supp.

Phillips v. *Britannia Hygienic Laundry Co.,* [1923] 1 K.B. 539; 92 L.J.K.B. 389; 128 L.T. 690; *on appeal,* [1923] 2 K.B. 832; 36 Digest (Repl.) 92, *497.*

Searle v. *Laverick,* (1874), L.R. 9 Q.B. 122; 43 L.J.Q.B. 43; 30 L.T. 89; 38 J.P. 278; 3 Digest 73, *136.*

Smith, Hogg & Co., Ltd. v. *Black Sea & Baltic General Insurance Co., Ltd.,* [1940] 3 All E.R. 405; [1940] A.C. 997; 109 L.J.K.B. 848; 163 L.T. 261; 2nd Digest Supp.

Smith & Sons Fellmongery Proprietary, Ltd. v. *Peninsular & Oriental Steam Navigation Co.,* (1938), 60 Lloyd's Rep. 419.

Stennett v. *Hancock & Peters,* [1939] 2 All E.R. 578; 36 Digest (Repl.) 82, *447.*

Thomson v. *Cremin,* [1953] 2 All E.R. 1185; [1956] 1 W.L.R. 103 n.; 3rd Digest Supp.

Waddle v. *Wallsend Shipping Co., Ltd.,* [1952] 2 Lloyd's Rep. 105.

Waterville Victory, The, (1951), Amer. Mar. Cas. 320.

Wilsons & Clyde Coal Co., Ltd. v. *English,* 1936 S.C. 883; *affd.* H.L., [1937] 3 All E.R. 628; [1938] A.C. 57; 1937 S.C. (H.L.) 46; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

Woodward v. *Mayor of Hastings,* [1944] 2 All E.R. 565; [1945] K.B. 174; 114 L.J.K.B. 211, 218; 172 L.T. 16; 109 J.P. 41; 2nd Digest Supp.

Appeal.

The appellant plaintiffs were the owners of cargo which on May 7, 1953, they shipped on board the s.s. Muncaster Castle, the ship of the defendant shipowners, at Sydney for carriage to London. The cargo comprised 150 cases of tinned ox tongues and it was stowed in the after end of No. 5 lower hold of the ship. When discharged at the Royal Albert Docks, London, in July, 1953, it was found to have been damaged by sea water which had entered No. 5 hold on the voyage because of defective storm valves on the port and starboard sides of the hold. The cargo owners brought an action for damages against the shipowners alleging that the cargo was damaged as a result of the unseaworthiness of the ship, in that, inter alia (as was found to be the case), the inspection covers over the storm valves in the port and starboard scupper pipes in the hold were defective so that water leaked in, the defect being that the nuts securing the inspection covers were insufficiently tightened up. The shipowners contended that as carriers they had exercised due diligence to make the ship seaworthy, in accordance with their obligation under art. III, r. 1, and art. IV, r. 1 of the rules in the Australian Sea Carriage of Goods Act, 1924, which was incorporated in the bill of lading under which the cargo was shipped and to which the cargo owners were parties either as original shippers or as indorsees of the bill. On July 31, 1958, McNair, J., dismissed the cargo owners' action ([1958] 3 All E.R. 261), holding that the shipowners had fulfilled their duty to exercise due diligence to make the ship seaworthy under art. III, r. 1, and were not liable for the negligence in failing to tighten the nuts of a fitter employed by the independent contractors

who carried out work in connexion with surveys on their behalf, having employed A
a competent superintendent in relation thereto who was not negligent in failing
to detect the defect. He also held that the cargo owners' other claims in the
action failed. The cargo owners appealed to the Court of Appeal. The full facts
appear in the judgment of MORRIS, L.J. (p. 197, letter F to p. 199, post).

Ashton Roskill, Q.C., and *J. F. Willmer* for the cargo owners.
A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the shipowners. B

Cur. adv. vult.

Nov. 26. The following judgments were read.

MORRIS, L.J.: On May 7, 1953, a number of cases of canned ox tongues
were shipped in good order and condition on board the s.s. Muncaster Castle at
Sydney. The ship belonged to the respondent shipowners, Lancashire Shipping C
Co., Ltd. The goods were shipped for carriage to London. They were stowed
in the after part of No. 5 lower hold. They were shipped under a bill of lading
signed at Sydney on May 7, 1953. The goods belonged to the appellant cargo
owners, Riverstone Meat Co., Pty., Ltd., who, either as original shippers or as
indorsees, were parties to the bill of lading. It was a term or condition of the
bill of lading that it should have effect subject to the provisions of the rules in D
the schedule to the Australian Sea Carriage of Goods Act, 1924, as applied by that
Act. The carriers were to be entitled to all the privileges, rights and immunities
contained in that Act and its schedule as if the same were specifically set out in
the bill of lading.

The ship arrived in London on July 12, 1953. On July 16 it was found that
there was some water in No. 5 hold. No water had previously been detected. E
It has been held by the learned judge that sea water had entered No. 5 hold by
way of defective storm valves on the port and starboard sides of that hold,
there being one valve on each side. When the cargo owners' goods were discharged
it was found that 113 cases, out of a total of 150, were damaged by the
sea water that had entered the hold. The cargo owners made a claim for the
damage to the goods. The amount of their loss, £974 10s. 3d., was not in dispute. F
The cargo owners alleged that their loss was caused because the ship was unseaworthy.
One respect in which unseaworthiness was alleged was that the inspection
covers over the storm valves in the port and starboard scupper pipes situated
in the forward frame space of No. 5 hold were defective, whereby sea water
leaked into the hold. Other allegations of unseaworthiness were made at the
trial with which we are not now concerned. In the result, after a careful investigation, G
the learned judge held that the vessel was unseaworthy in that at the time
when the cargo owners' cargo was loaded at Sydney the nuts on the inspection
covers were loose to such an extent as would permit of water finding its way
into the hold. The shipowners said, however, that they could exonerate themselves
by reason of the contractual term contained in the bill of lading giving
them similar protection to that given by the schedule to the Australian Sea H
Carriage of Goods Act, 1924. Article III (1) of such schedule provides as follows:

> "The carrier shall be bound before and at the beginning of the voyage,
> to exercise due diligence to—(a) make the ship seaworthy; (b) properly
> man, equip, and supply the ship; and (c) make the holds, refrigerating and
> cool chambers, and all other parts of the ship in which goods are carried, fit
> and safe for their reception, carriage and preservation." I

Article III (2) provides:

> "Subject to the provisions of art. IV, the carrier shall properly and
> carefully load, handle, stow, carry, keep, care for and discharge the goods
> carried."

Article IV (1) provides as follows:

> "Neither the cargo nor the ship shall be liable for loss or damage arising
> or resulting from unseaworthiness unless caused by want of due diligence on

> A the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of para. 1 of art. III. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the B exercise of due diligence shall be on the carrier or other person claiming exemption under this section."

The question, therefore, arose at the trial whether the shipowners could discharge the burden of proving that there had been no want of due diligence on their part to make the ship seaworthy. They had contractually bound themselves so that, before and at the beginning of the voyage from Sydney, which C commenced when the vessel first left Sydney after May 7, 1953, they were under obligation to exercise due diligence in certain respects which included exercising due diligence to make the ship seaworthy. In fact, as has been held by the learned judge, and as is not now challenged, the vessel was not seaworthy on May 7, 1953. She was unseaworthy because the inspection covers were in the condition to which I have referred. The cargo owners' loss did in fact result D from such unseaworthiness. The learned judge had, therefore, at the trial to investigate whether the shipowners had exercised due diligence to make the ship seaworthy. The onus was on them to establish that they had. The very nature of the inquiry involves that the exercise of due diligence to make a ship seaworthy may not always bring it about that a ship is seaworthy.

E The conclusions of fact reached by the learned judge were not the subject of dispute or complaint on the hearing of the appeal. When it is being considered whether due diligence to make a ship seaworthy has been exercised it may be helpful to ascertain the history and the record of the ship and then to proceed to consider (inter alia) whether there have been such steps and such procedures as a prudent and careful carrier would take and follow. It will, I think, be convenient to summarise the main conclusions of fact which were recorded by the F learned judge. (1) The ship was acquired by the shipowners in the year 1949. She had been built in the United States of America during the last war. She was originally completed as an aircraft carrier and was converted into a cargo carrier in 1948; so converted she conformed in all material respects to a C.3 type cargo vessel. On conversion she was classified with the British Corporation (which was united with Lloyd's Register in 1949) and remained so classified at G all material times. Her tonnage was 8,000 gross and 4,800 net.

(2) Throughout her service with the shipowners, which continued until 1955, she was well maintained.

(3) In February, 1953, which was immediately before the ship set out for Australia, she was passed through her No. 2 special survey by Lloyd's Register H surveyors. The ship was placed in the hands of Alexander Stephen & Sons, Ltd., at Glasgow. She went into dry dock. Her class of registration was the highest for ships that had not been built under the supervision of the society, and after the survey she was reported to be

> "so far as now seen . . . in good condition and eligible in my opinion to remain as at present classed in the Register Book."

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(4) On the same occasion she was passed through her annual loadline survey. After the inspection by the surveyor to Lloyd's Register, he certified that the arrangements on board the ship were in agreement with or equivalent to those given in the original freeboard report and he verified the freeboard marking.

(5) Under rules made under s. 42 of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932, provision is made for the examination at the annual survey of the discharges leading through the ship's side from spaces below the freeboard deck. In practice Lloyd's surveyors are content if twenty-five per

cent. of the sea outlets are opened up for inspection on the annual survey but in A
fact the shipowners insist that they should all be opened up.

(6) Mr. Atkinson, of Moller Line (U.K.), Ltd., the managers of the ship, was attending to the ship on behalf of the shipowners on the surveys. Mr. Atkinson is an experienced and competent marine superintendent. In compliance with the practice of the shipowners, Mr. Atkinson instructed Alexander Stephen & Sons,
Ltd., to open up all the storm valves on the ship for inspection. They B
numbered thirty-one in all, including the two which were positioned in No. 5 hold. The opening of the storm valves necessarily involved opening up the inspection covers. That was done.

(7) After the inspection by the surveyor to Lloyd's Register, it became the duty of a fitter employed by Alexander Stephen & Sons, Ltd., to replace and
close the inspection covers. The covers are placed over the studs which are in C
the top of the inspection chamber and nuts are placed in position. The nuts should then be tightened at opposite angles to ensure even all-round pressure. If the nuts on one side are both tightened up before there is any tightening on the other side, the pressure will be uneven and it will be impossible to make a secure joint. This will be so even though the nuts ring true, if, after being tightened
up, they are tapped with a spanner. D

(8) The task of tightening up the nuts, when an inspection cover is replaced, is one that is well within the competence of a skilled fitter. It is ordinary and prudent practice to leave this task to a fitter and not to have the supervision either of Lloyd's surveyors or of the owners' superintendent.

(9) Once the nuts have been tightened up, no visual inspection would detect
any unevenness in the positioning of the cover or any insufficiency in tightening E
up.

(10) Alexander Stephen & Sons, Ltd., are a ship repairing concern of the highest repute.

(11) The ship sailed from Glasgow on Mar. 15, 1953, with a general cargo
for Australian ports. The cargo stowed in the after half of No. 5 hold was F
discharged at Sydney. None of the cargo carried on the outward voyage in No. 5 hold was damaged by sea water.

(12) After the discharge at Sydney of the outward cargo stowed in the after half of No. 5 hold and before the cargo owners' cargo was taken on board and there stowed, the hold was inspected by the chief officer. There was no sign of
leakage of sea water. G

(13) The ship left Sydney on May 7 and proceeded to Brisbane, where outward cargo from Glasgow that had been in the forward part of No. 5 hold was discharged. As a result the places where the storm valves were situated became visible. The chief officer again inspected the hold and there were no signs either of sea water staining or of rust. The two inspections made by the chief officer
and referred to above were properly carried out. No sea water did enter No. 5 H
hold on the outward voyage to Australia either through the storm valves or at all.

(14) On the voyage from Australia there was a certain amount of rolling and pitching of the ship which was sufficient to loosen the nuts of the inspection covers in No. 5 hold if they had been improperly tightened up in Glasgow and
if there had been some loosening in the working of the ship on the outward I
voyage.

(15) The cause of the admission of sea water was that the fitter at Glasgow

> " negligently failed to secure the nuts on the inspection cover evenly or sufficiently, with the result that the working of the ship on the outward voyage was sufficient to produce the condition, by the time the [cargo owners'] cargo was loaded at Sydney, that the nuts had been loosened to such an extent that with the vessel rolling and waves striking the sides of the

ship sea water was forced through the interstices below the inspection covers."

It seems to me that the question whether a carrier has exercised due diligence to make a ship seaworthy is primarily a question of fact. (See *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* (1).) It must depend on the particular features and circumstances of each particular case. It is for this reason that I have considered it appropriate to record the relevant findings of fact made by the learned judge in this case. Those findings are not challenged. On those findings did the shipowners show that they had exercised due diligence to make the ship seaworthy? The learned judge was of opinion, subject to a consideration of one matter, that the shipowners had discharged the burden that was on them. The one matter was whether it could be said that the shipowners must be held accountable in law for the negligence of the fitter. The conclusion of the learned judge was succinctly expressed in the words (2):

> ". . . unless the [shipowners] are in law responsible for the negligence of the fitter, as I have found it, they have discharged the onus of proving the exercise of due diligence so far as concerns the inspection covers."

That conclusion is not challenged on appeal. The learned judge proceeded to consider whether the shipowners were responsible in law for the negligence of the fitter. On an examination of the authorities, he decided that they were not and, accordingly, he exonerated them. His decision as regards that one matter is now challenged on appeal. The issue so raised is in neat and concentrated form. For our assistance in resolving it, we have had the advantage of hearing most powerful and learned and painstaking arguments from learned counsel, to whom we are greatly indebted. We were referred to and we considered a great many authorities.

The point which is in contest is, however, an extremely short one. Did the shipowners exercise due diligence to make the ship seaworthy? The cargo owners submit that, as the shipowners were under a duty to exercise due diligence, they are liable if they failed to perform their duty or if there was a failure on the part of anyone to whom the performance of the duty was delegated. That submission may in general be sound, but it prompts the inquiry whether the shipowners did perform their duty and the inquiry whether they delegated performance of it. In the case of something so complex as a modern ocean-going ship, it is only reasonable to recognise that there must be a variety of matters which call for skilled or expert or specialised attention. There may be repairs or overhauls or adjustments or inspections which demand knowledge, experience and skill and which normally and reasonably are entrusted to those possessing the qualifications to undertake the work which has to be done. In the present case, which must depend on its own facts, it seems to me that it was eminently reasonable for the shipowners to entrust a ship repairing concern of the highest repute with the surveys to which I have referred, and, incidentally, with the task of taking off the inspection covers and of replacing them after the conclusion of the inspection by the surveyor to Lloyd's Register. On the facts as found, I would consider that, in doing what they did, the shipowners did exercise due diligence to make their ship seaworthy. There was no delegation by them of their duty to exercise due diligence to make their ship seaworthy. There was a performance by them of that duty. They did exercise due diligence by taking steps which included employing Alexander Stephen & Sons, Ltd. The particular task in regard to the inspection covers was well within the competence of a fitter; no supervision of a fitter was either in prudence or according to practice called for. Unless, therefore, there is some authority which directs me to a different conclusion, I consider that the shipowners proved that they had exercised due diligence to make their ship seaworthy. That was their duty. Such duty must not be unwittingly misstated so as to enlarge it into a duty to make the ship as seaworthy as due diligence on the part of anyone could make it. A

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(1) [1934] All E.R. Rep. at p. 484; [1934] A.C. at p. 543.

(2) [1959] 1 Q.B. at p. 86.

In considering the present case, the learned judge referred to what WRIGHT, J., said and decided in *W. Angliss & Co.* (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (3), and to the speech of LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (4). But, subsequently to the decision of the B learned judge in the present case, the House of Lords have decided *Davie* v. *New Merton Board Mills, Ltd.* (5). We, therefore, have the advantage of the authoritative guidance which is given in the speeches in *Davie's* case (5) and we are relieved of the task of venturing to analyse the earlier pronouncements which were there considered. In his speech in *Davie's* case (6) VISCOUNT SIMONDS said: C

> "And, much as I distrust analogies, I would add that there is a striking resemblance between the shipowner who is held not to be liable for the bad workmanship, undiscoverable by him, of the shipbuilder's employees and the employer who claims not to be liable for the bad workmanship, equally undiscoverable, of the employees of the manufacturer who supplied at secondhand the tools with which he has provided his workman." D

I do not read the speeches of VISCOUNT SIMONDS or of LORD REID as challenging the conclusion reached by WRIGHT, J., in the *Angliss* case (3). WRIGHT, J., there decided that, where a carrier contracted for the building of a ship, he was not liable for lack of due diligence on the part of the shipbuilders or their workmen unless he had failed to engage builders of repute and to adopt all reasonable E precautions such, e.g., as requiring the builders to satisfy one of the recognised classification societies or engaging skilled naval architects to advise him and skilled inspectors to supervise the work with due diligence. In his judgment, WRIGHT, J., said (7):

> "Under the old rule the only relevant question was whether the ship was seaworthy or unseaworthy. That rule was no doubt well adapted to more F simple days when ships were not very complicated wooden structures of a few hundred tons, but in modern times, when ships are complicated steel structures full of complex machinery, the old unqualified rule imposed too serious an obligation on carriers by sea, and I think that the new Acts have intended to emphasise the specialisation which has developed in modern times and to emphasise the distinction between carrier and shipbuilder and G limit the carrier's obligation to due diligence in his capacity as carrier. He is to be liable for all such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions. He may be held bound to require, for instance, the builders to satisfy one of the well known classification H societies, such as Lloyd's, or to engage skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. But I do not think in any case that the carrier can be held guilty of want of due diligence simply because I the builders' employers have put in some bad work which, though concealed, renders the vessel unfit.
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> "In the present case the defendants employed an inspector to supervise the work. I have held that that inspector used due diligence. It may well be that, if he had negligently passed bad work which he saw, or even,

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(3) [1927] 2 K.B. 456.
(4) [1937] 3 All E.R. 628; [1938] A.C. 57.
(5) [1959] 1 All E.R. 346.
(6) [1959] 1 All E.R. at p. 353.
(7) [1927] 2 K.B. at p. 461.

> perhaps, which he ought to have seen, the carrier would be liable for want of due diligence on the part of one to whom he had delegated the task of inspecting the work, although such supervision, it may be, cannot be other than general or go to every detail of the workmanship. Similarly, the carrier might perhaps be held liable if the naval architect whom he employed to supervise the design, applying current standards, failed to detect a definite error in design, although I do not think that he would be so liable for an error on the part of one of the classification societies, such as Lloyd's, which occupy a public and quasi-judicial position. He might also be liable if, either personally or by his scientific advisers, he chose a special form of construction which involved, according to current standards, a known risk—for example, if he chose to dispense with a cofferdam so as to increase his cargo space although the best opinion thought a cofferdam necessary. Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects."

I have read that passage at length because it seems to me to illustrate the correct approach. There may be infinite variations of facts and whether in a particular situation the carrier has exercised due care will be a question of fact. But it is to be observed from the passage quoted that the carrier was not held guilty of due diligence simply because the builders' men put in bad work which, though concealed, rendered the vessel unfit. The carrier could prove that he had exercised due diligence even though there was a want of it on the part of the builders' men. But, as Wright, J., pointed out, there might be cases, where ship building is being done for a carrier or where ship repairing is being done for a carrier, in which supervision during the work or inspection after the work would be necessary or desirable. In such cases the inspector or special adviser would be the delegate of the carrier to perform one part of the carrier's duty to exercise due care. In such cases, if the inspector or special adviser failed to exercise due diligence, that would be the failure of the carrier or a failure for which he would be liable. I can see no distinction in essential principle, though perhaps much when facts come to be regarded, between cases where a ship is being built for a carrier and cases where a ship is being repaired or is being surveyed for a carrier.

It seems to me that in the last sentence of the passage which I have quoted above, Wright, J., was saying that, if a carrier is having repairs effected to his ship, it may be necessary for him to appoint special advisers, for whom he would would be " personally responsible ", to make a check to see that the repairs have been properly effected. This shows that the question as to what the exercise of due diligence demands is a question of fact depending on the circumstances. The sentence, though not strictly a part of the reasons for the decision, suggests that the carrier would not necessarily be liable for the negligence of the repairers. Wright, J., had pointed out earlier that (8):

> " The obligation of the carrier to exercise due diligence to make the ship fit is clearly not limited to his personal diligence."

If in certain circumstances, when repairs are being effected, the exercise of due diligence requires that there should be a check on the repairers' work, the carrier would be " personally responsible " for the special advisers employed to make such check.

In each particular set of circumstances it will be a question of fact as to what steps and measures a carrier should take in order to exercise due care and diligence to make his ship seaworthy; it will be a further question of fact whether he has done all that he should. But there may be situations in which good and prudent practice and the exercise of due diligence will warrant a carrier in entrusting some particular work to skilled and competent people who are not his servants so that, even if there is some failure or negligence on their part, there will nevertheless have been an exercise of due diligence on his part. On the facts as found by the learned judge the present case is in my judgment an example of such a situation.

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(8) [1927] 2 K.B. at p. 460.

Is there then any authority which casts doubt on this conclusion? There was a passage in the speech of LORD WRIGHT in *Wilson's* case (9) which might have been thought to do so. It is quoted by VISCOUNT SIMONDS in his speech in *Davie's* case (10). But we now have the pronouncements of their Lordships in that case. Taking the facts as found by McNAIR, J., and they are not challenged, the question is: Are the shipowners responsible in law for the negligence of the fitter?

If the fitter had been the servant of the shipowners, the position would have been different. In *Dobell & Co.* v. *S.S. Rossmore Co.* (11) a shipowner was held responsible for the failure of the ship's carpenter to close a porthole, the closing of which was necessary in order to ensure the seaworthiness of the ship. In that case the contract incorporated the clauses of the Harter Act, and it was argued that the provisions of cl. 3 referred only to the exercise of due diligence by the owners themselves and not to the diligence of agents or servants. It was held, however, that the clause did not only refer to due diligence by an owner personally but to due diligence by him and his agents whom he employs to act for him. The precise problem with which we are concerned in the present case, however, did not arise in that case. But it must be recognised that, just as a carrier will probably not be a shipbuilder and may, subject to whatever checks are in a particular case appropriate, place reliance on a shipbuilder and the shipbuilder's men, so also a carrier may, subject to whatever checks are in a particular case appropriate, entrust repairs or renewals or overhauls or surveys to those who are skilled in the work that is entailed and may place reliance on such persons. In such a situation there is no delegation by a carrier of his duty but a performance by him of his duty.

The duty resting on the carrier to exercise due diligence is one of which he cannot divest himself. In deciding what the exercise of due diligence requires, a carrier may act, or may have to act, by servants or agents; it is the carrier then who, by his servants or agents, is acting. As WRIGHT, J., pointed out in his judgment in the *Angliss* case (12), a carrier may be a company and in any case in the complication of modern affairs and by reason of the widely scattered situation of seaports, he must act by agents or servants. In his speech in *Davie's* case (13) VISCOUNT SIMONDS said (14):

> " No one now doubts that an employer cannot escape liability by appointing an agent to perform the employer's obligation on his behalf."

If I may most respectfully say so, that states the matter very clearly.

A similar approach, as it seems to me, is shown in some words used by LORD WRIGHT in his speech in *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.* (15). LORD WRIGHT said (16):

> " The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants or agents."

If owners choose to entrust to others, be they experts or servants or agents, the duty which the owners must themselves discharge, then the owners are liable if their delegates fail to do what it is incumbent on the owners to do. But that is not to say that in some circumstances, depending on their particular facts, owners (or those acting for owners) may not be able to discharge their duty by planning and organising and setting in train certain works or operations without being accountable for each and every fault of every person who may play any part in such works or operations. The carrier cannot wash his hands of his duty to exercise due diligence by passing it on to someone else, however competent. The duty remains. But that does not involve that, if the duty of exercising due diligence is fully and faithfully performed and discharged, there is inevitably a liability for any and every negligent act of anyone who may take a part in some work which has to be done. In line with the words of Viscount Simonds were the words of Lord Morton of Henryton (17) and of Lord Tucker (18) and Lord Keith (19). Lord Tucker said (18):

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(9) [1937] 3 All E.R. at pp. 640, 641; [1938] A.C. at p. 78.
(10) [1959] 1 All E.R. at p. 352.
(11) [1895] 2 Q.B. 408.
(12) [1927] 2 K.B. 456.
(13) [1959] 1 All E.R. 346.
(14) [1959] 1 All E.R. at p. 351.
(15) [1939] 2 All E.R. 648; [1939] A.C. 397.
(16) [1939] 2 All E.R. at p. 651; [1939] A.C. at p. 403.

> " It may well be that, in some cases, the employer may delegate the performance of his obligations in this sphere to someone who is more properly described as a contractor than a servant, but this will not affect the liability of the employer, he will be just as much liable for his negligence as for that of his servant. Such a contractor is entrusted by the employer with the performance of the employer's personal duty. But this does not mean that every person with whom the employer may have entered into some contractual relationship connected with the manufacture or supply of some machinery, appliance or tool which is ultimately used in his business automatically becomes a person entrusted by the employer with the performance of his common law duty. Still less can the negligence of some person with whom the employer has never been in contact, contractually or otherwise, or of whom perhaps he has never even heard, be imputed to him."

In my judgment that passage has relevance, mutatis mutandis, to the case of a carrier, who is under a duty to exercise due diligence to make his ship seaworthy. It must also be remembered that, if a ship is undergoing a survey or an overhaul, there will often and in different ways be a necessity to purchase some new fittings or new structural material.

If a repairer purchased some new part from a reputable supplier and then fixed such part in position in a ship, and if the ship became unseaworthy because the new part had been negligently made by the supplier although apparently satisfactory, I consider, unless the circumstances pointed to the necessity for some examination or test, it would be open to a court to hold that the owner of the ship had exercised due diligence to make the ship seaworthy and that he would not necessarily be accountable by reason of the negligence of the supplier. Though in *Davie's* case (20) the negligent manufacturer stood in no contractual relation to the employer and though the action was founded in tort, the speeches afford guidance to us in the present case because they analyse certain judicial pronouncements concerning the circumstances under which there may be responsibility for the acts of " independent contractors ". It is to be observed that Lord Morton's conclusion would have been just the same if the employers had bought direct from the manufacturers (17): so also would have been Lord Tucker's conclusion (21). There is, I think, an analogy between a duty to take reasonable care to provide proper appliances and a duty to exercise due diligence to make a ship seaworthy. The content of the duty will vary according to the circumstances of each case, but the measure of duty is the same. I can see no practical distinction for present purposes between the phrases " due diligence " and " reasonable care ".

Viscount Simonds (22) expressed his approval of what Lord President Normand had said in the Court of Session in *Wilsons*' case (23) in regard to *Bain* v. *Fife Coal Co.* (24). Viscount Simonds said (25):

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(17) [1959] 1 All E.R. at p. 357.
(18) [1959] 1 All E.R. at p. 368.
(19) [1959] 1 All E.R. at p. 371.
(20) [1959] 1 All E.R. 346.
(21) [1959] 1 All E.R. at p. 369.
(22) [1959] 1 All E.R. at pp. 351, 352.
(23) 1936 S.C. at pp. 894, 901.
(24) 1935 S.C. 681.
(25) [1959] 1 All E.R. at p. 352.

> "There is an illuminating passage in the judgment of the Lord President A (26). He refers to the judgment of the Lord Justice-Clerk in *Bain*, who there asserted it to be a fundamental doctrine of the law of master and servant that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any B of those duties. Lord Normand said (26): 'I agree with this opinion, subject to the explanation, which is to be gathered from the context, that, when delegation to others is spoken of, it is delegation to servants that is meant'. It is legitimate, therefore, to approach *Wilsons'* case (27) with the warning that anything said about the default of any person other than the employer and his servants cannot be regarded as relevant to the decision." C

The analysis by Viscount Simonds (28) of what Lord Wright (29) and Lord Maugham (30) said in *Wilsons'* case (31) is all of great materiality in the present case, though Viscount Simonds pointed out (32) that in *Davie's* case (33) the manufacturer could not vis-à-vis the employer be regarded as an "independent contractor". Viscount Simonds said (34):

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> "As I have already said, a large number of authorities were cited to us, many of them relating to the liability of an employer, or more often of an occupier of land, for the default of an independent contractor. It may one day fall to the House to explain and, perhaps, to reconcile these cases. It is not the occasion for that task when the fault lies at the door of one who was not an 'independent contractor', however wide a meaning may be given E to those words."

Lord Reid (35) also analysed *Wilsons'* case (31) and pointed out that in that case there was no question of the company being liable for the negligence of some person who was not their servant. He also pointed out that there was nothing in the speeches of Lord Thankerton or of Lord Macmillan or in the opinions in the Court of Session, which latter were approved in the House of Lords, to suggest F any intention to deal with the question whether an employer is in any way liable for the negligence of any person who is not his servant. After reviewing what Wright, J., said in the *Angliss* case (36) and what Lord Wright said in *Wilson's* case (37), Lord Reid said (38):

> "Lord Wright had the nature of the vicarious liability of a shipowner sufficiently in mind to enable him to select this as an appropriate analogy to G the vicarious liability of an employer to his servant, and it seems to me impossible that he could at the same time have forgotten his judgment in *Angliss* (39), and equally impossible that he would have said no more than he did in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (31) if he had come to think that his judgment in *Angliss* (39) was wrong. He certainly thought that a master (or a shipowner) would, in some cases, be vicariously liable for the H negligence of a person who was not in law his servant. But he thought that a shipowner would not be vicariously liable for the shipbuilder's negligence: and by parity of reasoning he must have taken the same view about a master's liability in respect of plant which he had purchased. I cannot avoid

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(26) 1936 S.C. at p. 901.
(27) 1936 S.C. 883; *affd.* [1937] 3 All E.R. 628; [1938] A.C. 57.
(28) [1959] 1 All E.R. at pp. 352, 353, 354.
(29) [1937] 3 All E.R. at pp. 640, 641; [1938] A.C. at pp. 78, 79, 80.
(30) [1937] 3 All E.R. at p. 646; [1938] A.C. at pp. 87, 88.
(31) [1937] 3 All E.R. 628; [1938] A.C. 57.
(32) [1959] 1 All E.R. at p. 354. (33) [1959] 1 All E.R. 346.
(34) [1959] 1 All E.R. at p. 355. (35) [1959] 1 All E.R. at pp. 358, 359, 360, 361.
(36) [1927] 2 K.B. 456 at p. 459.
(37) [1937] 3 All E.R. 628 at pp. 640, 641, 642, 643; [1938] A.C. 57 at pp. 78, 79, 80, 81, 82, 83, 84, 85. (38) [1959] 1 All E.R. at p. 360. (39) [1927] 2 K.B. 456.

A the conclusion that, if the facts of the present case had been put before him in 1938, he would have decided in favour of the present respondents."

In similar manner I am of the opinion that, if the facts of this present case had been before LORD WRIGHT in 1937, he would have decided it in favour of the present respondents.

B LORD REID examined the words used by LORD MAUGHAM in *Wilsons*' case (40) and concluded (41):

> "It appears to me, therefore, to be at least doubtful whether LORD MAUGHAM would have held an employer vicariously liable for the negligence of a manufacturer from whom he had bought plant or machinery."

C After a review of the authorities, including *Thomson* v. *Cremin* (42), LORD REID said (43):

> "The conclusion to which I have come is that an employer, besides being liable to his servant for injury caused by the negligence of his own servants, is in some cases liable in respect of the negligence of others. Where, then, is the line to be drawn? On the one hand it appears that an employer is liable D for the negligence of an independent contractor whom he has engaged to carry out one of what have been described as his personal duties on his own premises and whose work might normally be done by the employer's own servant—at least if the negligent workmanship is discoverable by reasonable inspection. On the other hand, for the reasons which I have given, I am of opinion that he is not liable for the negligence of the manufacturer of an E article which he has bought, provided that he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make. That leaves a wide sphere regarding which it is unnecessary and it would I think be undesirable to express any opinion here. Various criteria have been suggested and it must be left for the further development of the law to determine which is correct."

F LORD KEITH OF AVONHOLM agreed with the analysis made by VISCOUNT SIMONDS and LORD REID of the opinions expressed in *Wilsons*' case (44) and said (45):

> "Granted that, in certain circumstances, he may be responsible for the negligence of persons who may be described as independent contractors in the performance for him of his common law duties, where does his liability for negligence in the chain of performance end? The answer made by appellant's G counsel is: Nowhere, for the only excuse which he accepts is latent defect arising without negligence in manufacture and which could not be discovered by the maker of the instrument in which the defect existed. This need not, and in the present case does not, involve negligence in a chain of delegation and sub-delegation, for here there was nothing but a purchase of a tool from a reputable wholesale supplier of tools. For all practical purposes, the H appellant's case involves that an employer is bound to warrant the sufficiency and safety of the tools used by his servants."

LORD KEITH also said (46):

> "The duty of a master in supplying a servant with plant or material cannot, in my opinion, be placed higher than a duty to exercise reasonable care I to see that the plant or material is safe for the purpose for which it is intended, and he cannot be liable, except in a proper case of delegated performance, for the negligence of someone other than himself in the provision of that plant or material. I find it unnecessary to consider whether that liability can extend further than one remove in a chain of delegation.

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(40) [1937] 3 All E.R. at p. 646; [1938] A.C. at pp. 87, 88.
(41) [1959] 1 All E.R. at p. 361.
(42) [1953] 2 All E.R. 1185.
(43) [1959] 1 All E.R. at p. 367.
(44) [1937] 3 All E.R. 628; [1938] A.C. 57.
(45) [1959] 1 All E.R. at p. 371.
(46) [1959] 1 All E.R. at p. 372.

> Purchase by a master from a wholesale or retail merchant, without more, is not, in my opinion, an instance of delegation. It is performance by the master himself."

Although the decision in *Davie's* case (47) does not in any way conclude the question raised in the present appeal, the speeches there made do not lend any favour to the view that, if the carriers exercised due diligence in the particular circumstances of this case by entrusting certain work to independent contractors of the highest repute, they are answerable for some act of undiscoverable negligence on the part of a servant of the independent contractors. There was no delegation of the carriers' duty to the independent contractors: there was a discharge by the carriers of their duty by various acts which included calling on the skilled services of the independent contractors.

In the judgment of the Privy Council in *Paterson S.S., Ltd.* v. *Robin Hood Mills, Ltd.* (48), it was said in reference to the exercise of due diligence to make a ship seaworthy that (49):

> " The condition is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose—see *Dobell & Co.* v. *S.S. Rossmore Co.* (50)."

The reference to the *Rossmore* case (50) was therefore to a case which concerned the negligence of a servant. So also in the recent judgment of the Privy Council in *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (51), where those words were cited, a failure on the part of the fourth officer to exercise due diligence was failure on the part of a servant.

On behalf of the cargo owners it was powerfully submitted that, in American or English cases which were concerned with the Harter Act and in English cases dealing with the Hague Rules, there could be discerned a current of authority supporting the view that all those who may be engaged in the work of making a ship seaworthy must be regarded as the delegates of the carrier in carrying out his obligation. It was submitted that the decision now under appeal involves a complete reversal of what has been a consistent line of approach. Reference was made to certain expressions of opinion by the learned editors of SCRUTTON ON CHARTERPARTIES (12th and 13th Edns.) as well as to the judgment in this court in *Dobell's* case (50), to the words of WRIGHT, J., in *Angliss's* case (52), and of LORD WRIGHT in *Wilsons'* case (53) and in the *Northumbrian Shipping* case (54) and in *Paterson S.S., Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* (55). Reference was also made to passages in other cases, including *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (56), *International Packers, Ltd.* v. *Ocean S.S. Co., Ltd.* (57), and *Waddle* v. *Wallsend Shipping Co., Ltd.* (58). I have referred above to certain passages from the judgments and speeches of LORD WRIGHT. To these passages I may add the following words from his speech in the *Smith, Hogg* case (59):

> " The unseaworthiness, constituted as it was by loading an excessive deck cargo, was obviously only consistent with want of due diligence on the part of the shipowner to make her seaworthy. Hence the qualified exception of unseaworthiness does not protect the shipowner. In effect, such an exception can excuse only against latent defects. The overloading was the result of overt acts."

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(47) [1959] 1 All E.R. 346. (48) (1937), 58 Lloyd's Rep. 33.

(49) (1937), 58 Lloyd's Rep. at p. 40. (50) [1895] 2 Q.B. 408.

(51) [1959] 2 All E.R. 740. (52) [1927] 2 K.B. at pp. 460, 461, 462.

(53) [1937] 3 All E.R. at pp. 640, 641, 642, 643; [1938] A.C. at pp. 78, 79, 80, 81, 82, 83, 84, 85. (54) [1939] 2 All E.R. 648 at p. 651; [1939] A.C. 397 at p. 403.

(55) [1934] All E.R. Rep. at pp. 486, 487; [1934] A.C. at p. 547.

(56) [1940] 3 All E.R. 405; [1940] A.C. 997. (57) [1955] 2 Lloyd's Rep. 218.

(58) [1952] 2 Lloyd's Rep. 105.

(59) [1940] 3 All E.R. at p. 408; [1940] A.C. at p. 1001.

A The various passages from judgments to which I have referred are strongly relied on by the cargo owners and when marshalled in sequence are said to reveal a steady and consistent line of authority supporting the view that all persons taking part in the work or operations connected with making a ship seaworthy must be regarded as the delegates of the shipowner or carrier, so that, if the ship is unseaworthy as a result of a negligent act on the part of any one of them, the B shipowner or carrier has, per alios, failed to exercise due diligence to make the ship seaworthy. But it is to be noted that the issue raised in the present appeal was not effectively raised in the cases relied on. In the *Angliss* case (60) it was, however, clearly held that the carrier was not to be held guilty of want of due diligence simply because the builder's employees had put in some bad work which, though concealed, rendered the ship unfit. Some of the passages relied on C by the cargo owners are passages which, when analysed, are seen to have reference to servants. That appears from the speeches in *Davie's* case (61). Other passages when analysed show that the duty cast on the carrier under art. III, r. 1, is a personal duty of the carrier, so that he cannot escape liability by appointing someone to perform his obligation on his behalf. But I do not read any of the passages as laying it down that there cannot ever be circumstances in which a D carrier may be free from liability for some act of negligence on the part of someone doing work on his ship, even though he can show that he has made arrangements of a kind reasonably made by carriers in circumstances where work may be entrusted to independent contractors.

It is neither necessary nor desirable to seek to formulate some test by reference to which it can be decided whether a carrier has performed his duty or whether E he has delegated it. We are concerned only with the facts of the present case and on the facts as found I consider there was a discharge by the shipowners of their duty.

We were referred to a number of American cases and to expressions used in the judgments. Thus in *The Mary L. Peters* (62), it was held that there was no such evidence of due diligence on the part of the owner or of those who represented F him on the inspection and the repair of a ship before she sailed as would exempt the ship under the Harter Act. So in *The Colima* (63) it was said that there must be due diligence in the work itself and there was a reference to agents to whom a carrier may have committed the work of fitting a ship for sea. In *Nord-Deutsche Lloyd* v. *President, etc., of Insurance Co. of North America* (64), it was said that due diligence must be adequate to the occasion and must be in the work itself G and not merely in the selection of agents to do the work, for if it were the latter, carriers might escape all responsibility. These and other cases all confirm that a carrier does not evade his duty either by choosing competent servants or agents or by delegating performance to others, but I am not persuaded that the cases establish that there cannot be cases in which, on their particular facts, certain persons preparing a ship for sea are neither the servants or the agents nor the H delegates of the carrier.

It does not seem to me that the construction of art. III, r. 1 of the Hague Rules presents any difficulty. The words are clear. The duty is defined. The duty is imposed on the carrier. It is for him to discharge it. The rule is mandatory. The duty is unqualified. The only question in the present case is whether it was performed. Independent contractors engaged to do work on the ship may I themselves arrange for sub-contractors to do certain work. Are all those who are employed by independent contractors and their sub-contractors to be regarded as delegates of the carrier? If so, the obligation of the carrier becomes an obligation to make the ship as seaworthy as the exercise of due diligence can make it. That, however, is not the contractual obligation in this case. That would be in effect to impose on the carrier all the obligations of a warranty of seaworthiness subject only to non-liability for latent defects. That also is not the contractual obligation in this case. If the carrier is to be liable for the negligence of all persons who have been engaged in doing anything to the ship, it would seem impossible to exclude those who have been engaged in building a new ship for a carrier. If everybody who has a hand in preparing a ship for a voyage so as to make her seaworthy is a delegate of the carrier, why should not every person who prepares a ship for her first voyage also be a delegate? And what persons are more intimately concerned in preparing a ship for such a voyage than those who build her? If it is said that the carrier is entitled to rely on the expert skill of the shipbuilder, that is but to recognise that as a question of fact there may be circumstances in which the exercise of due diligence entitles a carrier to place dependence on the skill of others, without making those others his delegates for the exercise of the due diligence which he has contracted to exercise. As WRIGHT, J., pointed out in *Angliss's* case (65), a carrier may be a charterer of a ship or a purchaser of a ship and in such cases the builders of the ships and the builders' men could not possibly be regarded as the servants or agents of the carrier. Nor could they possibly be regarded as the delegates of the carrier. If in the present case the position had been that the Muncaster Castle had been purchased by a purchaser in March, 1953, prior to the sailing to Australia, and if the purchaser had received assurances that the special survey and the loadline survey had been properly carried out, I cannot think that the purchaser would be responsible for the negligence of the fitter. In such a situation it would be a question of fact whether any special steps should have been taken by the purchaser in the exercise of his obligation of due diligence as a carrier. On the facts of this case it is shown that no visual examination of the inspection covers would have revealed any unevenness in their positioning.

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(60) [1927] 2 K.B. 456. (61) [1959] 1 All E.R. 346. (62) (1895), 68 Fed. Rep. 919.
(63) (1897), 82 Fed. Rep. 665. (64) (1901), 110 Fed. Rep. 420.

The speech of VISCOUNT SIMONDS in *Davie's* case (66) points a warning against any ardent resort to analogies. In this field analogies will only furnish a guide or a corrective if there is some duty or obligation which is of like nature to that now being considered. For this reason I do not find guidance in such cases as *Grote* v. *Chester & Holyhead Ry. Co.* (67) or *Francis* v. *Cockrell* (68); the duties owed in the former case to a passenger on a railway that crossed a bridge and in the latter to one who paid money to occupy a seat on a stand differed from the duty resting on the carrier in the present case. The duty of an employer to an employee bears a closer resemblance. Hence it is indeed significant to note that an employer, being under a duty to take reasonable care to provide a reasonably safe tool for his employee, is not liable for the bad workmanship, undiscoverable by him, of the employees of the manufacturer of a tool which the employer purchases.

Some other situations in which there is a duty to take reasonable care provide illustrations of the fact that such measure of care may be taken without attracting responsibility for the negligence of someone whose work and services have been sought. Thus, in *Phillips* v. *Britannia Hygienic Laundry Co.* (69) while the defendants' motor lorry was being driven in a public highway, a wheel came off and damaged the plaintiff's van. The wheel came off owing to a defect in the axle. The defendants had sent the lorry to the makers of it, a firm of known competence, to be overhauled and repaired. The makers were negligent in not having replaced the defective axle. The lorry was only received back from the makers two days before the accident. It was held that the defendants were not liable for the negligence of the makers and that the plaintiff could not recover, inasmuch as he had failed to establish knowledge or negligence on the part of the defendants. In his judgment in that case BAILHACHE, J., said (70):

> " The remaining point is that there is a common law duty on the owner of a motor vehicle to have it reasonably fit for the road. In my judgment that

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(65) [1927] 2 K.B. at p. 461.
(66) [1959] 1 All E.R. at pp. 350, 353.
(67) (1848), 2 Exch. 251.
(68) (1870), L.R. 5 Q.B. 501.
(69) [1923] 1 K.B. 539.
(70) [1923] 1 K.B. at p. 556.

A is not a correct statement of the duty. Correctly stated the duty is to take reasonable care that the motor vehicle shall be fit for the road. That is quite a different thing from the duty to have it reasonably fit for the road. If the duty were to have it reasonably fit for the road it might well be that, although the owner of the vehicle had entrusted his repairs to a competent repairer, he would be liable to a person who suffered injury upon the high road if the B competent repairer were negligent. If, on the other hand, the duty is, as I hold it is, to take reasonable care to have his vehicle fit, then that duty is discharged by the owner of the vehicle who puts it into the hands of a competent repairer with instructions to do what is necessary to put it in a fit state to use the road."

(See also *Stennett* v. *Hancock & Peters* (71).)

C In the well-known case of *Haseldine* v. *Daw & Son, Ltd.* (72), it was held that where there was an obligation on a landlord to take care that a lift was reasonably safe, a landlord fulfilled that obligation by employing a competent firm of engineers to make periodical inspections of the lift, to adjust it and to report on it. SCOTT, L.J., said (73):

> D "The invitor is bound to take that kind of care which a reasonably prudent man in his place would take, neither more nor less."

GODDARD, L.J., said (74):

> "Towards an invitee the occupier has the duty of taking care that the premises are reasonably safe. I need not quote the classic passage from the judgment of WILLES, J., in *Indermaur* v. *Dames* (75), but he there points E out that whether or not reasonable care has been taken is to be determined as a matter of fact. It seems to me that, by employing a first-class firm of lift engineers to make periodical inspections of the lift, adjust it and furnish reports upon it, this defendant did all that a reasonable man could do towards seeing that the lift was safe, especially when it is remembered that he also had the advantage of quarterly inspections by the insurance company's F engineer. However, it is said that, if the engineers were negligent, it cannot be said that the occupier has discharged his duty. With this I cannot agree. An occupier or any other person may have, either by contract or by law, such a degree of duty imposed upon him that he cannot discharge it by employing a contractor to do work for him, but, where the duty is to take care that the premises are safe, I cannot see how it can be discharged better G than by the employment of competent contractors. Indeed, one may well ask how otherwise could the duty be discharged?"

If other obligations than those of a carrier under the Hague Rules or other situations than that relating to carriage of goods by sea are being referred to, it must at all times be remembered that in the present case we are concerned with a definitely defined obligation. It is only if other obligations are comparable H that cases are helpful which illustrate that there may be some circumstances in which the obligation to take reasonable care or to exercise due diligence may be discharged by placing dependence on experts or those possessed of technical skill (or special knowledge or experience). Thus *Haseldine* v. *Daw & Son, Ltd.* (72) illustrates a situation in which a duty was discharged in that way, whereas *Woodward* v. *Mayor of Hastings* (76) illustrates a situation in which a duty to be I discharged called for no such dependence. There was no "esoteric quality" in the nature of the work which the cleaning of snow from a step demanded.

Though a consideration of other obligations which exist in other circumstances may yield valuable illustrations of principle, I consider that the present case falls to be decided according to whether the carriers delegated the performance of their duty or whether they themselves performed and discharged their duty. The negligent fitter was not their servant and there is no room for the application of the principle respondeat superior. I see no reason why on the particular facts of this case it was not proper to hold that the carriers did exercise reasonable care to make the ship seaworthy. I would, therefore, dismiss the appeal.

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(71) [1939] 2 All E.R. 578. (72) [1941] 3 All E.R. 156; [1941] 2 K.B. 343.
(73) [1941] 3 All E.R. at p. 168; [1941] 2 K.B. at p. 356.
(74) [1941] 3 All E.R. at p. 181; [1941] 2 K.B. at p. 374.
(75) (1866), L.R. 1 C.P. at p. 288; *affd.* (1867), L.R. 1 C.P. 311.
(76) [1944] 2 All E.R. 565; [1945] K.B. 174.

ORMEROD, L.J. (read by Willmer, L.J.): I have had the opportunity of reading the judgment which has just been delivered by Morris, L.J., and the one about to be delivered by Willmer, L.J. I am in full agreement with the views there expressed, and have not, therefore, a great deal to add.

The question at issue is a short one, although it has involved a good deal of argument and the citation of numerous authorities. The facts as found by the learned judge are not in issue and the question to be decided is whether the shipowners have discharged the burden, which is undoubtedly on them, of proving that they exercised due diligence to make their ship seaworthy. The shippers' goods in respect of which the claim is made were shipped from Australia under a bill of lading signed at Sydney on May 7, 1953, and on arrival in London on July 12, 1953, some of the goods were found to be damaged through water having entered No. 5 hold. It is not in dispute that the water entered the hold because the inspection covers to the storm valves on the port and starboard sides near the hold in question had not been screwed down efficiently. In February, 1953, the ship was in dry dock for the purpose of her No. 2 special survey by Lloyd's Register surveyor, for which purpose she was handed over to Alexander Stephen & Sons, Ltd., at Glasgow, a firm of ship repairers of the highest repute. The work of the survey was supervised on behalf of the shipowners by a Mr. Atkinson of Moller Line (U.K.), Ltd., the managers of the ship, a marine surveyor whose knowledge and experience were not in question. An annual loadline survey of the ship was made at the same time and this also was under the supervision of Mr. Atkinson. For the purpose of the surveys it was necessary to inspect the storm valves which involved the removal of the inspection covers. It was usual to require that 25 per cent. only of these storm valves should be inspected, but Mr. Atkinson, in accordance with the usual practice of the shipowners, instructed the ship repairers to open up all of them. The inspection covers were afterwards replaced by a fitter in the employ of the ship repairers. It is common ground that the two covers in question were not properly screwed down, with the result that, although they remained watertight on the outward voyage, they allowed water to enter the hold when the ship was homeward bound. The learned judge found, and the shippers do not dispute, that it was the ordinary and prudent practice for the covers to be replaced by a fitter without supervision, and that, once the nuts holding down the inspection covers have been hardened up, no visual inspection would detect any unevenness of the cover or any insufficiency in the hardening up. On these facts the learned judge came to the conclusion that the shipowners had exercised due diligence to make the ship seaworthy and it is from this decision that the cargo owners have appealed. The cargo owners in their pleadings and at the trial made other allegations of unseaworthiness, but the insufficient screwing down of the storm valve covers is the only ground which has been considered in this appeal. It is not in dispute that the ship was unseaworthy in this respect, and that the cargo owners' loss resulted therefrom.

The bill of lading was expressed to have effect subject to the provisions of the rules in the schedule to the Australian Sea Carriage of Goods Act, 1924, which are in identical terms with the corresponding provisions in the British Carriage of Goods by Sea Act, 1924. The relevant articles are art. III, r. 1 and r. 2 and art. IV, r. 1. The effect of these articles, so far as they relate to the issues with which this appeal is concerned, is that it is the duty of the carrier to exercise due diligence to make his ship seaworthy and properly and carefully to stow, A carry, keep and care for the goods carried. He is not, however, liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the ship seaworthy. The burden of proving the exercise of due diligence is on the carrier. The learned judge, after finding that the most probable cause of the admission of sea water on the homeward voyage was the defective condition of the two inspection covers, went on to say (77):

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> "This finding is sufficient to support the [cargo owners'] first allegation of unseaworthiness; but I am also satisfied that unless the [shipowners] are in law responsible for the negligence of the fitter, as I have found it, they have discharged the onus of proving the exercise of due diligence so far as concerns the inspection covers."

C These words express in a succinct manner the sole question in issue. The cargo owners' contention is that the obligation to exercise due diligence, which is placed on the shipowners by art. III, r. 1, is a personal obligation which cannot be delegated. It was argued that the responsibility would remain on the shipowners if, as in this case, there was a want of care on the part of an employee of an independent contractor appointed to do work on the ship which in the ordinary D way would not and probably could not be performed by the shipowner. It is not disputed by the shipowners that they would be responsible for unseaworthiness due to a lack of care on the part of their own employees, or by an agent employed by them for the purpose of seeing that the work of inspection and repair was done. If, for example, Mr. Atkinson had been negligent in the performance of his duties of supervision and unseaworthiness of the ship resulted, there can be no E doubt that the shipowners would have been liable. The cargo owners, however, go further, as indeed they must if they are to succeed in this appeal, and as I have said have contended with much force that the responsibility still remains on the shipowners although the negligence was that of an employee of the independent contractor. If I am not constrained by authority to hold otherwise, I have little difficulty in coming to the conclusion that the shipowners have discharged the F burden which is on them. If the cargo owners' contention is sound, it means that a shipowner must warrant the seaworthiness of a ship except in the rare case of a latent defect which no reasonable examination could discover. It is to be remembered that, according to the relevant article, the duty on the carrier, before and at the beginning of the voyage, is to exercise due diligence to make the ship seaworthy. It is not his duty to ensure that due diligence has been exercised. G It is his diligence which is in question, the responsibility for exercising which remains in him, although much of the work falls to be performed by his servants and agents. But it is straining the language of the article much too far to hold that, when work of repair and inspection, which cannot be done by the shipowner, is given under contract to a firm of shipbuilders, admittedly of the highest repute, the shipowner can be said to be failing in his duty to exercise due diligence H if, as in this case, unseaworthiness results by reason of the negligence of a fitter employed by the contractor, the effects of which are not discoverable by any reasonable inspection. By entering into a contract with a reputable firm of ship repairers for the doing of the necessary work under the supervision of a competent and experienced agent, the shipowners acted in performance of their duty of exercising due diligence. They did not, in my judgment, delegate such performance to the ship repairers. If the cargo owners were right in their contention, I the results would be far-reaching. It might well be necessary, for instance, for the repairers to purchase one or more components to replace worn or damaged parts of the mechanism of the ship. If the shipowners are right, the employers' obligation would, it seems, extend to liability due to faulty workmanship in these components, although they were of approved design and purchased from manufacturers of repute. They might even be held liable for defective workmanship in the building or earlier repair of the ship, although such repair was done before the ship came into their ownership and was not discoverable by any reasonable inspection.

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(77) [1959] 1 Q.B. at p. 86.

The cargo owners contended that there was a continuous stream of authority both in the English and in the American courts to support their submission. These have already been examined carefully by Morris, L.J., and I am in full agreement with the conclusions at which he has arrived with regard to them. I do not propose, therefore, to enter into a further examination of them, and content myself with the observation that, in so far as any of these authorities are binding on this court, they do not support the cargo owners' contention that the shipowners are in breach of their obligation, even though the lack of diligence complained of is that of an employee of an independent contractor.

There is not, therefore, in my judgment, any sufficient authority to lead me to a conclusion other than the one I have already expressed. But there is authority which supports that conclusion. The learned judge in coming to his conclusion relied chiefly on *W. Angliss & Co.* (*Australia*) *Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (78), which was one of the earliest decisions under the Carriage of Goods by Sea Act, 1924. It was a case where the plaintiff's goods were damaged by oil fuel or the fumes thereof from an oil fuel bunker owing to a defective deck bar. Wright, J., found that the design of the bar and its fitting was inadequate, but that, having regard to the then state of knowledge and experience of the use of oil fuel, there was no failure of due diligence on the part of those concerned. But he held also that there was bad workmanship both in riveting and fitting the bar, which was the fault of individual workmen employed by the builders, and could not have been detected by reasonable care on the part of those whose duty it was to inspect the work. Having found these facts, the learned judge went on to state the legal position and the history and development of the Act, and went on to say (79):

> " . . . I think that the new Acts have intended to emphasise the specialisation which has developed in modern times and to emphasise the distinction between carrier and shipbuilder and limit the carrier's obligation to due diligence in his capacity as carrier. He is to be liable for all such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions. He may be held bound to require, for instance, the builders to satisfy one of the well known classification societies, such as Lloyd's, or to engage skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. But I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which, though concealed, renders the vessel unfit.
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> " In the present case the defendants employed an inspector to supervise the work. I have held that that inspector used due diligence. It may well be that, if he had negligently passed bad work which he saw, or even, perhaps, which he ought to have seen, the carrier would be liable for want of due diligence on the part of one to whom he had delegated the task of inspecting the work, although such supervision, it may be, cannot be other than general or go to every detail of the workmanship. Similarly, the carrier might perhaps be held liable if the naval architect whom he employed to supervise the design, applying current standards, failed to detect a definite error in design, although I do not think that he would be so liable for an error on the part of one of the classification societies, such as Lloyd's, which occupy a public and quasi-judicial position. He might also be liable if, either

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(78) [1927] 2 K.B. 456.

(79) [1927] 2 K.B. at p. 461.

> A personally or by his scientific advisers, he chose a special form of construction which involved, according to current standards, a known risk—for example, if he chose to dispense with a cofferdam so as to increase his cargo space although the best opinion thought a cofferdam necessary. Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, B that the repairs adequately make good the defects."

The decision has been followed frequently in other cases, and as the learned judge put it in his judgment (80):

> " . . . I have no doubt that the innumerable disputes between shippers and cargo owners have been settled on the basis of this judgment."

C I find it difficult to see any distinction between the case where the employee of the shipbuilder has been negligent and the present case where the negligence is that of an employee of the repairers. If the decision in the *Angliss* case (81) be right, then it is in my view ample authority to support the shipowners' contention in this appeal. The decision has recently been the subject of consideration by the House of Lords in *Davie* v. *New Merton Board Mills, Ltd.* (82), who decided that D the respondent employers, being under a duty to take reasonable care to provide a reasonably safe tool, had discharged that duty by buying from a reputable source a tool whose latent defect they had no means of discovering.

In the course of the argument the cargo owners relied considerably on some observations of LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (83). Reference has already been made to the relevant passages in the speech of LORD E WRIGHT (84), and I do not propose to repeat them except to draw attention to one passage (85):

> " But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer per se or per alios. If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a F shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not G the performance."

VISCOUNT SIMONDS was, I think, of the opinion that the decision of WRIGHT, J., in the *Angliss* case (81) was right, but that LORD WRIGHT, in making the observation to which I have referred in *Wilsons'* case (85), did so (86)

> " with an imperfect recollection of what he had himself decided in the earlier case."

H He then went on to say (86):

> " And, much as I distrust analogies, I would add that there is a striking resemblance between the shipowner who is held not to be liable for the bad workmanship, undiscoverable by him, of the shipbuilder's employees and the employer who claims not to be liable for the bad workmanship, equally I undiscoverable, of the employees of the manufacturer who supplied at secondhand the tools with which he has provided his workman."

LORD MORTON OF HENRYTON did not refer either to the *Angliss* case (81) or to *Wilsons'* case (83) but he accepted the views expressed by VISCOUNT SIMONDS in his review of the authorities (87). Lord Reid found himself able to reconcile the views of Wright, J., in the *Angliss* case (88) with those of Lord Wright in *Wilsons'* case (89). He said (90):

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(80) [1958] 3 All E.R. at p. 267.

(81) [1927] 2 K.B. 456.

(82) [1959] 1 All E.R. 346.

(83) [1937] 3 All E.R. 628; [1938] A.C. 57.

(84) [1937] 3 All E.R. at pp. 640, 641, 642, 643; [1938] A.C. at pp. 78, 79, 80, 81, 82, 83, 84, 85.

(85) [1937] 3 All E.R. at p. 641; [1938] A.C. at p. 80.

(86) *Davie* v. *New Merton Board Mills, Ltd.*, [1959] 1 All E.R. at p. 353.

> "Lord Wright had the nature of the vicarious liability of a shipowner sufficiently in mind to enable him to select this as an appropriate analogy to the vicarious liability of an employer to his servant, and it seems to me impossible that he could at the same time have forgotten his judgment in *Angliss* (88), and equally impossible that he would have said no more than he did in *Wilsons & Clyde* (89) if he had come to think that his judgment in *Angliss* (88) was wrong. He certainly thought that a master (or a shipowner) would, in some cases, be vicariously liable for the negligence of a person who was not in law his servant. But he thought that a shipowner would not be vicariously liable for the shipbuilder's negligence; and by parity of reasoning he must have taken the same view about a master's liability in respect of plant which he had purchased. I cannot avoid the conclusion that, if the facts of the present case had been put before him in 1938, he would have decided in favour of the present respondents."

Lord Tucker expressed his agreement (91) with the views of Viscount Simonds and Lord Reid, as did Lord Keith of Avonholm (92), who referred with approval (93) to the judgment of Wright, J., in the *Angliss* case (88).

Analogies, of course, are dangerous, and it may be that too much reliance should not be placed on the decision in *Davie's* case (94) in considering the present appeal. But there can be no doubt in reading the opinions of their Lordships in that appeal that they all expressly or by implication approved the decision in the *Angliss* case (88) and were of the opinion that nothing that was said by Lord Wright in *Wilsons'* case (89) was intended to express any different view. I have already said that in my view the proper construction of the relevant articles is that there is no liability in this case on the shipowners. There is no contrary view expressed in the authorities as I read them, but there is, on the other hand, the judgment in the *Angliss* case (88) and its recent approval by their Lordships in *Davie's* case (94). I agree that the appeal should be dismissed.

WILLMER, L.J.: The facts of this case are simple and are not now in controversy. The question is whether, on the facts found by the learned judge and now accepted, the shipowners discharged the burden, which lay on them, of proving that they had exercised due diligence to make their ship, the Muncaster Castle, seaworthy. It is admitted that the vessel was in fact unseaworthy in that the inspection covers of the storm valves in No. 5 hold were so ineffectively screwed down that, during the course of the relevant voyage, sea water was enabled to enter the hold, whereby the cargo was damaged. The cargo was loaded at Sydney, New South Wales, for carriage to London under a bill of lading which was expressed to have effect subject to the provisions of the rules in the schedule to the Australian Sea Carriage of Goods Act, 1924, as applied by that Act. The Muncaster Castle was classed with Lloyd's Register of Shipping, and immediately before leaving this country for Australia for the relevant voyage she passed through her second special survey. At the same time she passed through her annual loadline survey, as required by the Merchant Shipping (Safety and Load Line Conventions) Act, 1932. For the purposes of these surveys the vessel was placed in the hands of Alexander Stephen & Sons, Ltd., of Glasgow, who are admitted to be ship repairers of the highest repute. The necessary work was carried out to the satisfaction of the classification society's and loadline surveyors under the

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(87) [1959] 1 All E.R. at p. 357.
(88) [1927] 2 K.B. 456.
(89) [1937] 3 All E.R. 628; [1938] A.C. 57.
(90) [1959] 1 All E.R. at p. 360.
(91) [1959] 1 All E.R. at p. 368.
(92) [1959] 1 All E.R. at p. 369.
(93) [1959] 1 All E.R. at p. 371.
(94) [1959] 1 All E.R. 346.

A supervision of Mr. Atkinson, the marine superintendent of Moller Line (U.K.), Ltd., the vessel's managers. Mr. Atkinson's experience and competence are not in question. In the course of the surveys all the vessel's storm valves, including the two material storm valves in No. 5 hold, were opened up for inspection. On the conclusion of the work, the inspection covers were replaced and tightened up, this task being left in the hands of a competent fitter in the employment of B the ship repairers. As to this the learned judge said (95):

> "I am satisfied that, according to ordinary and prudent practice, this work of tightening up, which is a task well within the competence of a skilled fitter, is left to the fitter, and is not in fact supervised by Lloyd's surveyors or the owners' superintendent. Furthermore, once the nuts have C been hardened up, no visual inspection would detect any unevenness in the positioning of the cover or any insufficiency in hardening up."

There was in fact no leakage of sea water during the outward voyage, nor at any time prior to the loading of the cargo owners' cargo, and the inspection covers then appeared on inspection to be in proper order. The leakage on the homeward voyage which damaged the cargo owners' cargo was found by the learned judge D to have been due to the negligence of the ship repairers' fitter at Glasgow in failing to secure the nuts of the inspection covers evenly or sufficiently, with the result that they were enabled to work loose in the course of the voyage to an extent sufficient to admit water to the hold.

On these facts the shipowners claimed that they had discharged their obligation to exercise due diligence to make the ship seaworthy, and on this, the only E remaining issue in the case, the learned judge found in their favour. It is from this finding that the cargo owners now appeal.

The Australian Sea Carriage of Goods Act, 1924, like the corresponding Act in this country (96), provides that there shall not be implied in any contract for the carriage of goods by sea to which the Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship. Carriage of goods to which F the Act applies is made subject to the provisions of the Hague Rules, which, as in the English Act, are set out in a schedule. It is common ground that the carriage of the cargo owners' cargo in the present case was subject to the provisions of the Hague Rules. Of these the two most material provisions for the purposes of this case are those contained in art. III, r. 1, and art. IV, r. 1. These have already been read, and I do not pause to read them again.

G The argument for the cargo owners is that the shipowners' obligation under art. III, r. 1, to exercise due diligence to make the ship seaworthy, is one which is personal to him, and one for which he cannot evade responsibility by delegating its performance to some other person, whether that other person be a servant, an agent or an independent contractor. The principle contended for cannot be expressed better than in the words of LORD WRIGHT in *Wilsons & Clyde Coal Co., H Ltd.* v. *English* (97) as follows:

> " . . . the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint I a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance."

Here, it is argued, the shipowners delegated to the ship repairers, Alexander Stephen & Sons, Ltd., the performance of their obligation to exercise due diligence to make their ship seaworthy, and having so delegated must accept their delegates' performance as their own. Accordingly, since owing to the negligence of the fitter the obligation was not performed, the shipowners cannot be heard to say that they discharged their personal obligation to exercise due diligence to make the ship seaworthy.

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(95) [1959] 1 Q.B. at p. 85.
(96) See the Carriage of Goods by Sea Act, 1924, s. 2.
(97) [1937] 3 All E.R. at p. 641; [1938] A.C. at p. 80.

In rejecting this contention, the learned judge was clearly of the view that the facts of the present case were covered in principle by the decision of WRIGHT, J., in *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (98). That decision has never been overruled, and has more than once been followed; and the learned judge took the view that it has, since 1927, been accepted by the profession as stating the legal position authoritatively and accurately, forming the basis for the settlement of innumerable disputes between shipowners and cargo-owners during the last thirty years (99). In that case the ship in question had been specially built for the shipowners by competent shipbuilders, and the actual question in issue was as to the liability of the shipowners for damage caused or contributed to by bad workmanship on the part of some of the builders' workmen. In the course of his judgment, however, WRIGHT, J., took the opportunity to review the scheme of the, then new, Hague Rules with particular reference to the shipowners' obligation to exercise due diligence to make the ship seaworthy. Counsel on both sides in the present case have found in what WRIGHT, J., said a good deal of material to support their respective arguments. The fact is that the present case raises a question not specifically answered in the *Angliss* case (98). The precise question in issue in the present case has never hitherto been the subject of express decision.

It is, however, argued on behalf of the cargo owners that the principle for which they contend is supported by a long and consistent line of authorities, commencing with decisions, both English and American, under the American Harter Act, and including a number of dicta by judges of the highest eminence with regard to the effect of the Hague Rules. In examining decisions under the Harter Act it is well to remember: (i) that under that Act the old absolute warranty of seaworthiness remained unaffected, and (ii) that reliance on any of the exempting provisions was made conditional on the shipowner proving the exercise of due diligence to make the ship seaworthy. Subject to that, however, it remains true to say that the words calling for interpretation here, namely, " due diligence to make the ship seaworthy ", are common to both the Harter Act and the Hague Rules. In *Dobell & Co.* v. *S.S. Rossmore Co.* (100)— a case in which the unseaworthiness complained of was in fact due to an act of negligence on the part of the ship's carpenter—LORD ESHER, M.R., stated the shipowner's duty under the Harter Act, in terms which appear wide enough to support the principle now contended for. He said (101):

> " . . . the words of the third section which limit the owner's liability if he shall exercise due diligence to make the ship in all respects seaworthy, must mean that this is to be done by the owner by himself or the agents whom he employs to see to the seaworthiness of the ship . . ."

The other two members of the court expressed a substantially similar view.

We were referred to a number of American decisions of the same period, to show that the approach to the problem of construing the Harter Act was the same on both sides of the Atlantic. Thus in *The Irrawaddy* (102), it was said that the purpose of the Act was to relieve the shipowner from liability for latent defects not discoverable by diligence on the part of anyone. In *The Mary L. Peters* (103), it was said that what was required under the Act was due diligence on the part of the owner or of those who represented him in the inspection and

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(98) [1927] 2 K.B. 456.

(99) See [1958] 3 All E.R. at p. 267.

(100) [1895] 2 Q.B. 408.

(101) [1895] 2 Q.B. at p. 413.

(102) (1897), 171 U.S. at p. 192.

(103) (1895), 68 Fed. Rep. 919.

A repair of the ship before sailing. In *The Colima* (104), it was held that the Act required due diligence not only by the owner but also by such agents as he might employ, i.e., due diligence in the work itself. A similar view was expressed in *Nord-Deutsche Lloyd* v. *President, etc., of Insurance Co. of North America* (105).

Reliance was also placed on the views expressed by the learned editors of SCRUTTON ON CHARTERPARTIES (12th and 13th Edns.), in the first two editions B to be published after the passing of the Carriage of Goods by Sea Act, 1924, as showing the initial impact of the relevant provisions of the Hague Rules on the legal opinion in this country. At pp. 106, 107 of the 12th edition it is said:

> " Neither of these clauses [i.e., art. III, r. 1, and art. IV, r. 1] nor the provision in the Act [whereby the absolute undertaking of seaworthiness C was abolished] will generally be of much practical value in face of the dilemma that must constantly arise on the facts. In most cases if the vessel is unseaworthy due diligence cannot have been used by the owner, his servants or agents; if due diligence has been used the vessel in fact will be seaworthy. The circumstances in which the dilemma does not arise (e.g. a defect causing unseaworthiness but of so latent a nature that due diligence could not have D discovered it) are not likely to occur often."

Again at p. 499 of the 12th Edn., note (z) is in the following terms:

> " In appearance the undertaking to use due diligence to make the ship seaworthy is less onerous than the old common law undertaking that the ship is in fact seaworthy. In reality there is no great gain to the shipowner E by the substitution. For the dilemma indicated on p. 106 must constantly arise, and the relief to the shipowner by the substitution will occur only in cases where the unseaworthiness is due to some cause which the due diligence of all his servants and agents could not discover, e.g., in the case of ' latent defects not discoverable by due diligence '."

The first case to arise for decision in this country, in which the construction F of the relevant rules was considered, was *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (106), already referred to. The actual decision in that case was that the owners of a new ship specially built for them were not guilty of want of due diligence where the unseaworthiness complained of was caused or contributed to by certain bad workmanship in the construction of the ship on the part of some of the shipbuilders' workmen. What G is relied on, however, is WRIGHT, J.'s approach to the problem which he had to consider. He said (107):

> " The obligation of the carrier to exercise due diligence to make the ship fit is clearly not limited to his personal diligence. The carrier may be a company and, in any case, in the complication of modern affairs and by H reason of the widely scattered situation of seaports, he must act by agents or servants, which is the phrase employed in art. IV, r. 2 (q) (108). The question is: How wide is the category of agents or servants with reference to the obligation now being considered."

Since that date there have been several dicta to the same effect by LORD WRIGHT, I notably in *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* (109), *Northumbrian Shipping Co., Ltd.* v. *E. Timm & Son, Ltd.* (110), and *Smith, Hogg & Co., Ltd.* v. *Black Sea & Baltic General Insurance Co., Ltd.* (111), in addition to the dictum, already quoted, in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (112). These dicta have already been referred to, and I do not therefore pause to quote them again.

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(104) (1897), 82 Fed. Rep. 665.
(105) (1901), 110 Fed. Rep. 420.
(106) [1927] 2 K.B. 456.
(107) [1927] 2 K.B. at p. 460.
(108) Of the Schedule to the Carriage of Goods by Sea Act, 1924.
(109) [1934] All E.R. Rep. at pp. 486, 487; [1934] A.C. at p. 547.
(110) [1939] 2 All E.R. at p. 651; [1939] A.C. at p. 403.
(111) [1940] 3 All E.R. at p. 408; [1940] A.C. at p. 1001.

We were next referred to a dictum of Lord Roche in delivering the judgment of the Privy Council in *Paterson S.S., Ltd.* v. *Robin Hood Mills, Ltd.* (113), a case under the Canadian Water Carriage of Goods Act, 1910, where the relevant negligence was that of a compass adjuster. The Canadian court had found that, having regard to the negligence of the compass adjuster, the shipowners were unable to establish that they had exercised due diligence to make the ship seaworthy, and there was no appeal on this issue, the appeal to the Privy Council being concerned only with a claim by the shipowners to limit their liability. What was said in the Privy Council was therefore clearly obiter, but coming from so authoritative a source it must necessarily be treated with a considerable measure of respect. Lord Roche is reported as saying (114):

> " The condition is not fulfilled merely because the shipowner is personally diligent. The condition requires that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose—see *Dobell & Co.* v. *S.S. Rossmore Co.* (115). Therefore . . . want of diligence in the compass adjuster who adjusted the compasses or in the captain who said he checked or verified the adjuster's work would be material, and a finding adverse to the shipowner could be arrived at upon the ground of want of diligence in those persons."

The importance of this dictum, which was cited with approval by the Privy Council in the very recent case of *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* (116), lies in the fact that a compass adjuster would not ordinarily be a servant in the regular employment of the shipowner, but could fairly be regarded as belonging to the category of independent contractor.

Reference was also made to some words used by McNair, J., himself in *International Packers, Ltd.* v. *Ocean S.S. Co., Ltd.* (117), where he is reported as saying (118), with reference to the shipowner's obligation to exercise due diligence to make the ship seaworthy, that he

> " cannot escape on proof that he employed a competent independent contractor who was in fact negligent."

The learned judge himself referred to this dictum in his judgment in the present case (119), and said that the words imputed to him were either a slip or a mistake in reporting. Counsel for the cargo owners contended, however, that the statement by McNair, J., as reported, falls exactly into line with the previous current of authority, and sought to rely on it as supporting his argument.

Finally, reliance was placed on a decision of Devlin, J., in *Waddle* v. *Wallsend Shipping Co., Ltd.* (120). In that case the claim was for loss of life resulting from the total loss of the defendant shipowners' vessel, and the construction of the Hague Rules was not immediately in issue. It was, however, necessary to consider the cognate question whether the shipowners had exercised proper care to see that their ship was seaworthy, and in relation to that question Devlin, J., said (121):

> " It is a universal principle (and not special doctrine imported into this type of case) that if a man owes a duty to another to perform an act carefully, he cannot rid himself of liability by appointing somebody else, however competent, to do it for him. A person so appointed becomes his agent

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(112) [1937] 3 All E.R. at p. 641; [1938] A.C. at p. 80.
(113) (1937), 58 Lloyd's Rep. 33.
(114) (1937), 58 Lloyd's Rep. at p. 40.
(115) [1895] 2 Q.B. 408.
(116) [1959] 2 All E.R. 740.
(117) [1955] 2 Lloyd's Rep. 218.
(118) [1955] 2 Lloyd's Rep. at p. 236.
(119) [1958] 3 All E.R. at p. 268.
(120) [1952] 2 Lloyd's Rep. 105.
(121) [1952] 2 Lloyd's Rep. at p. 129.

pro hac vice in the discharge of the duty; and the principle *respondeat superior* applies to him just as much as it applies to a whole-time servant of the employer."

In the light of these decisions and dicta it was argued that there has been a consistent stream of authority over the years in support of the principle contended for, viz., that a shipowner cannot evade his responsibility for the exercise of due diligence to make the ship seaworthy by delegating the performance of his obligation to someone else, whether to a servant, to an agent, or to an independent contractor such as a ship repairer. Accordingly, the decision of the learned judge in the present case, whereby the shipowners were held free from liability for the bad workmanship of the repairers' fitter, amounts, so it was contended, to a novel and wholly unjustifiable departure from a well-worn principle, such as this court should be slow to approve, especially having regard to the observations made by LORD DUNEDIN (122) and LORD ATKIN (123) in *Louis Dreyfus & Co.* v. *Tempus Shipping Co., Ltd.* (124). Oddly enough, the observations of their Lordships in that case were strenuously pressed on us by both sides. For the shipowners on their side have contended that the decision of WRIGHT, J., in *Angliss's case* (125), properly understood, is a decision wholly in their favour, and one that should not now be disturbed after it has stood unchallenged for over thirty years.

I hope that I have adequately summarised the argument so forcibly presented to us on behalf of the cargo owners. I certainly appreciate its force, and it is only after careful consideration that I have come to the conclusion that it is not well founded. I am persuaded that in coming to the conclusion to which he came the learned judge was guilty of no error of principle, and that on the particular facts of this case he came to a correct decision in absolving the shipowners from liability for the bad workmanship of the repairers' fitter.

I base my conclusion both on principle and on authority. In the first place, as a matter of construction, and unhampered by authority, I find it impossible to extract the principle contended for by the cargo owners from the words of the Act, and of the rules scheduled thereto, without doing violence to the language used. It is not to be forgotten that by the Australian Act, as by our own Act, the old absolute undertaking of seaworthiness has been abolished. Yet, as pointed out by the learned judge, acceptance of the construction sought by the cargo owners to be put on art. III, r. 1, would be in effect to substitute for the new qualified obligation something barely distinguishable from the old absolute undertaking, except in the necessarily rare cases of true latent defect. The obligation now imposed is to exercise due diligence, not to see that due diligence has been exercised—still less is there any warranty that due diligence has been exercised. An obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care—a concept not unfamiliar in English law, and one to be sharply distinguished from the obligation, to which certain relationships give rise, to see that care is taken. Moreover, as appears from the wording of art. IV, r. 1, it is due diligence " on the part of the carrier " that is in question under the Hague Rules. These words are no doubt wide enough to render the carrier liable for lack of due diligence on the part of his own servants, whatever the task on which they may be engaged.

Again, where an independent contractor is engaged by a carrier to perform on his behalf any part of the ordinary business of carrying goods, e.g., a firm of stevedores employed to load cargo, I can well understand that failure on the part of such contractor to exercise due diligence could be held to be a failure on the part of the carrier. Similarly, where a shipowner appoints some independent person to act for him, i.e., to be his representative, such as a firm of ship's agents,

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(122) [1931] All E.R. Rep. at pp. 579, 580; [1931] A.C. at p. 733.
(123) [1931] All E.R. Rep. at p. 588; [1931] A.C. at p. 749.
(124) [1931] All E.R. Rep. 577; [1931] A.C. 726. (125) [1927] 2 K.B. 456.

or a surveyor or engineer appointed to supervise the building or repair of a ship, A
he may become liable for any want of due diligence on the part of such person, as being equivalent to his own want of due diligence. Such persons could properly be regarded in law as his servants pro hac vice, though not persons in his regular employment. But that is far removed from saying that every time a shipowner engages some outside person or independent contractor to perform some work on a ship which goes outside the carrier's own business of carrying goods, he B
renders himself liable for any lack of due diligence on the part of such person or contractor. Where the matter in question is one of building, or rebuilding, or repairing a ship, or of the supply of equipment or spare parts, I can see no reason in principle why the court cannot properly be invited to conclude, as a jury question, that the carrier has exercised due diligence, on proof (a) that he has engaged a reputable contractor or supplier, (b) that he has provided for the work C
to be properly superintended by his own representative, and (c) that such representative has in fact exercised due diligence. To hold the contrary would, as it seems to me, lead to absurd results which cannot have been in the contemplation of those who framed the rules. The carrier, even though he was only a purchaser at second-hand, would have to be held liable for any defective workmanship in the original building of the ship, or in any repairs carried out at any time D
in the ship's history, and equally for any defective equipment or spare parts supplied at any time in the ship's history, notwithstanding that the defects might be latent to everybody but the original builder, repairer or supplier, and notwithstanding that such person might be far removed from the carrier by a chain of contractors and sub-contractors. It would, in my judgment, be absurd to construe the rules in such way as to render it thus virtually impossible for a E
shipowner ever to discharge his obligation.

In my judgment, the fallacy in the argument on behalf of the cargo owners lies in the use of the word "delegation" to cover every occasion when the shipowner engages some other person to do some work on the ship. I see a distinction between employing someone else to carry on one's own business and engaging someone else to perform something which is his business. Any master delegates to his own F
servants the work of carrying on his own business. Equally I think he may be said to delegate when he employs some outside person to act as his representative. In applying art. III, r. 1, and art. IV, r. 1 of the Hague Rules, the difficult question which has to be determined is whether, on the facts of the particular case, the person who has failed to exercise due diligence is one who can fairly be said to be the carrier's representative. The superintendent or surveyor whom the G
carrier employs to supervise the repair of a ship may fairly be said to be the carrier's own representative, to whom he has delegated the performance of his own obligation to exercise due diligence to make the ship seaworthy. But I find it difficult to see how in principle a carrier can be said to be delegating to the firm of repairers whom he employs his own obligation to exercise due diligence. In so far as he can be said to delegate to the repairers at all, he delegates performance H
of the actual job of doing the repairs and making the ship seaworthy.

If the matter were res integra, therefore, and uncomplicated by authority, I should find it impossible to accede to the argument on behalf of the cargo owners, or to hold, as a matter of construction of the rules, that whenever some contractor's workman puts in bad workmanship in carrying out work on the ship, that is necessarily conclusive to show a want of due diligence on the part of the I
shipowner. Do the authorities compel me to hold otherwise? In my judgment they do not; on the contrary, they appear to me to lead to the same result.

Any examination of the authorities must, as it seems to me, begin with Angliss's case, which properly understood is in my view wholly in favour of the shipowners' case. I have already stated what was the actual decision in that case. If that decision be right, I am unable to see any distinction in principle between bad workmanship on the part of the original builders' men and bad workmanship on the part of the repairers' men at a later period in the ship's history. As I read

A the report of *Angliss's* case (126), the same argument as has been adduced before us was put forward before WRIGHT, J., and decided by him adversely to the cargo owners. Immediately following the passage in his judgment which I have already quoted, WRIGHT, J., went on as follows (127):

> B " It is contended by the plaintiffs that, as the primary obligation on the carrier is to provide a seaworthy ship, the carrier cannot delegate any part of that obligation so as to relieve him of his personal liability, and he must accordingly be accountable for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be his agents, to make the ship seaworthy and fit, and that, therefore, the defendants must be held liable for the bad workmanship of which I have found the shipbuilder's men guilty and which I have not excluded as a contributing cause C of the actual damage. I do not think that this contention is sound."

The contention which WRIGHT, J., is there declaring to be unsound is the contention that the carrier cannot delegate any part of his obligation so as to relieve him of his personal liability.

I think that it is clear that, had the question of faulty workmanship on the D part of repairers' men been before WRIGHT, J., in *Angliss's* case (126), his conclusion would have been the same as it was in relation to faulty workmanship on the part of the builders' men. I see can no other possible interpretation of the sentence already quoted by my Lord, where the learned judge says (128):

> " Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom E he is personally responsible, that the repairs adequately make good the defects."

On the cargo owners' argument, there could be no point in referring to the carrier's duty to appoint " special advisers " or to his personal liability for any errors on their part. For such a " special adviser ", whether negligent or diligent, would be quite irrelevant if the carrier is in any event to be held liable F for bad workmanship on the part of the repairers' men. According to WRIGHT, J., the carrier may be in breach of his obligation if he does not appoint a " special adviser ". Yet, on the cargo owners' argument, even if he does, and even if such " special adviser " is in every way diligent, the carrier has still not fulfilled his obligation where there is in fact bad workmanship. Clearly WRIGHT, J.'s view was that the carrier would be liable (a) if he failed to appoint a special G adviser to supervise the repairs, or (b) if such special adviser failed to exercise due diligence, but would not be liable if such special adviser, exercising due diligence, failed to detect, e.g., bad workmanship on the part of the repairers' men. This, I think, is in accordance with his statement (129) that the carrier

> " . . . is to be liable for all such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment."

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The decision in *Angliss's* case (126) has never been overruled, nor, so far as I am aware, has it been the subject of any adverse comment. It was followed and applied by BUCKNILL, J., in *The Australia Star* (130), where the facts were somewhat similar. It was referred to with obvious approval by SINGLETON, J., in *Smith & Sons Fellmongery Proprietary, Ltd.* v. *Peninsular & Oriental Steam* I *Navigation Co.* (131), though in the event nothing turned on it, since on the facts the repairers in that case were found to be free from fault. It was again referred to and treated as authoritative by DEVLIN, J., in *Waddle* v. *Wallsend Shipping Co., Ltd.* (132), though once again the actual decision of that case turned on another point. In the American case of *The Waterville Victory* (133), where the

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(126) [1927] 2 K.B. 456. (127) [1927] 2 K.B. at p. 460.
(128) [1927] 2 K.B. at p. 462. (129) [1927] 2 K.B. at p. 461.
(130) (1940), 67 Lloyd's Rep. 110. (131) (1938), 60 Lloyd's Rep. at p. 423.
(132) [1952] 2 Lloyd's Rep. 105. (133) (1951), Amer. Mar. Cas. 320.

A facts appear from the report to have been substantially the same as those in *Angliss's* case (134), the same result was reached, and the shipowner was held not to have failed in his duty to exercise due diligence notwithstanding defective workmanship on the part of the builders' men.

What is perhaps most important is that the decision of WRIGHT, J., in *Angliss's* case (134) was carefully considered by the House of Lords in *Davie* v. *New Merton Board Mills, Ltd.* (135), where it was treated with obvious approval. B In that case the question was whether an employer was liable for injury caused to one of his workmen by the defective condition of a tool supplied for the use of the latter. The tool had been purchased by the employer from a reputable supplier, who had in turn obtained it from a reputable manufacturer. The defect in the tool was such that it could not have been detected by anyone but the original manufacturer. C In these circumstances, the House of Lords unanimously decided that the employer was not liable for the injury sustained by the workman. The argument on behalf of the workman was based largely on the speech of LORD WRIGHT in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (136), and reliance was placed particularly on the dictum therein which I have already quoted (137), and in which LORD WRIGHT sought an analogy in the liability of a carrier under the Carriage of Goods by Sea Act, 1924. D In dealing with this argument in *Davie's* case (135) VISCOUNT SIMONDS said (138):

> "... the analogy is an unfortunate one, for in the earlier case of *Angliss* (134) ... the same learned judge had to construe the same section, and I venture to quote a substantial passage of his judgment because it is very apposite to the present case."

E VISCOUNT SIMONDS then proceeded to set out the passage in WRIGHT, J.'s judgment in *Angliss's* case (134), which I have already quoted myself, and continued (139):

> "My Lords, I think, with great respect that when, in *Wilsons'* case (136) the learned judge referred to the analogy of the Carriage of Goods by Sea Act, 1924, he did so with an imperfect recollection of what he had himself F decided in the earlier case."

Clearly VISCOUNT SIMONDS thought that the decision in *Angliss's* case (134) was right, and that in so far as the dictum in *Wilsons'* case (136) differed from what LORD WRIGHT had said in the earlier case it went too far. LORD MORTON OF HENRYTON did not specifically refer to *Angliss's* case (134), but he expressed G his agreement with VISCOUNT SIMONDS' examination of the cases cited in argument. LORD REID thought that what LORD WRIGHT said in *Wilsons'* case (136) could be reconciled with his previous decision in *Angliss's* case (134), but on the footing that what was said in *Wilsons'* case (136) related only to cases where performance of the shipowners' obligation was delegated to a skilled servant. In *Davie's* case (140) LORD REID said:

> H "In choosing this analogy [i.e., of the Carriage of Goods by Sea Act, 1924], I think that [LORD WRIGHT] must have had in mind his own carefully reasoned judgment in *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (134), and, reading the words 'personal obligation' and 'absolutely' in the peculiar sense which he gives to them in his speech in *Wilsons & Clyde* (136), I see no contradiction between this I passage and that judgment."

Later LORD REID said (141):

> "LORD WRIGHT had the nature of the vicarious liability of a shipowner

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(134) [1927] 2 K.B. 456.
(135) [1959] 1 All E.R. 346.
(136) [1937] 3 All E.R. 628; [1938] A.C. 57.
(137) [1937] 3 All E.R. at p. 641; [1938] A.C. at p. 80.
(138) [1959] 1 All E.R. at pp. 352, 353.
(139) [1959] 1 All E.R. at p. 353.
(140) [1959] 1 All E.R. at p. 359.
(141) [1959] 1 All E.R. at p. 360.

A sufficiently in mind to enable him to select this as an appropriate analogy to the vicarious liability of an employer to his servant, and it seems to me impossible that he could at the same time have forgotten his judgment in *Angliss* (142), and equally impossible that he would have said no more than he did in *Wilsons & Clyde* (143) if he had come to think that his judgment in *Angliss* (142) was wrong."

B LORD TUCKER was content to express his agreement with VISCOUNT SIMONDS and LORD REID in their analyses of what was said in *Wilsons & Clyde* (143) and their conclusions thereon. LORD KEITH OF AVONHOLM, who also agreed, referred specifically to *Angliss's* case (142) and quoted a long passage from the judgment of WRIGHT, J., in support of his own conclusion.

C In these circumstances I think that it must now be taken that the decision in *Angliss's* case (142) has the approval of the House of Lords, and therefore should be followed by this court. If so, for reasons already given, I can see no ground in principle for distinguishing it from the present case. It is difficult to see why it is not decisive in favour of the shipowners here. The authorities cited in support of the argument for the cargo owners, on the other hand, appear D to me to be far from decisive. Many of the cases referred to turn out on examination to be cases where the lack of due diligence was that of one of the shipowners' own servants, and the dicta relied on were clearly obiter. They cannot weigh in the balance against the actual decision in *Angliss's* case (142), which, as already stated, appears to me to be indistinguishable in principle from the present case.

E That is not the end of the matter, for in the course of the argument before us a large number of cases was cited in which consideration was given to the responsibility of a person, on whom the law imposed a duty to exercise reasonable care, for damage resulting from the negligence of an independent contractor employed by him. I do not find it necessary to burden this judgment by any prolonged examination of these authorities. They were referred to by way of F analogy only, but so far as they go they weigh heavily in favour of the argument for the shipowners. So long as we remember that we are proceeding only by way of analogy, I think it is useful to examine briefly the principles on which the court has acted in cases where it has been sought to fix liability on a person under a duty to exercise reasonable care for the faults of an independent contractor. As already stated, I can see no distinction in principle between an G obligation to exercise due diligence, such as art. III, r. 1, of the Hague Rules imposes on a carrier, and an obligation to exercise reasonable care, such as the law imposes, for instance, on a bailee in favour of the bailor, on a master in favour of his servant, or on an invitor in favour of an invitee. Cases arising out of all these relationships were cited to us, and, basing himself on these cases, counsel for the shipowners formulated his proposition as follows. Where the law imposes an obligation to exercise reasonable care, as opposed to an H obligation to see that care is taken, it is always a question of fact whether such reasonable care has been exercised. In considering this question, the court will pay regard to whether what has to be done is something which normally forms part of the obligor's own ordinary trade or business. If it does, then, if what has to be done is negligently done, the obligor is liable, whether he has done it himself or by his servants or by engaging an independent contractor to do it I for him. If, however, what has to be done is no part of the obligor's ordinary trade or business, but is something calling for the exercise of specialised knowledge or experience, then the obligor discharges his duty by engaging a properly skilled person to do it for him, and is not liable if that person does it negligently, assuming of course that such negligence is not apparent to the obligor himself.

It seems to me that this proposition is well justified by the authorities which were cited to us. Thus in *Searle* v. *Laverick* (144), the bailee of a carriage, who owed a duty to exercise reasonable care to see that the building in which the carriage was housed was safe, was held not liable for damage resulting from the collapse of the building due to the negligence of a competent independent contractor whom he had engaged to erect it for him. Similarly in *Haseldine* v. *Daw & Son, Ltd.* (145), the occupiers of a building were held not liable to an invitee for personal injuries sustained in consequence of the defective condition of a lift, which they had engaged a competent independent contractor to keep in repair for them. This case may be usefully contrasted with *Woodward* v. *Mayor of Hastings* (146), where the negligence of the independent contractor occurred in the course of doing something which did not call for the exercise of any special skill, and the decision went the other way. Again, in *Phillips* v. *Britannia Hygienic Laundry Co.* (147)—a case which went to the Court of Appeal on another point—and in *Stennett* v. *Hancock & Peters* (148), the owner of a vehicle was held not liable to another road user for damage occasioned by a defect in the vehicle, the repair of which he had entrusted to an independent contractor.

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(142) [1927] 2 K.B. 456.

(143) [1937] 3 All E.R. 628; [1938] A.C. 57.

The principle for which counsel for the shipowners contended was neatly and, I think, correctly summed up by SALMON, J., in the recent case of *Green* v. *Fibreglass, Ltd.* (149), where most of the relevant authorities are collected. It also formed the basis for LORD REID's opinion in *Davie's* case (150), as appears from the final paragraph of his speech (151). *Davie's* case (150) itself is of considerable importance, not only for its approval of the decision in *Angliss's* case (152), but also as showing that, in regard to the master and servant relationship, there is a limit beyond which the law will not go in imposing liability on an employer for the negligence of a so-called independent contractor. It is to my mind clear from the reasoning underlying the speeches of the various members of the House that, if *Davie's* case (150) had fallen to be determined in accordance with the duty imposed on the carrier under the Hague Rules, instead of that imposed by the law of master and servant, the result would have been the same.

It seems to me that the principle underlying the decision of these cases from other branches of the law must be a guide in approaching the question—essentially a question of fact—whether in a given case a carrier under the Hague Rules has discharged the burden, which lies on him, of proving that he has exercised due diligence to make the ship seaworthy. Clearly the carrier must act through servants and agents and for any failure on their part to exercise due diligence he must accept responsibility. Due diligence may require him to appoint some outside person, e.g., an expert adviser or a surveyor, to act as his representative and advise him in connexion with some technical matter. Here again I apprehend that this would be a true case of delegation of his own obligation to exercise due diligence, and he would remain responsible for any lack of due diligence on the part of such person. There may well be cases in which the employment of an independent contractor can be regarded as a delegation of the carrier's duty to exercise reasonable care, e.g., where the task to be performed is something falling within the carrier's own ordinary business as a carrier. As already suggested, the employment of a firm of stevedores to perform the work of loading or discharging the ship is an instance which comes to mind. But I do not think it follows that every time an independent contractor is employed the carrier must be regarded as delegating to such contractor his own duty to exercise due diligence to make the ship seaworthy. Where

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(144) (1874), L.R. 9 Q.B. 122.
(145) [1941] 3 All E.R. 156; [1941] 2 K.B. 343.
(146) [1944] 2 All E.R. 565; [1945] K.B. 174.
(147) [1923] 1 K.B. 539.
(148) [1939] 2 All E.R. 578.
(149) [1958] 2 All E.R. at pp. 524, 525; [1958] 2 Q.B. at p. 250.
(150) [1959] 1 All E.R. 346.
(151) [1959] 1 All E.R. at p. 367.
(152) [1927] 2 K.B. 456.

A the work to be done is of a specialised nature, outside the course of the carrier's ordinary business, it seems to me quite unreal to say that the carrier is delegating his duty to exercise due diligence; on the contrary, the very fact of employing a skilled and competent contractor may amount of itself to a performance of the duty. The question must be one of fact, depending on the nature of the work to be performed.

B In the present case it could be said that the work of replacing the inspection covers after examination of the storm valves was a task well within the competence of one of the engineer members of the ship's crew, and as such something within the ordinary course of the carrier's business, rather than a matter calling for the exercise of any specialised technical skill. It is fair to say that the appeal was not argued on this ground, and on consideration I do not think C it would be a valid argument on the facts of this case. The work of replacing the inspection covers was merely incidental to the work of opening up the storm valves for inspection, which, being part of the survey through which the ship was being passed, was a task properly entrusted to the competent contractors whom the shipowners engaged. In the same way, the task of replacing the wheel of a car is one that is doubtless within the competence of the ordinary D car owner. Yet no one, I venture to think, would suggest that it was a task not properly to be left to a competent garage to whom the owner may have entrusted the car for the purposes of a repair necessitating the removal of a wheel. In my judgment this case must be approached on the basis that the replacement of the inspection covers of the storm valves was part of the specialised and technical work which Alexander Stephen & Sons, Ltd., were properly E engaged to do.

The employment of competent contractors to carry out the work that has to be done is in my judgment merely one step in the exercise of due diligence. All the circumstances in relation to the particular repair must be looked at. It seems to me that the right approach to the problem is that made by HILBERY, J., in *Cranfield Bros., Ltd.* v. *Tatem Steam Navigation Co., Ltd.* (153), a case arising F under the Canadian Water Carriage of Goods Act, 1936, where the damage was caused by a defective rivet which had escaped detection. HILBERY, J., said (154):

> G "The shipowner does not discharge his duty of exercising due diligence to have his ship seaworthy merely by establishing to the court that she passed her classification survey, or merely by showing to the court that he has appointed someone who by qualification should be a skilled person to examine it; but both those things are elements to be considered, in my view, in considering whether the shipowner has exercised due diligence to make the ship seaworthy . . . Again, of course, it is an element to be considered whether there has been a sufficiently frequent dry-docking of the H vessel for examination and report. That is another element to be considered; and it is an element to be considered to see into whose hands the owners have put the vessel for their periodical examinations and reparations—to see whether they are properly skilled people for the work."

In the present case the shipowners, in my judgment, exercised due diligence I in arranging for the classification and loadline surveys to be carried out. Having regard to the technical nature of the work to be done, I think they also exercised due diligence by entrusting the vessel to a competent firm of repairers. On the facts of this case, I regard this as an act in furtherance of their obligation, not as a delegation of their obligation, to exercise due diligence. Furthermore, they arranged for their own managers' superintendent, Mr. Atkinson, to supervise the work and see that the requirements of the classification surveyors were carried out. This again I regard as an act in furtherance of their obligation to exercise due diligence. Had they not appointed some competent person to superintend the work, they would, I think, have been guilty of a want of due diligence. But, in the case of Mr. Atkinson, I have no doubt that they did, properly and wisely, delegate to him the duty of acting for them throughout, which would involve the continuing exercise by him of due diligence on their behalf. Had Mr. Atkinson shown a want of due diligence—had he, for instance, failed to detect bad workmanship which ought to have been detected—the shipowners would have been liable for his want of due diligence as for their own, and in such case it would have been no answer to say that the contractor employed to carry out the repairs was a competent one. Nor would it help the shipowners, I think, to say that the classification surveyor also failed to detect the bad workmanship. But here, on the facts found by the learned judge, there was no fault on the part of Mr. Atkinson. The fault was entirely that of the fitter employed by the repairers, and it was a fault which, as found by the learned judge, could not reasonably have been detected by following the ordinary and prudent practice. In these circumstances, on the facts of this case, it appears to me that it would be contrary to common sense, and would be doing violence to the plain meaning of the words of art. III, r. 1, of the Hague Rules, as well as flying in the face of authority, to say that these shipowners were guilty of a want of due diligence to make their ship seaworthy.

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(153) (1939), 64 Lloyd's Rep. 264.

(154) (1939), 64 Lloyd's Rep. at p. 267.

For these reasons I am of the opinion that the learned judge came to a correct conclusion, and I would dismiss the appeal. I should, however, like to add one word of caution. It is a commonplace that there is nothing static about what does, and what does not, amount to negligence. Reasonable care—and equally due diligence—requires that men must learn from their mistakes. It may be that in future, in the light of experience gained in this case, it will not be regarded as good practice to leave a repairers' fitter unsupervised when he is performing tasks such as that of replacing these inspection covers. It does not follow necessarily from our decision in this case that, if a similar casualty happens in the future, arising from a similar cause, the shipowners concerned, having regard to the experience now gained, will be able to show that they have exercised due diligence without proof of something more than has been proved in this case.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Clyde & Co.* (for the cargo owners); *Botterell & Roche* (for the shipowners).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re THE AGREEMENT BETWEEN THE MEMBERS OF THE FEDERATION OF WHOLESALE AND MULTIPLE BAKERS (GREAT BRITAIN AND NORTHERN IRELAND).

[RESTRICTIVE PRACTICES COURT (Pearson, J., Mr. W. Wallace and Mr. W. G. Campbell), November 2, 3, 4, 5, 6, 9, 10, 11, 12, December 16, 1959.]

Restrictive Trade Practices—Reference—Bread price restriction—Wholesale and Multiple Bakers (Great Britain and Northern Ireland) Federation—Agreement not to sell at retail prices higher than those recommended by Federation—Whether removal of restriction would deny public substantial benefit—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 21 (1) (*b*).

Restrictive Trade Practices—Reference—Burden of proof—Recommendation, not clause in agreement, constituting restriction—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 6 (7), *s.* 21 (1).

Restrictive Trade Practices—Court—Practice—Declaration—Past restrictions—Whether declaration as to past restrictions would be made—Restrictive Trade Practices Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 68), *s.* 20 (5).

The baking industry in England and Wales comprised three main sections: (i) the National Association of Master Bakers, Confectioners and Caterers, formed in 1887, which had in its membership a large number of family bakers and a few plant bakers; (ii) the Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland), formed in 1942, whose members were all plant bakers, and who had about thirty-seven per cent. of the total bread production in 1956, and an estimated fifty-one per cent. in 1958-59; (iii) the co-operative societies, most of whose production was in plant bakeries. There was also a small residue of family bakers who were not members of any association. There were several types of bread, the main type being the standard loaf. There had, since 1938, been a decline in the consumption of bread in general and of standard bread in particular. From 1941 to 1956, the price of bread was controlled under a system of bread subsidy and price control. Following the removal of price control, the Federation recommended to its members fixed retail prices for the standard loaves. In July, 1957, the Registrar referred the Federation's agreement to the Restrictive Practices Court, and in 1958 the Federation adopted a memorandum entitled "Cost and Sale of Standard Bread in England and Wales", which incorporated a formula to regulate price recommendations. One of the resolutions* in the memorandum stated that the Federation could at any time or from time to time discontinue the making of recommendations as to prices, but that, if a specific recommendation was made, each member, while free to charge less than the maximum retail price stated in the recommendation, should not charge more than that price. The memorandum set out the method of costing to be used for the purpose of determining the cost of producing and distributing standard bread in England and Wales and the method of determining recommended maximum retail selling prices of such bread. The costing system used by the Federation was, in essence, a continuation of that used during the period of control, i.e., a basis of samples of costs of production and distribution. From these a ceiling was calculated by making an addition and including any shortfalls for the four preceding quarters and some deduction on account of any excesses during the same period; and in the final average computation a percentage deduction, called the "efficiency factor" (see p. 240, letter G, post) was made. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, whether the restrictions not A to offer for sale or sell standard bread of the statutory weights of twenty-eight ounces and fourteen ounces at prices exceeding those recommended by the Federation, together with a fixed retailer's margin, were contrary to the public interest, and, therefore, void under s. 20 (3) of the Act of 1956, the Federation sought to support its restrictions under s. 21 (1) (b)† of the Act. The court was also asked, under s. 20 (5)‡ of the Act, to make declarations B not only in respect of the agreement as it now was, but also in respect of the agreement as it was before it was varied by the resolutions introducing the costings formula and the description of the recommended prices as maximum.

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* See p. 236, letter I, to p. 237, letter A, post.

Held: (i) the restrictions were deemed by s. 21 (1) of the Restrictive Trade Practices Act, 1956, to be, and were declared to be, contrary to the C public interest, because—

(a) though a collective price control by maximum prices might operate so as to be less open to criticism on grounds of public interest than a fixed price control, as maximum prices permitted sales at lower prices, yet the recommended maxima had operated in fact substantially as fixed prices (see p. 244, letter I, to p. 245, letter D, and p. 247, letter E, post), while some D members of the Federation could have afforded to make sales for less (see p. 245, letter E, post); moreover, the absence of any public announcement in the Press, when the recommended maximum price system was established after the end of national price control, that the prices were maxima and that sales could be made at lower prices, tended to show that the description of prices as maxima was not intended to make much practical difference E (see p. 245, letter H, post), and

(b) it was not proved by the Federation that the removal of the restriction would deny benefit to the public in future, because the formula allowed profits that were too favourable to justify a claim that it adequately protected the consumer (see p. 247, letter H, post), and, on a declining or stationary public demand accompanied by ample production such as F existed in the present case, free competition would in the long run favour reduction of prices (see p. 249, letter H, post).

(ii) the powers given by s. 20 (5) of the Act were discretionary and it was not appropriate in the present case to make a declaration as to the previous price recommendations (see p. 250, letters F and G, post).

Per Curiam: (a) where the restrictions are contained in recommendations G of a trade association, not in clauses of an agreement, the burden of proof is nevertheless on the trade association by virtue of the joint effect of

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* Section 20, as far as relevant, provides:

"(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

"(2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

"(3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions ; . . ."

† The terms of s. 21 (1) (b) are set out at p. 230, letter B, post.

‡ Section 20 (5) is as follows: "The powers of the court under this section shall not be affected by the determination of an agreement effected after the commencement of the proceedings, and where an agreement is varied after the commencement of the proceedings, the court may make a declaration and, if it thinks fit an order under sub-s. (3) or sub-s. (4) of this section, either in respect of the agreement as at the commencement of the proceedings or in respect of the agreement as varied, or both."

A s. 6 (7)* and s. 21 (1)* of the Restrictive Trade Practices Act, 1956 (see p. 231, letter H, to p. 232, letter H, post).

(b) if there were to be collective regulation of prices on a costs basis, the system should be based on a principle of lowest costs plus an addition calculated to keep in business enough higher cost producers to supply the public need, rather than on a basis of average costs reduced by an "efficiency B factor" (see p. 247, letter I, to p. 248, letter A, post).

[For the Restrictive Trade Practices Act, 1956, s. 6, s. 20 and s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 952, 954.]

Case referred to:

Scottish Association of Master Bakers' Agreement, Re, Wholesale and Retail C *Bakers of Scotland Association's Agreement, Re,* [1959] 3 All E.R. 98; L.R. 1 R.P. 285.

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court by notice of reference dated July 12, 1957, an agreement subsisting between D the members of the Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland), and contained in the Federations's constitution and rules, list of members, recommendations of various dates and memorandum. The facts appear in the judgment of the court.

Sir Milner Holland, Q.C., and *Robert Lochner* for the Federation of Wholesale E and Multiple Bakers (Great Britain and Northern Ireland).

John Megaw, Q.C., and *R. A. Barr* for the Registrar.

Cur. adv. vult.

Dec. 16. **PEARSON, J.**, read the following judgment of the court: The present case is confined to matters arising in England and Wales. There was recently before this court in Scotland a case dealing with bakers carrying on F business in Scotland (1). Naturally there is much in the technical, industrial and historical background that is common to the two cases, both being concerned with trade associations of bakers and with the prices to be charged for standard bread. There are, however, differences in the facts generally, and, in particular, there are differences in the arrangements for price recommendations as a result of changes introduced for England and Wales in the year 1958. Shortly, it can G be said that the present system in England and Wales involves recommended retail prices, which are in form at any rate maximum and not fixed or minimum retail prices, and a rigid formula for determining on a costings basis what prices are to be recommended from time to time, and an ancillary recommendation of a fixed retailer's margin. There are in that system certain features which distinguish it from the system which was considered in the *Scottish* case (1). H The issues to be decided in the present case, although from one point of view they cannot be basically different from those which arose in the Scottish case under the same provisions of the same Act, have arisen on different facts in relation to a different system and have been differently presented and argued. There was rightly no suggestion made on behalf of the Registrar that the decision in this case should be governed by the decision in the *Scottish* case (1), and the I respondent Federation are fully entitled to have this case considered quite separately and independently on its own evidence and its own merits.

We will first state what are the main issues to be decided, and deal with a question which was raised as to the burden of proof, before proceeding to examine the facts of the case. The issues are related to s. 21 of the Restrictive Trade

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* The terms of s. 21 (1) and s. 6 (7) are set out at p. 230, letters A to E, and p. 231, letter I, to p. 232, letter C, post.

(1) *Re Scottish Association of Master Bakers' Agreement, Re Wholesale and Retail Bakers of Scotland Association's Agreement,* [1959] 3 All E. R. 98; L.R. 1 R.P. 285.

Practices Act, 1956, and the provisions of sub-s. (1) of that section which are material to the present case are as follows:

> "For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . . (g) that the restriction is reasonably required for purposes connected with the maintenance of any other restriction accepted by the parties, whether under the same agreement or under any other agreement between them, being a restriction which is found by the court not to be contrary to the public interest upon grounds other than those specified in this paragraph, or has been so found in previous proceedings before the court,
>
> and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction."

Subject to the point of law which will be mentioned hereafter, the incidence of the burden of proof is quite clear. The Registrar can rely on the prima facie presumption that the restrictions are contrary to the public interest, and the Federation, in order to displace the presumption, have to satisfy the court on two points, namely:—(i) the existence of the "circumstances" referred to in para. (b) and para. (g); and (ii) that the restrictions are not unreasonable having regard to the balance between those circumstances and any such detriment as is mentioned at the end of sub-s. (1). If the Federation fail to prove the circumstances, the "balancing provision", as it is conveniently called, does not need to be considered. If the Federation prove the circumstances, they have the further task of satisfying the court that the restriction is not unreasonable having regard to the balance when the circumstances are put in one scale and any detriments are put in the other scale. As the case developed at the hearing, battle was joined, so to speak, on the para. (b) line, and attention was mainly concentrated and most of the evidence and argument were directed to establishing or defeating the Federation's contention that removal of the restrictions would deny to the public as purchasers, consumers or users of any goods specific and substantial benefits or advantages such as are referred to in para. (b). The Federation's contention was summarised very briefly and clearly in two paragraphs of counsel's opening speech on behalf of the Federation. On the first day, referring to "specific and substantial benefits or advantages", he said:

> "The simplest way of putting it is to give them as two; one is the limitation of upward movement of retail prices, which is inherent in the maximum price, and the other is the limitation imposed by the moral pressure, at any rate, of the recommended discount, which tends to keep down one cause of upward price movement . . . We also say that the benefits are substantial . . . because as a fact in this industry there is a real risk that prices would rise if this very influential body of large plant bakers withdrew or was ordered to withdraw its maximum price recommendation."

On the second day he said:

> "The specific benefit which would be denied to the public if we stopped

> what we are doing is the limitation to upward movement of retail price, and the limitation on one particular cause of upward movement, namely, the retailer's margin."

In his closing speech counsel gave a slightly different version of the Federation's contention, quite consistent but bringing out another aspect of it, when he said that

> " The broad question . . . is . . . whether the adoption of a maximum price by a very influential part of the bread industry . . . does not necessarily confer a substantial benefit on the public, not only because it will prevent members of the Federation from charging more, but because on the facts it must tend to keep the price of bread down by its influence on others."

Counsel on behalf of the Registrar disputed the Federation's contention and said that it raised two questions, namely:

> " First, are these recommendations recommendations of maximum prices, or are they in effect recommendations of fixed prices, or are they what may be thought to be somewhere between the two, recommendations which tend to bring prices up to or towards the maximum recommended price? Secondly whichever they are or whatever they are in these respects, is their true effect to keep the prices in general now and hereafter, while the formula continues, below what they would be if there were no such recommendations? "

Undoubtedly, those questions do arise. In so far as the consideration of them involves construction of para. (b) of s. 21 (1), the court, having regard to the general effect and language of that paragraph and the subsection as a whole and also the provisions of s. 2, s. 3 and s. 4 of, and the Schedule to, the Act as to the composition and procedure of the court, takes the view and decides that it is at liberty and ought to adopt a realistic approach and to consider on the merits of the particular case whether, in fact, the removal of the restrictions would have the effect alleged. In particular, the court is not bound to confine its attention to the quasi-legal or formal effect of the recommended maximum prices, but can and should consider how they have been, and are, and are likely to be, effectively operating in practice, and whether as maximum or fixed or minimum prices. That question, and the question whether the recommendations are having, and are likely to have, the practical effect of keeping prices down, are simply questions of fact to be decided on the evidence. In addition, there are questions as to the adequacy of the Federation's formula for determining the prices to be recommended. Is it apt and correct for keeping prices down and stimulating efficiency and affording an objective standard and regulator independent of the wishes of the members?

A point of law was taken on behalf of the Federation as to the burden of proof in a case such as this, where the restrictions are contained in recommendations of a trade association and not in clauses of an agreement (2). It was pointed out that the words in s. 21 (1) which place the burden of proof on the Federation are the words

> " a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied . . ."

In the present case, restrictions were not in fact accepted in pursuance of an agreement. Accordingly, it is argued that s. 21 does not apply to this case or can only be applied partially, or by analogy, or with modifications or otherwise imperfectly. In the view of the court, this point is covered and disposed of by sub-s. (7) of s. 6 of the Act, providing as follows:

> " Where specific recommendations (whether express or implied) are

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(2) Compare *Re Blanket Manufacturers' Association's Agreement* ([1959] 2 All E.R. 1 at p. 6; L.R. 1 R.P. 208 at p.249), where there also were restrictions by " recommendations ".

> made by or on behalf of a trade association to its members or to any class of its members, as to the action to be taken or not taken by them in relation to any particular class of goods or process of manufacture in respect of any matter described in the said sub-s. (1), this Part of this Act shall apply in relation to the agreement for the constitution of the association notwithstanding any provision to the contrary therein, as if it contained a term by which each such member, and any person represented on the association by any such member, agreed to comply with those recommendations and any subsequent recommendations made to them by or on behalf of the association as to the action to be taken by them in relation to the same class of goods or process of manufacture and in respect of the same matter."

That subsection introduces a convenient statutory fiction. The obvious reason for this fiction is that compliance by the members of a trade association with its recommendations may have substantially the same effect in establishing and maintaining restrictive practices as would compliance with an agreement by the parties to it. The manifest object of the subsection is to bring the recommendations within the Act and put them on the same basis as contractual provisions for the purpose of being fully amenable to the jurisdiction of the court. The conditions which are required for bringing sub-s. (7) into operation are satisfied in the present case, in that (a) the respondents in these proceedings are the Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland) representing their members; (b) they are a trade association as defined in sub-s. (8), being a body of persons formed for the purpose of furthering the trade interests of the members; (c) there is an agreement for the constitution of the Federation; and (d) specific recommendations have been made by the Federation to the members as to action to be taken by them in relation to standard bread in respect of wholesale retail and other prices to be charged therefor in England and Wales. Accordingly by the operation of sub-s. (7), Part 1 of the Act applies in relation to the agreement for the constitution of the Federation as if the agreement contained a term by which each member of the Federation agreed to comply with those recommendations and to comply with any subsequent recommendations so made as to the action to be taken as to the same class of goods and in respect of the same matter. If, then, we turn back to s. 21, we have to apply the statutory fiction in order to give effect to the obvious intention of the Act and in order to implement the express provisions of sub-s. (7) of s. 6. We have this position. The agreement constituting the Federation contains a term that the members shall comply with the Federation's recommendations; the agreement does contain that term, notwithstanding appearances to the contrary, because Parliament has said so; that is the effect of the statutory fiction. The Federation makes a recommendation setting up a restriction. The members have to accept, and do accept, the restriction in pursuance of the agreement, which contains a term obliging them to accept it. Therefore, the provisions of s. 21 as to the burden of proof do apply fully and without modification to the present case.

Now we come to the facts. There are several types of bread. First and foremost there is the standard loaf, which may be white or brown and is made from normal bread dough with some fat enrichment and is baked in a tin. It is sometimes sold whole and unwrapped, but in the great majority of cases nowadays it is sliced and wrapped in wax paper. There is the enriched loaf, often known as the American or top grade loaf, which is similar in appearance to the standard loaf, but contains added fat, milk powder and sugar and is usually sold at a price 3d. more than the price of the equivalent standard loaf. There are loaves called " Farmhouse " or " Long Tin " or " Tin Coburg ", which are baked in tins of various sizes and usually sold at the same price as the standard loaves, though they are produced in very much smaller quantities. There are the so-called " oven bottom " types of loaf which are baked in the oven without being placed in a tin, and are usually sold at about 1d. above the price of the standard loaf owing to additional costs of production and the preference of some customers. In addition, there are certain proprietary and specialised types of bread. Of the methods of production the least modern is that of the family baker using what is called a " peel oven ". The loaves are baked on the oven bottom and are withdrawn by means of a " peel ", which is a wooden shovel. Intermediate is the semi-automatic baker, which is partly mechanised and can supply several retail shops. The modern highly mechanised method of production is that of the plant baker, using a travelling oven, which is, in effect, a baking chamber with a conveyor. One type of travelling oven is the swing-tray type, suitable for the baking of standard loaves and other tinned loaves. Methods of distribution have advanced from the handcart to motor transport, but there is an economic limit to the radius of profitable distribution owing to congestion of traffic, the need for bread to be delivered fresh to the customers and the large bulk of bread and its low value per cubic foot. These limit the expansion of the business of any particular bakery and may account for the growth of groups of bakeries in this industry. There has been a decline in the consumption of bread in general and standard bread in particular. The statistical and oral evidence on this point will be referred to at a later stage.

The baking industry in England and Wales can conveniently be divided into three main sections: 1st section. The National Association of Master Bakers, Confectioners and Caterers, formed in 1887, has in its membership a large number of family bakers and a few plant bakers, including J. Lyons & Co., Ltd. They had about forty-five per cent. of the total bread production in 1956, but only a reduced percentage, estimated at thirty-four per cent., in 1958-59. The number of family bakers had declined from 24,000 in 1935 to 12,700 in 1955. Probably the decline both in share of output and in number is continuing. 2nd section. There is the respondent Federation, formed in 1942. The members are all plant bakers. They had about thirty-seven per cent. of the total bread production in 1956, and a large percentage, estimated at fifty-one per cent., in 1958-59. There are three groups and some independent members of the Federation. One group is controlled by Allied Bakeries, Ltd., formed in 1935 by Mr. Garfield Weston, who has bakery interests in Canada and other countries but has no flour-milling interests in the United Kingdom. A second group is controlled by British Bakeries, Ltd., which was formed in 1955 and is controlled by Rank, Ltd., who have large flour-milling interests. The third group is controlled by United Bakeries, Ltd., which was formed in 1955 and is controlled by Spillers, Ltd., who also have large flour-milling interests. The groups have been growing, and the independent members of the Federation have become fewer. In 1953 there were forty-three group members and one hundred and twenty independent members. In 1959 there are one hundred and forty-two group members and only fifty-one independent members. Comparative figures for present output are not available, but in 1955-56 the aggregate output of the independent members was less than half of the aggregate output of the three groups. 3rd section. There are the co-operative societies which in the year 1956 had about eighteen per cent. of the total bread production, and in 1958-59 about fifteen per cent. Most of their production is in plant bakeries. There is also a small residue of family bakers who are not members of any association.

The declared objects of the Federation are (inter alia):—(a) to promote commerce and in particular in relation to the baking industry; (b) to promote and to protect the industrial interests and the trade of its members; (c) to encourage co-operation between any two or more members for the furtherance of any one or more of the above mentioned objects by any means which are not contrary to the public interest or registrable under the Restrictive Trade Practices Act, 1956; (d) to do all or any acts or things as may be incidental or necessary to the carrying out of any of the said declared objects.

Under art. 3 of the constitution and rules of the said Federation membership shall be open to: (a) such bread and flour confectionery bakers who use in the manufacture of bread an average sackage of not less than two hundred sacks of flour a week, or whose output of bread and flour confectionery together or of flour confectionery alone exceeds £100,000 per annum measured in terms of retail prices; (b) such other bread and flour confectionery bakers as may be elected by the main committee of the Federation.

The costing system used by the Federation is, in essence, a continuation of that utilised, during the period of government control, for the determination of the subsidies payable to bread producers. A short review of the subsidy period is necessary, therefore, as a preliminary to the consideration of the present system. In 1941 the price of bread (under the description of "national" bread) became subject to a control, and a subsidy system was instituted, for the benefit of bakers producing and distributing this bread, in order to compensate them for selling it at uneconomic prices. From 1941 to 1949, nearly all the output of the baking industry consisted of these "national" loaves, baked from "national" flour and neither sliced nor wrapped; the output of other breads and of flour confectionery was negligible. During the war and afterwards, until September, 1956, the retail selling price of "national" bread was fixed under statutory order. The subsidy rates were usually determined at half-yearly intervals by the Ministry and were based on sample returns of information as to the proceeds and costs of production and distribution of "national" bread covering the whole industry, which then included the Federation, the National Association of Master Bakers, the co-operative societies, and a minority of family bakers not covered by any association. Each of these submitted returns to the Ministry, who then calculated the amounts payable as subsidies, after making, when appropriate, adjustments to allow for known changes in material items, such as wages, when they became effective. The decisions as to rates of subsidy were sent to the industry, with details of the computations in support. These computations averaged the returns from these sources of proceeds and costs of "national" bread produced, after weighting the returns to the extent that each participant was regarded or estimated as representing the whole industry. For this purpose, the weighting of the Federation returns was 37½ per cent., that being the estimate of their production proportionately to the total production in England and Wales. There was, inevitably, a considerable lapse of time between the end of each costed period and the date of the eventual subsidy decision based on that period. At first, the successive rates of subsidy operated from the date of the decision but, latterly, the subsidy changes were made retroactive to the date to which the costings had been made. The unit of costing was by reference not to the loaf but to the sack of flour used in bread production, on the assumption that the loaves of a given weight, produced from each sack of 280 lb. of flour, would be a reasonably constant number. After the war, in May, 1946, the weight of the larger national loaf was reduced from two lb. to twenty-eight ounces, and of the smaller loaf from one lb. to fourteen ounces. The number of larger loaves which it was possible to produce from a sack of flour increased from 192 to as many as 218. In practice it is usual to assume the latter number to be 216.

The permitted profit margin on each sack for subsidy purposes, was 5s. with (in later years) an additional 4s. per sack for the first twenty-five sacks of flour converted to national bread, each week, by each bakery undertaking. This 5s. remained, in spite of the increased number of loaves allowed in 1946, until October, 1954, when it was increased to 7s. This increase was given, inter alia, to remunerate the additional capital employed between 1941 and 1954, to allow for greater usage of plant owing to the greater number of units produced, and to allow for the reduced value of the £ sterling. Until the weight of loaf was reduced in 1946, the bakers had been allowed to retain the extra profit arising on production and distribution of the smaller loaf, of one lb. weight, of which the retail price was usually more than half the price of the larger, two lb. loaf. When the downward change in weight was permitted, it was assumed that this additional profit would increase and the Ministry assessed it at 3s. 6d. per sack, for subsidy purposes. In the costings covering the period to March, 1956, the percentage of national bread produced and sold as small loaves, by members of the Federation, was eleven per cent. of their total output of "national" bread; this percentage of 3s. 6d. gives 5d. per sack, approximately, so that, at the end of the subsidy period, the overall permitted profit margin was 7s. 5d. per sack. This margin did not take account of other sources of profit, arising from the production of "national" bread, which successively arose in the later years and which the bakers had been allowed to retain; these were: (a) Profits from wrapping and slicing; (b) Deferred rebates on flour under the scheme operated by the Incorporated National Association of British & Irish Millers, Ltd., from Mar. 1, 1954, and (c) Cash discounts allowed by the millers for prompt payment.

Mr. Charles, the Federation's accountant, gave evidence that the information available to the Federation, from the subsidy computations of the Ministry, showed that the production and distribution costs of members of the Federation were lower in amount than those attributable to the other sections of the industry. The computations based on the costings to March, 1956, which determined the rate of subsidy ruling for the final six months, to September, 1956, of the subsidy period showed the average costs of Federation members to be 2s. 10d. lower than the average costs of the industry as a whole. The average margin effectively available to Federation members at the end of the subsidy period may, therefore, be regarded as 10s. 3d., representing the 7s. 5d. margin increased by 2s. 10d. The average profit arising from production and distribution of standard bread by members of the Federation, inclusive of the profits of wrapping and slicing and of the millers' rebate, but exclusive of cash discounts, on the above bases as on Apr. 1, 1956, has been estimated by the Federation as follows:

Ministry margin, and increase above	10s.	3d.
Profits of wrapping and slicing,	5s.	0d.
Millers' rebate,	1s.	7d.
Total profit, exclusive of cash discounts,	16s.	10d.

The controlled price of the twenty-eight ounce loaf at the end of the subsidy period was 8½d., and the final subsidy was just over 1½d. The baker normally received just over 10d. per loaf. If "long-hauled" flour was used an additional subsidy adjustment brought the proceeds to 10¼d.

For some time prior to September, 1956, with the removal of price control imminent, members of the Federation were in some doubts as to the situation which might develop. The fifteen years of control, during which the sections of the trade had provided costings, the average of which had been made known to the other sections, had produced a similarity of pattern in the costs of members. It was decided, in June, 1956, that the main committee should recommend prices to Federation members before the end of September. Two main reasons were given for this decision: members had no knowledge what the then current rate of subsidy would be (it was not agreed till February, 1957); and a considerable number of members were convinced that the recommended price should be as low as was consistent with a reasonable profit. Behind this conviction was the desire to retain a steady turnover, since a fall in production would have resulted in uneconomic labour costs and idle capital equipment, added to the fact that bread which is not sold within a short time of baking becomes unsaleable; unlike many other products it cannot be stored for sale if and when demand revives.

Before control was removed, the Minister asked representatives of bakers' organisations to attend a meeting at which he is stated to have expressed the hope that the trade, following the withdrawal of the bread subsidy, would use its freedom to fix bread prices in a statesmanlike manner, having regard to the economic position of the country. Following this, in September, 1956, the main committee recommended, from Oct. 1, a retail price for the standard twenty-eight ounce loaf of 10d. for port areas and 10½d. for inland areas where the price of flour was 2s. per sack, or more, over the basic price; the recommended price for the fourteen ounce loaf being 6d. In each case one penny was allowed extra for wrapping and slicing. The port areas' bakeries thus received a small fraction of a penny less than they had done in the subsidy period; and the remainder almost exactly the same as before. Dissatisfaction with these recommendations was expressed by some members and, after consideration of the rising cost of flour, it was decided, on Dec. 6, 1956, to remove the port-area differential and to recommend a uniform national price of 10½d. for the unwrapped twenty-eight ounce loaf, no change being made in the price of the fourteen ounce loaf nor in the wrapping and slicing allowances. The cost of flour continued to rise, with increased distribution and other costs, and, on Feb. 14, 1957, the unwrapped large loaf was raised to a recommended price of 11d., the smaller loaf in most areas being raised to 6½d. The price of flour was then 10s. per sack higher than at the end of the subsidy period, and this increase, together with the trend of costs shown by the abridged form of costings then available, was considered to justify an increased price for the loaves. Subsequently the price of flour fell and, on May 29, 1957, it was recommended that the price of the unwrapped standard twenty-eight ounce loaf should be reduced to 10½d. for all areas in spite of considerable opposition. This recommendation was the last of those made in the immediate post-subsidy period, a difficult time during which, it is claimed, the Federation was concerned to keep price changes reasonably in line with cost variations so far as these could be ascertained. From the evidence, it appears that the Federation made every effort to satisfy the Minister's request for moderation in the period following decontrol.

On July 12, 1957, the Registrar referred the agreement of the Federation with its related recommendations to this court. By that time, as we were told, it was apparent to the main committee that, working largely in the dark, relying on abridged costings and loose estimates of changes in material elements and factors and with no precise information, it was increasingly difficult to justify their recommendations convincingly. The Federation's accountant advisers were strongly in favour of a return to a more elaborate costing system and it was decided to adopt a form substantially the same as that which had operated up to the end of control. During the succeeding months the prices remained unchanged at the June, 1957, levels, in spite of increased flour and wages costs, and a formula was sought which could be used, and justified, as a reasonable basis for determining standard bread price recommendations. It was not till Apr. 9, 1958, that a definitive memorandum entitled " Cost and Sale of Standard Bread in England and Wales ", with supporting resolutions, was adopted. This memorandum incorporated a formula to regulate price recommendations. The essential resolutions were as follows:

> " It is hereby resolved and declared on behalf of the members of the Federation in England and Wales that if the said members or the main committee acting on their behalf, at any time or from time to time recommend a retail selling price for standard bread, or wrapped, or sliced and wrapped standard bread in England and Wales or allow such recommended price to continue, they shall not recommend or continue any such price in a manner which conflicts with the provisions of a memorandum dated Apr. 9, 1958, and entitled ' Cost and Sale of Standard Bread in England and Wales ' . . .
>
> " It is further hereby resolved and declared that the members of the Federation in England and Wales or the main committee acting on their

> behalf may at any time or from time to time discontinue the making of such recommendations but if a specific recommendation is made each member, while free to charge less than the maximum retail price stated in the recommendation, should not charge more than that price.
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> " It is hereby resolved and declared that four copies of these resolutions and of the memorandum entitled 'Cost and Sale of Standard Bread in England and Wales' shall forthwith be delivered to the Registrar of Restrictive Trading Agreements and two copies of the same shall forthwith be delivered to Peat, Marwick, Mitchell & Co., and one copy to each of the said members and that any amendment or cancellation or revival of those resolutions or of any of them and of the said memorandum shall forthwith on the occasion of the amendment or cancellation or revival be likewise delivered."

Amendments were made to the memorandum on May 13, 1958, Nov. 12, 1958, and May 11, 1959, and these have been incorporated in the present form of the memorandum, which will be discussed in detail later.

From Dec. 8, 1958, the recommended price for the unwrapped fourteen ounce loaf was 6½d. for all areas. The current recommended prices of unwrapped standard loaves are: twenty-eight ounce loaf—10½d.; fourteen ounce loaf—6½d. Wrapped and sliced loaves are 11½d. and 7½d. respectively.

Before considering fully the memorandum and formula, an explanation of some trade terms which occur in this case will be helpful. The trade in standard bread is either (a) from baker direct to public, or (b) from baker to retailer, then from retailer to public. There is no intervention of a wholesaler between the baker and the retailer, and " wholesale price " means the price charged by the baker to the retailer. " Retailer's margin " is the difference between the wholesale price and the retail price; this margin is that allowed to retailers who do not qualify for specially advantageous terms. The term " discount " is used in two ways. Normally it means the retailer's margin plus an additional sum allowed to quantity purchasers, to groups of multiple stores, or to " ex-bakers " (a somewhat odd term used to describe family bakers who buy part of their requirements from the plant bakers). Sometimes " discount " is used to mean the additional sum only, without the retailer's margin. The term is appropriate only in contexts which denote that retailers are purchasing on specially advantageous terms entitling them to a preferential wholesale discount.

During the control period the retailer's margin rose from 6d. to 9d. per dozen two lb. loaves. When the subsidy was withdrawn, it was increased to 1s. per dozen twenty-eight ounce loaves. Up to that time this margin was dealt with by the area groups, but it was then decided that the Federation should make a national recommendation, which was done on Feb. 14, 1957, when the retailer's margin was increased to 1s. 3d. per dozen twenty-eight ounce loaves; for the fourteen ounce loaf it was fixed at 8d. in some areas and 7½d. in others.

It is necessary to examine in some detail the memorandum of Apr. 9, 1958, with subsequent amendments. In opening the Federation's case, counsel said:

> " That memorandum was at the heart of this case . . . It is a memorandum determining how costing information should be obtained, what costing information should be obtained, and what use should be made of it."

The first introductory paragraph states:

> " This memorandum sets out the method of costing to be used on behalf of the members of the Federation in England and Wales for the purpose of determining the cost of producing and distributing standard bread in England and Wales and the method of determining recommended maximum retail selling prices of such bread in the event that the members (through the main committee) decide to make or continue making such recommendation, it being understood that the members are not under any obligation to

> initiate recommendations or to continue any recommendations already in force."

Part 1 defines the term " standard bread ", and goes on to state the requirements as to number and types of costed members. The paragraphs read:

> " 1. Definition of standard bread. The term ' standard bread ' in this memorandum and in any returns of cost means all loaves of fourteen ounce weight or multiples thereof baked in tins from brown or white flour, or blends thereof, by members of the Federation in England and Wales, whether or not subsequently wrapped or sliced, other than Vienna bread or rolls, or fancy or proprietary or specially enriched bread.
>
> " 2. Number and types of costed members. The costs of producing and distributing standard bread and wrapped and sliced and wrapped standard bread in England and Wales will be determined from the like representative numbers and types of members to those used in the preparation of costs for the Ministry of Food during the period of price control of national bread by that Ministry. A sufficient number of returns not being less than forty should be submitted by members to the appointed accountants and should continue to be representative of the whole of the members of the Federation in England and Wales."

After stressing that confidential treatment would be given to all information submitted, it is added that members who are not subsidiaries of the same parent company should not exchange information relating to their individual returns.

Returns are made on seven schedules:

Production Costs:
Schedule 1 Flour, other ingredients, and bakehouse wages and expenses.
6a Administration expenses, apportioned to production.

Distribution Costs:
Schedule 2 Wholesale selling and depot expenses.
3 ,, delivery expenses.
4 Retail shop expenses.
5 ,, delivery expenses.
6b Administration expenses, apportioned to distribution.

A statement, containing details of sales and production for the quarter, and a statement summarising costs and margins, with a separate summary of additional proceeds and costs of slicing and wrapping standard bread, complete the returns.

Instructions for dealing with specific items in the costings, and for methods of apportionment, are given. Amongst these it is necessary to mention two, about which comment is made later. Depreciation of plant and the like is to be taken as one quarter of the annual allowance and initial allowance granted by the Inland Revenue for the fiscal year within which the costed quarter falls. Rent is to be taken as one quarter of the net Sch. A annual value, or of the actual annual rent paid, whichever is higher, with an addition of one quarter of the industrial buildings allowance and initial allowance on the buildings granted for the fiscal year in which the costed quarter falls.

Members producing or distributing other goods in addition to standard bread are to apportion costs between the standard bread and other goods. Where possible the apportionment is to be made on the basis of actual costs, failing which certain bases are given amongst which three may be noted:

> " Wholesale delivery expenses (Sch. 3), in the proportion of gross retail value of standard bread delivered wholesale to twenty-five per cent. of the gross retail value of other goods delivered wholesale.
>
> " Retail shop expenses (Sch. 4), in the proportion of gross retail value of standard bread sold over the counter to fifty per cent. of the gross retail value of other goods sold over the counter.

> A “Retail delivery expenses (Sch. 5) in the same proportion as for retail shop expenses substituting ‘delivered to retail customers’ for ‘sold over the counter’.”

The returns are to be completed within twenty-one days of the end of the quarter and sent to the appointed accountants, Messrs. Peat, Marwick, Mitchell & Co. who have the right to inspect the records of any member submitting returns and B to test the accuracy of the returns submitted.

Part 2 of the memorandum deals with the analysis of the returns which is to be prepared by the accountants after they are satisfied (a) that the sample is of “like representative numbers and types of members to those used in the preparation of costs for the Ministry of Food” during the control period, and (b):

> C “that the sum of the outputs . . . from those returns of plants whose average weekly sackage exceeds the average weekly sackage per member of all members of the Federation in England and Wales, is not less than the sum of the outputs from those returns of plants whose average weekly sackage is below the said average weekly sackage per member.”

The accountants may exclude returns in order to satisfy (b) so long as the total D number included in the sample is not less than thirty-six. No analyses are to be prepared if insufficient returns are made. The accountants, having made the analysis, prepare statements to show basic averages as follows:—(a) Averaged production cost, that is the average, on a weighted basis, of the cost of production of standard bread per sack for the costed period. (Sch 1 and Sch. 6a supply the data.) (b) Averaged distribution cost, that is the average, on the same basis, E of the distribution costs of standard bread including the costs of slicing and wrapping. (c) Averaged total datum cost, which is the sum of (a) and (b) less an amount equal to 7½ per cent. of that part of the cost in (a) which is attributable to costs other than flour cost. (d) Averaged datum sales revenue, that is the average, on a weighted basis, of the revenue from the sales of all standard bread, including proceeds from any retail delivery charge, assuming that the bread had been F sold during the period of the return at the recommended maximum retail selling price prevailing during the period. (e) The returned margin, which is the difference between the datum revenue (d) and the datum cost (c) averages. This, the final product of the sample for the quarter, is then taken as the basis for determination of “the current margin”. (f) The current margin is determined, as at the date of the analysis, by

> G “correcting the returned margin to account for changes during the period of the costing not fully reflected in such costings and for changes, since the period of the returns in charges for flour and wages and in the price of standard bread.”

Authoritative sources for such changes are given, and “forecast” changes of H charges and “contemplated” changes in price may be taken into account also. (g) The ceiling. This is ascertained by adding to 15s. per sack one-quarter of the sum of any shortfalls in the preceding four quarters and deducting one-quarter of the sum of any excesses in the preceding four quarters. Shortfalls occur in any quarter when the returned margin for that quarter is less than 15s. per sack, excesses when the returned margin is greater than 15s. per sack.

I Part 3 of the memorandum deals with the duty of the main committee as regards the specific recommendations and the notice to be given to the purchasing public. It reads as follows:

> “The main committee, if it decides on behalf of the members of the Federation in England and Wales to make specific recommendation as to the maximum retail selling price of standard bread in England and Wales or to allow any such recommendation to continue in force, shall not make any such recommendation the effect of which would be to cause the current margin, after allowing for any contemplated change of price and for any

> forecast change of charges, to exceed the ceiling by more than an amount represented by one-half of the minimum practicable price change of ½d. in the retail price of standard bread of twenty-eight ounces weight and shall not allow any recommendation to remain in force after discontinuance of cost returns, or the effect of which would be to cause the current margin to exceed the ceiling after allowing for any prospective change of charges by more than half the said minimum practicable price change.
>
> " The main committee shall make any such specific recommendations or withdraw the same by public announcement and for this purpose may use the National press and radio, the object being to ensure that the purchasing public is informed of any such recommendation or withdrawal."

The phrase " amount represented by one-half of the minimum practicable price change " may be simplified as " 4s. 6d. ", that amount being one-half of 9s., the effect, on the proceeds of sale of 216 loaves of twenty-eight ounces, of a price change of ½d. per loaf.

Schedules were submitted in evidence, prepared in considerable detail by the appointed accountants, and summarised according to the formula, for the five consecutive quarters to Mar. 31, 1959. They cover the first fifteen months of the existence of the formula. Generally, it may be said that the Federation has adopted the Ministry's practice of using samples of costs of production and distribution. Mr. Charles said that, so far, no returns have been excluded from the analysis and that he considered that the sample had been fairly consistent, quarter by quarter. The numbers of members making returns were:

	1st	*2nd*	*3rd*	*4th*	*5th quarters*
Bakers of First Group	15	15	15	15	15
Bakers of Second Group	16	16	14	15	16
Bakers of Third Group	14	19	19	18	18
Non-Group Bakeries	3	4	3	2	3
Total individual returns	48	54	51	50	52

Basic average results computed were as follows:

Returned margins	11s. 8d.	15s. 7d.	15s. 10d.	12s. 6d.	12s. 10d.
Current margins	13s.	15s. 7d.	15s. 10d.	13s. 2d.	13s. 5d.

A material item in the final average computation is the 7½ per cent. reduction (a considered but arbitrary percentage) made from the ascertained average production costs, other than flour cost. In the five quarters analysed this deduction varied from 3s. 2d. to 3s. per sack. No such deduction was made in the Ministry control period. We were told that it was deliberately introduced into the formula in order to bias the ascertained costs down from the average towards the lower-costed bread production. It sets the weighted average costs of the sample about 3s. per sack below what the sample shows them to be and, to that extent, reduces the difference between the average sample costs and the production costs of the lower cost producers. Mr. Curtis, the Federation's trade witness, called this " the efficiency factor ".

As an illustration of the final calculation which determines the decision whether or not to recommend a change in price the last quarter, to Mar. 31, 1959, may be taken. The " current margin " was 13s. 5d., and it was estimated that an increase of ½d. in the recommended price of the twenty-eight ounce loaf would have produced additional proceeds of 8s. 2½d. (after allowing for the estimated effect of the smaller loaf remaining at an unchanged price). Such a change would have increased the profit margin to 21s. 7½d. The ceiling, however, was then 15s. 10d., (the 10d. being one-quarter of the net deficiencies of the earlier quarters) to which was added the 4s. 6d. limitation, making 20s. 4d., above which the profit margin was not to rise. No increase could, therefore, be recommended.

In present conditions, the operation of the formula, it was agreed by Mr. Charles, with a basic ceiling of 15s. and an " efficiency factor " of 3s., produces, in the long run, an average profit of 12s. per sack, exclusive of cash discounts.

These, it was also agreed, add approximately 1s. 5d. per sack, and so we are dealing with a total average profit margin of 13s. 5d. per sack.

At this stage two considerations must be stressed. First, the baking of standard bread is not the sole activity of the trade, granting the justice of the comment that it is, indeed, the standard " bread-and-butter line " of the plant baker. Other sources of profit are the baking of special breads and the production of flour confectionery. According to the costing returns of March, 1956, and March, 1958, respectively, Mr. Charles stated that the relative percentages, on a flour converted basis, were:

	1956	1958
National or Standard Bread	86.9	84.2
Other breads, etc.	13.1	15.8

If the proportion is based on proceeds, that is retail turnover, for both these years the National or Standard bread percentage is 56.9. Secondly, the sample shows a very wide range of profits both as a whole and within the groups. Taking the year 1958 (which incorporates the first four quarters of the formula's operation), the range over the whole sample was from a profit of 31s. 3d. to a loss of 22s. 11d. per sack. Ranges within the groups were:

First group	Profit 20s. 2d. to Loss 1d.
Second group	„ 21s. 3d. to Loss 2s. 10d.
Third group	„ 31s. 3d. to Loss 22s. 11d.
(Non group members	Profit 11s. 2d. to Loss 6d.).

The weighted average profit margin for all returns for the year was 10s. 11d.

Comment may be made here that the participation in the sample by the third group appeared to us scarcely to merit the description " fairly consistent " applied to the sample as a whole by Mr. Charles. Both from variation in the number of members participating, quarter by quarter, and from variations in the identity of those members, it seems that there was no settled group policy in these respects. Be that as it may, it is certain that a considerable number of Federation producers of standard bread within the sample were making profits in 1958 well above the average of the sample, and it is a reasonable assumption that this applied outside the sample members and, indeed, outside the Federation.

Much time and thought has been applied to the question of comparison of the trading results of the Federation, judged from the sample, with those obtained in other reasonably similar trades. The value of such comparisons of averages, especially in cases based on a sample of returns, must always be limited because of the difficulty of ascertaining with sufficient accuracy the bases of preparation of the accounts, samples and statistical tables which may be selected for comparison purposes. Comparison of averages resulting from the sample returns with outside statistical sources might have been usefully supplemented by the production of actual samples of representative balance sheets and trading accounts. Such examples would certainly supply a useful check, especially if the trading results are, to use a phrase which has statutory authority, " computed on ordinary principles of accountancy recognised in the United Kingdom ". Mr. Charles produced a comparison, based on one of the annual reports issued by the Commissioners of H.M. Inland Revenue, which, inter alia, give information of the net trading profit percentages, on turnover, earned by various categories of industrial companies. The report for 1957-58 gives for the food category the figures:

1953-54	6·2 per cent.
1954-55	6·6 per cent.
1955-56	5·7 per cent.

He agreed, basing his calculation on the sample returns for the March, 1959, quarter, that a profit margin of 13s. 5d. represented, approximately, a percentage on turnover of seven per cent.; that is to say, a materially higher percentage. In the case of one particular company, a group member put forward by the Federation as a typical plant-bakery the output of which, in standard bread, would show a proportion similar to the average, it was stated that, for the post-subsidy period 1956 to 1959, the ratio of profit to turnover, for standard bread only, was 10·2 per cent.

Unresolved differences of accountancy opinion appeared in the evidence of Mr. Charles, for the Federation, as compared with that of Mr. Parker, for the Registrar, not only with reference to the most appropriate standard of comparison, but also as to the methods of arriving at an estimate of the capital employed in the industry. Mr. Parker suggested that comparison should be made of the average profits earned on capital employed shown by the sample with similar statistics published in "The Economist", quarterly, relating to industrial profits and capital. These, for the period from April, 1958, to March, 1959 (corresponding to the last four quarters of the formula period), gave, for food and confectionery companies, capital employed, including intangible assets, £1,069 million and relevant trading profits, before taxation, £181 million. The average profit margin of such food and confectionery companies expressed as a percentage on capital employed including goodwill was, therefore, 16·9 per cent.

An inquiry was made by the Federation in 1958, when each member submitting costs was asked to furnish particulars of assets and liabilities according to their balance sheets ended between April, 1957 and March, 1958. Thirty-eight members sent returns, thirty-seven from the groups and one independent, and a schedule was completed from which the position can be summarised as follows:

(a) Capital employed with fixed assets taken, as far as possible, at estimated taxation written down values and including goodwill, 64s. 4d. per sack.

Average profit margin of 13s. 5d. per sack = 20·8 per cent.

(b) Capital employed with fixed assets taken at depreciated replacement cost and including goodwill, 87s. 10d. per sack.

Average profit margin of 12s. 1d. per sack = 13·8 per cent.

(Fixed assets at replacement cost would require a higher rate of annual depreciation, and this was estimated by Mr. Charles to be about 1s. 4d., reducing the 13s. 5d. profit margin to 12s. 1d. as above.) Mr. Parker challenged the inclusion of the whole of the groups' "goodwill" in the calculation, since there would certainly be included elements other than normal trade goodwill. He also argued that it was unlikely that "The Economist" table fixed assets were all at depreciated replacement cost, as probably some would be at historical cost. He had prepared an estimate of capital employed on a basis of historical cost, 49s. 6d. per sack, without goodwill, and at depreciated replacement cost, 73s. per sack, without goodwill. Profit margins of 13s. 5d. and 12s. 1d., respectively, equalled twenty-seven per cent. and 16½ per cent. on capital employed. He thought the reality lay between the two, and added that, from "The Economist" comparison, "it looks as if the industry is not doing too badly but I cannot be more specific than that." In fact both comparisons (in respect of turnover and in respect of capital employed) show, with whatever reservations, average profits favourable to the standard bread industry.

On the memorandum and sample generally, while it should be recognised that the Federation, faced with difficult problems at the end of 1956 and onwards, made a serious attempt to evolve a mandatory formula, nevertheless the basis of this formula is open to criticism. This criticism is in part detailed and in part general. As to the former, it appears to us that it was not necessary, nor realistic, to take as a foundation the methods adopted by the Ministry in the control period, evolved under the stress of war and directed in their origin to the conditions then existing. The present composition of the Federation, the relative importance of standard bread production in the industry and the general conditions are not comparable with the earlier period. We have already referred to the change in the composition of the Federation in England and Wales as follows:

	1953	1959
"Group" members	43	142
Independents	120	51
	163	193

During the early period of control, bakeries were producing practically nothing but "national" bread. Today, as we have stated, 56·9 per cent. in value of total output is standard bread, and 43·1 per cent. in value is made up of other breads and flour confectionery. The demand for standard bread has been steadily declining, and its relative importance to the trade is much reduced since the war period. As to general conditions, it was agreed in evidence that costing techniques had greatly improved and that much more accurate costing could, and should, be expected from the industry today than could have been hoped for in the control preiod. No evidence was given as to how far the requirement in the memorandum that apportionment of certain expenses should be on the basis of actual costs, where possible, was implemented in the sample. This would have been an almost unrealisable requirement in the difficult war years, but should be much more capable of realisation in any returns today.

In examining the sample analyses, it was noticeable that the cost of flour in the case of the two miller-controlled groups was greater than for the group which had no such association. The explanation given was that the millers charged the same price to their associated members as to outsiders, and that the "non-miller" group used overseas flour, with probably cheaper blends, and obtained higher rebates. Without investigating or questioning these reasons, we feel that there is here a potential weakness in the formula, since the millers' policy vis-à-vis their respective groups might easily change, with distorting effects on the costs of the sample. These groups are both powerful, and could exercise a very material power in this respect, if they so decided, within the frame of the memorandum as it now stands.

Mention has already been made of the inclusion of initial allowances in the charges for depreciation and rent. It was agreed that this method could cause considerable distortion of results when rebuilding or re-equipment was prevalent. No evidence was forthcoming of the difference which the replacement of the memorandum method by a more realistic depreciation method would make in the sample results.

Reference has been made to methods of apportionment of certain expenses where the Ministry adopted arbitrary reductions, to twenty-five per cent. and fifty per cent. of their retail selling values, for products other than national bread. It is fair to comment that Mr. Parker said he did not think that actual costing, where available, would produce a material effect within the sample, but we think that, given the great difference, to which we have already referred, between the period of control and today, in the relative production of the other sources of revenue to that of standard bread, an attempt should have been made to confirm, at least, the substantial accuracy of the fixed percentages adopted.

These are important criticisms of detail. But, assuming for the moment an arrangement to fix maximum prices on these general lines to be capable of justification, the basis actually adopted is open to major criticism. The obvious need was to produce figures of costs and profits which would justify the prices recommended. The most obvious and defensible way would be to assemble the costs and profits of all the members of the Federation. "Sample" figures can only be justified in certain circumstances and subject to recognised principles. In this case no attempt was made by the Federation to obtain the actual figures.

The sampling method was, as has been said, merely a continuation of sampling methods adopted under abnormal conditions and (an important distinction) under the supervision of a government department. Given this approach by the Federation, careful rules were made to secure that the samples used compared not unfavourably with those in the control period in numbers and in types of members, and to see that the figures resulting from these samples were weighted to secure due representation of the figures drawn from the larger and, it was assumed, lower-cost producers. Moreover, an arbitrary reduction of 7½ per cent. in the costs of production, excluding flour, was made in order to bring the assumed average costs nearer to those of the lower cost producers. Full credit must be given for these arrangements and for the way in which they were carried out by the Federation's accountants, as well as for the arrangements for the automatic change in prices. But it was freely admitted in evidence that no one knew anything about the essential test of the samples; namely, whether they were, in fact, representative of costs and profits. Only the costs and profits of the units submitting samples were known; there were no means of actually testing how far, in fact, they were representative.

Again, the quarterly returns were consistently referred to as " samples ", as if that fact gave them validity. But the first question of the statistician must be how these samples are arrived at. The answer given was that all members of the Federation were asked to " volunteer " to make returns; if these were the returns volunteered, obviously the varying circumstances and attitudes, and, indeed, interests, of the different members could have an unpredictable effect on the returns actually received. They were not the " planned samples " carefully specified to a given end, nor the " chance samples " known to statisticians as acceptable for certain purposes, and within certain limits and conditions. Moreover, it appeared that in fact (as has been shown) only three returns were volunteered from among fifty-one independent members and the remaining forty-nine (to take the quarter ending March, 1959) were supplied from the three large bakery groups. This ratio was justified by the Federation on the ground that the independents' costs would be higher. But a further factor emerged at the hearing, very important from the point of view of assessing the validity of the sampling as a method. This was that, as regards all those units within the three groups (representing nearly three-quarters of the whole), the selection of which units, within each group, should be regarded as representative and should make returns was decided by the management of each group. Without wishing in any way to suggest that, in fact, those concerned were biased, or were in fact influenced by any improper motive in their selection, it is obvious that returns " volunteered " in this way would not satisfy the tests of sampling as generally understood.

It should be mentioned here that, after the conclusion of the evidence at the hearing, counsel on behalf of the Federation informed the court that if only the limitations of the " sample " and the inclusion of the initial allowances in the depreciation figures stood in the way of a decision in favour of the Federation's recommendations, the Federation would be willing to undertake to amend the formula by providing for every member of each group to supply costings and for " straight line depreciation " to be used in the costings.

We have now stated the facts which appear to us to be most material, with special emphasis on the memorandum or formula, which is a central feature of this case. We can now come to the issues which have to be decided, as set out at an earlier stage.

The first issue, stated very shortly, is whether the maximum prices have in practice effectively operated so far, and can reasonably be expected to operate in the future if they are continued, as maximum or fixed or minimum prices. It should be said at the outset that a collective price control stated in terms of maximum prices, and actually so operating, seems less open to criticism in relation to the public interest than one stated in terms of fixed or minimum prices.

A maximum price might, in certain circumstances, safeguard the buyer against having to pay more, while giving him a chance of paying less if he could find a seller willing to take less. That chance might be a benefit, and not unreal, because a situation might arise in which a seller would be willing to take less, and the description of the recommended price as "maximum" would enable him to take less without infringing the recommendation. But whether the benefit is real or notional, substantial or insubstantial, depends on what happens in practice, or, for the present purposes under s. 21 (1) (b) of the Act, what is reasonably estimated as likely to happen in the future, taking into account what has been happening up to the present time. If it appears that, in fact, sales at prices below the recommended maximum price have been made very infrequently, that must tend to show that the benefit of having the recommended price stated as a maximum is insubstantial or even negligible. It is clear from the evidence in this case that such sales have taken place hardly ever. There has been no specific evidence of any actual instance, and it has been admitted on behalf of the Federation that such sales have been very rare. Indeed, in the market survey, which will be dealt with more fully later, there were 109 purchases of standard bread and not one of them was at a price below the recommended maximum price. That was the only specific evidence before the court on this point. It was contended that the reason for the absence of sales at prices below the recommended maximum price is that it was fixed at a low level, so that nobody could afford to sell below it. In our view, however, as will appear later, while the prices recommended may be low for certain higher cost sections of the industry (which includes the family bakers producing the loaves by manual operation and on a small scale), they are not low prices for the members of the Federation, having enabled them to make on the average of the "sample" good profits. Some of the Federation members are making high profits and could afford to make sales at reduced prices, if that were their policy.

Next, as we have to make under s. 21 (1) (b) a forecast as to what is likely to happen in the future, it is right to bring into account indications of the Federation's own attitude and expectations. When the change was made from fixed to maximum prices in April, 1958, there was no alteration of the figures and there was no announcement to the public. As appears from the resolutions, which have been set out above, copies of the resolutions and the memorandum were delivered to the Registrar of Restrictive Trading Agreements and to the Federation's accountants and to each of the members of the Federation. There is, however, nothing to show that the independent retailers or the purchasing public had any knowledge of the newly acquired "maximum" character of the recommended prices in April or May, 1958, or at any time before November, 1958, when, on the occasion of a change in some of the prices, public announcements were made in the Press clearly stating that the prices were maximum and sales could be made at lower prices. The absence of any public announcement at the time when the change from fixed to maximum prices was made tends to show that, at that time, the Federation were not expecting or intending that the new description of the prices as maximum would have far-reaching practical effects. Next, there was no softening of the Federation's uncompromising attitude towards price reductions, at any rate if they could be described as "price-cutting". They had in March, 1958, before the change was made, taken a very adverse view of a retailer giving away some loaves and selling others at 1d. below the proper price. In a letter of May 2, 1958, after the change had been made, the Secretary of the Federation, explaining the disadvantages of high rates of wholesale discounts, said:

> "There is too the danger that a sufficiently high discount will introduce price cutting at retail level, a result which might have the heaviest effect in the West Midland area. It is obvious that wholesale discounts must be kept to a minimum, not only for the protection of retail business, but

> also in the public interest . . . I feel particularly disturbed since I have endeavoured, and to date with a measure of success, to have all Federation members, be they independent or in groups, comply with the arrangements and agreements made freely in open discussion. This policy, I had hoped, would be in everybody's interests and prevent the outbreak of price-cutting wars, which were so ruinous twenty years ago."

Also, there are striking passages in the Federation's statement of case, delivered on May 19, 1958. It is right to bear in mind that the statement of case must have been drafted initially at a time when fixed prices were recommended, and that, even after the change, the court's approval was (as it still is) sought for the earlier fixed price recommendations as well as for the later maximum price system. Nevertheless, the passages are striking, and the following are examples:

> "21 (h) (i). there is information as to price available which would put any member of the public on inquiry as to profiteering in the event of prices substantially in excess of the recommended price being demanded without adequate justification and on inquiry as to a lowering of quality and service in the event of prices substantially lower than the recommended price being demanded without adequate justification ;
>
> "21 (h) (vi) . . . The existence of the recommended price, though not preventing sales of bread at lower prices when adequate justification for such lower prices exists, will tend to mitigate such periods of price cutting."

The intervention of the fixed retailer's margin of 1s. 3d. per dozen loaves of standard bread introduces an element of rigidity into the price structure, and would hinder sales to independent retailers at reduced prices, if any member of the Federation were minded to make such sales. While Mr. Curtis, the Federation's trade witness, was giving evidence, a problem was put to him on these lines:—Take the common case of a sale by a Federation member to an independent retailer in circumstances where only the fixed retailer's margin of 1s. 3d. per dozen loaves, without any additional discount, is appropriate. If the sale is made at the maximum price, the invoice will show for one dozen loaves the maximum retail price of 10s. 6d. and the retailer's margin of 1s. 3d., and the net wholesale price of 9s. 3d. The retailer will sell at 10½d. per loaf and receive 10s. 6d. But suppose that the Federation member wished to sell at a reduced price, what would he do? Would he simply charge a reduced wholesale price of, say, 8s. 9d., and leave the retailer free to sell at the recommended maximum price of 10½d. per loaf, which is also the current price, and so receive a total of 10s. 6d., thereby taking a margin of 1s. 9d. instead of 1s. 3d? Or should the Federation member, before reducing his wholesale price, take some action to ensure that the retailer will made a corresponding reduction in his retail price to the public, so that the retailer will receive no more than his proper margin of 1s. 3d.? Mr. Curtis asked for time to consider the question, and on a later day he was recalled. He gave a full and careful answer. He could not say that precisely the circumstances or precisely the type of example stated in the question had been considered, but he did think that, in approaching the question of retail price and fixed margin, so far as possible the whole context of such a position had been given some thought, and he could give a generalised answer on these lines:

> "First, if a producer reduced his recommended retail price and then gave the same fixed margin, so that he was in effect putting into the hands of the retailer bread at a lower price, it might well be considered by the Federation that he was not obeying the fixed margin; that in effect he was giving a larger margin than the fixed retail margin, which would be regarded as being against the interests of the Federation. The only other alternative circumstances I can think of is that if a producer desired his bread should

> A be sold to the public at a lower price, he would then have to enforce a
> fixed price ruling on the retailer."

Mr. Curtis was then asked if that meant there would be an understanding between the particular plant baker and the particular retailer, that, if the retailer got his twelve loaves at 8s. 9d., he must not sell them at more than 10s. Mr. Curtis said:

> B "Precisely. I cannot conceive that that would be likely to arise, because
> I do feel so much myself that the position we are in is that action by one
> producer could produce action by other producers in the same area, so that
> advantage would be short-lived with an arrangement of this sort."

In all probability, Mr. Curtis's answer does show how the problem would be
solved, if it arose and had to be decided. It is interesting, however, to note that
C there was no ready-made solution for this problem, which seems elementary if
any sales below the recommended maximum price in the common type of transaction (with the plant baker selling to the independent retailer, who re-sells to
the public) were expected or envisaged. So long as the recommended maximum
price is operating as a fixed price, it can operate in conjunction with the fixed
retailer's margin without raising any such problem, and, as the problem had not
D been raised, it is a reasonable inference that the recommended maximum price
had been operating as a fixed price. Finally, it can be said as a matter of common
sense that, if a large and influential Federation, which has at least half the
market for the commodity concerned, publishes a recommended price, even if
it is described as a maximum price, the members of the Federation and other
traders will naturally regard it as a fair and reasonable price approved by the
E Federation, and they will be disinclined and unlikely to sell at any lower price.
For the reasons which have been given, our conclusion is that the Federation's
recommended maximum price has, in practice, effectively operated as a fixed
price, and, whether or not the recommendations have been otherwise beneficial
to the public, they have not been substantially beneficial by virtue of their
description of the price as "maximum".

F We now come to the second main issue, which is whether the true effect of the
price recommendations is to keep standard bread prices now and hereafter, while
the formula continues, below what they would be if there were no recommendations. We have to make a forecast as to the likelihood or degree of risk
of price increase ensuing if the price recommendations were abolished. The
issue has two aspects. The first is financial—what level or kind of price is likely
G to be produced by the formula? The second is economic—what results would be
likely to flow from the economic facts of the situation if the formula had not
existed or were abolished?

As to the financial aspect, the formula itself, although for reasons given above
it cannot be fully relied on to present a dependable average cost, appears to show
profits which are too favourable to justify a claim that the formula adequately
H protects the consumer. The average profits have been shown to be favourable
in comparison with profits in other industries. Moreover, the average profit,
which results from the formula, is to continue while the formula lasts, in bad
times as well as good. Deficiencies below the average are to be automatically
recovered in subsequent periods whatever the state of trade or whatever the
variation in consumer purchasing power.

I As to the economic aspect, we will first mention a suggestion as to method
that was made by the Registrar's expert witnesses. They suggested that, if there
is to be a collective regulation of prices on the basis of costs, it should not be
on the basis of average costs reduced by an "efficiency factor" (such as the 7½
per cent. of production costs other than flour in this case), but rather on the
basis of lowest costs with an addition calculated to keep in business enough
higher cost producers to provide the supplies required by the public. There
was no evidence in this case as to practical applications of the suggested method,
and it might not be free from difficulties, but it does seem to us to be sound in

principle, and a citation from the judgment of this court in the *Scottish* case (3) will show what is involved:

> " . . . the ascertainment of a price based on averaged costs has been shown in the evidence in this case to be consistent with high profits being available to the low cost producers, with no means existing whereby they can pass any part of the benefit of these profits, or their own probable higher efficiency, to the consumer in the shape of lower prices for standard loaves. Not unnaturally, it is among the low cost producers that the businesses controlled by the five dominating groups are to be found. Thus the system is not designed to reflect the lowest economically practicable cost, or to result in the lowest economically practicable price being paid by the consumer, and, if it does not do so in the short run, we do not see why it should do so in the long."

We now come to consider directly the question: What results would be likely to flow from the economic facts of the situation if the formula had not existed or were abolished? A very important factor to be taken into account is one which has already been mentioned briefly, namely, the declining demand for bread in general and standard bread in particular. In the agreed statement of facts, there is a table of bread consumption stated in ounces per head per week as follows:

Year	*Ounces*
1937-38	58·19
1954	56·28
1955	55·13
1956	51·08
1957	48·00
1958	47·21

Of course, the increase of population is a partial countervailing factor. There is, in the agreed statement of facts, another table showing both the declining trend of bread sales for 1948 to 1954, and also the larger establishments gaining more of the market at the expense of the small firms. The figures are in thousands of hundredweights, and are for Great Britain, except that for 1954 the sales by larger establishments include also sales in Northern Ireland. Subject to that qualification the figures are as follows:

	1948	1951	1954
Sales by larger establishments	55,032	52,994	52,947
Sales by small firms	26,253	17,699	12,690
Total Sales	81,285	70,693	65,637

It was agreed by the witnesses that there has been a considerable decline in the consumption of standard bread since 1956. The declining trends in the consumption of bread in general, and standard bread in particular, will not necessarily continue indefinitely, and Mr. Curtis had an impression, from certain figures of flour consumption which he had seen, that the declining tendency is now levelling off. It seems, however, likely that the decline will continue to some extent owing to consumer preference for more expensive foods than bread and for breads other than standard bread. Another important factor which has already been mentioned is the need for a plant baker to maintain a steady turnover, because a fall in production would cause uneconomic labour costs and idle capital equipment. Production for stock is not practicable, as bread which is not sold within a short time of baking becomes unsaleable; unlike some other articles, it cannot be stored for sale if and when demand revives. So long as there is a declining demand for standard bread, the plant baker will have to increase his share of the diminishing market merely in order to retain his existing turnover, and he would be more likely to reduce than to increase his prices. If there is, or will be, a levelling out of the demand, so that it ceases to decline and becomes stationary, it will still be necessary for the plant baker not to lose turnover, and there would obviously be a risk of that if he increased his prices. Thirdly, the recommended prices, while they may be low for the industry as a whole, are not low for the Federation members, who are, on the average, making good profits from standard bread, which is their " bread and butter line ", and they are probably making higher profits from other breads and flour confectionery. There are thus sound economic reasons for expecting that prices would tend to be favourable to the consumer in the absence of collective price recommendations. Moreover, the evidence of Mr. Curtis shows that there are other considerations likely to influence the Federation in the direction of a low prices policy, in that (i) they wish to act with a due sense of responsibility to the public and give no ground for any accusation of profiteering, (ii) they wish to avoid any situation which might lead to the reimposition of price control by the government, (iii) high prices might give rise to wide retailers' margins, and (iv) the Federation members are supplying quite a number of substantial multiple grocers or dairies or similar large customers, and, if the profit margin of bread were at a high level, such customers might prefer to bake their own bread rather than buy it from Federation members. The effect of competition is illustrated by the results of a market survey carried out for a rather different purpose. The Federation had instructed Retail Statistics, Ltd. to carry out a market survey by making purchases of standard loaves in selected areas, and Retail Statistics, Ltd. accordingly purchased 109 of the twenty-eight ounce wrapped and sliced standard tin loaves for this purpose. A summary of the results of the survey shows that, in areas where the Federation's influence is strong, whether the population be large (as in Liverpool, Bristol and Croydon) or sparse (as in Hucknall, Garforth and Hereford) the sales were made, with only one exception, at the Federation's recommended maximum price of 11½d. per loaf; but that, in areas where the Federation's influence is weak, whether the population be large (as in Ipswich, Swindon and Weymouth) or sparse (as in Downham Market, Devizes and Whitchurch) a majority of the sales (fifteen to twelve and twelve to eight) were made at prices higher than the recommended price. Of the sales at prices higher than the recommended price, none was made to the customer by a Federation member through his own shop or roundsman, but some were of bread produced by Federation members. These results do afford evidence of the Federation influence in securing sales at the prices which they fix, but it is the local competition of the Federation members rather than the existence of the recommendations which tends to keep the other prices down.

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(3) [1959] 3 All E.R. at p. 111; L.R. 1 R.P. at p. 379.

Under free competition, there might well be cases of some prices in some areas being above the general level, but, as the market survey has shown, that happens also with the recommendations in operation. Moreover, a marked rise in production costs would force a rise in prices whether the recommendations were in operation or not. But, on the whole, having regard to the factors which we have mentioned and our impressions derived from all the evidence, we are not satisfied that there is a likelihood or serious risk that abolition of the recommendations would cause a rise in bread prices. On the contrary, in face of a declining, or at best stationary, demand on the one hand, and ample and increasingly efficient production capacity on the other hand, the long-term natural forces of competition would seem to favour some reduction in the level of prices.

The importance of preserving competition as the ultimate safeguard can be deduced from a consideration of the evidence of the Federation's economist, Mr. Watkins. He gave evidence to the effect that, at present, prices are largely controlled by dominant groups which have grown or developed under present arrangements; that in this situation it is in the economic interests of members of the Federation not to compete in price, and they are strong enough to fix prices if they act together; and that, in these circumstances, the consumer would do well to accept the existing system of recommended maximum prices.

If we had reached a different view as to the net benefits derived by the consumers from the present formula, it would then have become important to bear in mind the strain to which any formula would be exposed, if at some future time the groups' strong and increasingly dominant position in the industry were carried forward to a point only just short of "monopoly" as statutorily defined, and they were fixing the prices without any external check or independent regulator, with the purchasing public, deprived of the ultimate safeguard of price competition, left to rely solely on the formula for their protection. That is not the present position, but it is a future possibility which cannot be disregarded.

Our conclusion is that the Federation have not proved their case under s. 21 (1) (b), not having satisfied the court that the removal of the restrictions would deny to the public any specific or substantial benefit or advantage such as is referred to in that paragraph. Therefore, no question now arises under s. 21 (1) (g) or under the "balancing provision". As the restrictions concerned have failed to pass the statutory tests, there must be in the terms of the Act a finding that the restrictions are contrary to the public interest. As was said in the *Scottish* case (4)

> "It must always be kept firmly in view that it is to be presumed that freedom from the restrictions struck at by the statute is in the public interest, and freedom from such restrictions necessarily implies freedom to compete in price as well as in any other matters."

There is no implied criticism of the conduct or intentions of the Federation, who have not been lacking in moderation or in civic responsibility. Their formula has deserved, and we hope has received, full and careful consideration. The Federation have, through their counsel and witnesses, put the full facts candidly and lucidly and fairly before the court.

One further point remains to be dealt with. Counsel on both sides have asked us, in exercise of the powers conferred by s. 20 (5) of the Act, to make declarations not only in respect of the agreement as it now is with the set of restrictions now in force, but also in respect of the agreement as it was in, say, March, 1958, before it was varied by the resolutions of Apr. 9, 1958, introducing the costings formula and the description of the recommended prices as maximum. The powers under that subsection are discretionary, and we are asked to make a declaration in respect of a system which has been obsolete for twenty months and was materially different from the system now in force. We have to ask ourselves, how could s. 21 (1) (b) be applied? Suppose that the expression "would deny" can be read, as counsel on both sides asked us to read it, as including "would have denied"; it would still be necessary for us to project our minds back to March, 1958, and make a forecast in respect of a period then future but now past, and it would be difficult to decide how much foreknowledge we could allow ourselves to have in respect of that period. In our view, it is not appropriate to make any declaration as to past history in this case. There will be a declaration as to the restrictions involved in the present system.

Declaration accordingly.

Solicitors: *McKenna & Co.* (for the Federation of Wholesale and Multiple Bakers (Great Britain and Northern Ireland); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(4) [1959] 3 All E.R. at p. 112; L.R. 1 R.P. at p. 382.

A BLACK *v.* BLACK (MAY intervening).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 16, 17, 18, 19, 20, 1959.]

Divorce—Evidence—Petitioner not tendering evidence in person or on commission —Jurisdiction of court to hear and determine petition.

B The court has jurisdiction to hear and determine petitions where the petitioner neither is called as a witness nor tenders evidence on commission or otherwise, but this jurisdiction will be exercised only in exceptional cases.

[As to granting a decree in the petitioner's absence, see 12 HALSBURY'S LAWS C (3rd Edn.) 376, para. 819, note (a); and for a case on the subject, see 27 DIGEST (Repl.) 516, *4600*.

For the Matrimonial Causes Act, 1950, s. 4 (2), proviso (iii), see 29 HALSBURY'S STATUTES (2nd Edn.) 394.]

Petition.

In this case the husband petitioned, inter alia, for divorce on the ground of the D wife's desertion and asked for the exercise of the court's discretion in his favour. The wife by her answer cross-prayed for divorce on the grounds of the husband's constructive desertion and adultery with the intervener.

On Oct. 6, 1949, the parties were married in England, the husband being then a widower with three children and the wife being a United States citizen. On July 11, 1951, the wife returned to the United States alone and on Jan. 8, 1953, E she obtained a divorce in the court of common pleas in the commonwealth of Pennsylvania, Allegheny county in the United States. The husband knew of and did not oppose those proceedings but he was not represented at the trial. The husband's admitted adultery began after the wife had obtained the decree in Pennsylvania. At the hearing before SACHS, J., the wife did not give evidence either in person or otherwise and it was contended that the court had no jurisdic-F tion to entertain her cross-prayer. The case is reported solely on the judge's ruling on this point.

P. Goodenday for the husband and the intervener.

Joseph Jackson for the wife.

SACHS, J., in the course of his judgment said: Now I will turn to the wife's G cross-prayer. The first point taken was that the court ought not to or could not (I am not sure which) give relief where the wife had not appeared in person or given evidence on commission or tendered her evidence in some such way. I will merely say that in my view the court had jurisdiction to hear and determine any petition of whomsoever seeks a decree, in a cause in which that person is not called as a witness nor tenders evidence on commission or otherwise. On the other H hand, it seems to me equally clear that the jurisdiction will not be exercised in favour of the applicant save in really exceptional cases, because otherwise the court will be prevented very often from inquiring fully into the matter.

I am inclined to the view that the present case is exceptional. I think that it would be unreal to expect a wife in such financial circumstances as have so far been put before the court to come over to this country and incur additional I expense in order merely to fortify in the end a position which is already completely secured in her own country. As regards the question of tendering evidence on commission, I am told that the giving of evidence otherwise than in person by the wife was, during the interlocutory proceedings, strongly opposed. Suffice it to add that one often realises how little use evidence may be when it is not backed by the appearance of the person in question so that the demeanour of the witness can be tested. Here the real issue is whether the husband was guilty of the adultery charged and on that issue there is no contest whatsoever, and I for myself am prepared to consider the wife's prayer on its merits.

[His Lordship, however, refused to exercise his discretion in favour of the wife under the Matrimonial Causes Act, 1950, s. 4 (2) proviso (iii), and held, therefore, that the questions whether or not the wife connived at the husband's adultery or by her conduct conduced to it did not arise. He, therefore, rejected her cross-prayer and, having found that she was in desertion, His Lordship exercised his discretion in the husband's favour and granted him a decree.]

Decree nisi.

Solicitors: *Alec Woolf & Turk* (for the husband and for the intervener); *Oswald Hickson, Collier & Co.* (for the wife).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

NOTE.

Re GREAT UNIVERSAL STORES, LTD. AND OTHERS.

[Chancery Division (Roxburgh, J.), December 14, 1959.]

Company—Reduction of capital—Petition—Allegation that company was still carrying on business—Whether such an allegation necessary.

Company—Scheme of arrangement—Petition—Allegation that company was still carrying on business—Whether such an allegation necessary.

[As to schemes of arrangement and sanction by the court, see 6 Halsbury's Laws (3rd Edn.) 769-772, paras. 1555-1557; and for a form of petition, see 6A Court Forms 135, Form 84.

As to reduction of capital and confirmation by the court, see 6 Halsbury's Laws (3rd Edn.) 154-156, paras. 323-327; and for a form of petition, see 6A Court Forms 34, Form 9.

For the Companies Act, 1948, s. 66-s. 69 (dealing with reduction of share capital), and s. 206 (2) (dealing with the sanction of the court to a scheme of arrangement), see 3 Halsbury's Statutes (2nd Edn.) 515-519, 624.]

Cases referred to:

British & American Trustee & Finance Corpn. v. *Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 9 Digest (Repl.) 151, *883*.

Wallasey Brick & Land Co., Ltd. & Reduced, Re, (1894), 63 L.J.Ch. 415; 70 L.T. 870; [1894] W.N. 20; 9 Digest (Repl.) 152, *889*.

Petitions.

These were petitions presented by Great Universal Stores, Ltd. and twenty subsidiary companies. The petition of Great Universal Stores, Ltd. asked for the sanction of the court to a scheme of arrangement. Each of the subsidiary companies, by its petition, asked for (a) the sanction of the court to a scheme of arrangement, and (b) an order confirming a special resolution of the company for reduction of capital.

T. D. D. Divine and *R. B. S. Instone* for the petitioners.

ROXBURGH, J.: This is a very complicated scheme, involving a very large number of subsidiary companies, as well as the parent company, but there is no point of law or other point to which I feel it necessary to direct attention except one very small matter which, I think, might now be cleared up. There is not in any of the petitions an allegation that the relevant company is carrying on business. It might appear from a report of a decision by Kekewich, J., in *Re Wallasey Brick & Land Co., Ltd. & Reduced* (1), that such an averment was necessary in order to obtain the sanction of the court to a reduction of capital. On looking at that report, I am not at all sure that Kekewich, J., intended to say anything of that sort. The court always has a discretion as regards reductions of capital and it may be that all that he was saying was that he, in the exercise of his discretion, refused to sanction a reduction in that particular case. If so, that has no relevance to any other case whatsoever. If, however, he intended to go further than that, it seems to me that any such view is now completely out-dated and has been, indeed, ever since the decision of the House of Lords in *British & American Trustee & Finance Corpn.* v. *Couper* (2), which was given within a few months of the decision of Kekewich, J., namely, on Apr. 16, 1894. There is really no ground for suggesting that such an averment is a sine qua non of the success of a petition. The facts in this case are entirely different and the only reason why I have dealt with this is because of the possibility that that sort of view should still be lingering in the text-books or somewhere else.

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(1) (1894), 63 L.J.Ch. 415; 70 L.T. 870; [1894] W.N. 20. The judgment in this case was delivered on Jan. 27, 1894.

I sanction the scheme with regard to the companies and confirm the reductions as regards all subsidiaries. The minutes are all in order, and I approve them. I direct advertisement in the usual way.

Orders accordingly.

Solicitors: *Linklaters & Paines* (for the petitioners).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

OHOCHUKU *v.* OHOCHUKU.

[Probate, Divorce and Admiralty Division (Wrangham, J.), October 27, 1959.]

Divorce—Decree nisi—Specifying valid marriage—First marriage of Nigerian Christians in Nigeria according to local custom—Subsequent ceremony at register office in England—Which marriage would be dissolved—Whether religious beliefs of spouses justified first marriage being treated as monogamous.

The parties were Nigerian Christians. They married in Nigeria according to local custom in 1949, and the union was one that was recognised as a valid marriage by Nigerian law, but by that law a subsequent union between the husband and another woman would be recognised as lawful, and accordingly the marriage was potentially polygamous. The parties subsequently came to England and went through a second ceremony of marriage in 1953 at a register office in London. The husband had never relinquished his Nigerian domicil of origin. After the wife had been resident in England for more than three years she petitioned for divorce under s. 18 (1) (b) of the Matrimonial Causes Act, 1950, on the ground of cruelty, which she established, the suit being undefended.

Held: although the parties to the Nigerian marriage were Christians, and therefore according to their religious tenets their marriage should be monogamous, yet in view of Nigerian law the Nigerian marriage must be regarded as polygamous; therefore, as the court would not assume jurisdiction to dissolve a polygamous marriage, the decree nisi would be for the dissolution of the marriage celebrated in London.

[As to the essential requirement that a marriage should be monogamous if it is to be recognised by English law, see 7 Halsbury's Laws (3rd Edn.) 88, 89, para. 161; and for cases on the subject, see 11 Digest (Repl.) 455, 456, *906-911*, 459, *939*, and 3rd Digest Supp.

As to stating in the decree which of two ceremonies was the valid ceremony, see 12 Halsbury's Laws (3rd Edn.) 410, para. 908.]

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(2) [1894] A.C. 399.

Petition.

This was a petition dated May 21, 1959, by the wife, Vidah Chitura Ohochuku, for divorce on the ground of the husband's cruelty, alleging that both the petitioner and the husband were domiciled in England and, alternatively, that the petitioner had been ordinarily resident in England for three years immediately preceding the commencement of this suit and that the husband was not domiciled in the United Kingdom, Channel Islands or Isle of Man. The suit was undefended. The parties were Nigerians and Christians. On Jan. 1, 1949, they were married by local custom at Nkarahia, Isiokpe, Nigeria. The wife described the ceremony in evidence. As her father was dead, the husband had obtained the consent of her brother to the marriage, and followed this by giving the customary gifts to her family. In addition, the husband's father had paid £36 to the wife's brother by way of dowry. On the evening of the ceremony the wife was led to the home of the husband's parents. The husband did not attend the ceremony, as he was in Lagos on business. HIS LORDSHIP accepted the evidence of Dr. Elias, a member of the English Bar and a barrister of the Federal Supreme Court of Nigeria, that this ceremony, as described by the wife, constituted a valid marriage by Nigerian law, though it would be potentially a bigamous one, as both husband and wife could lawfully marry other persons whilst their marriage was in existence. The wife had stated, however, that she had intended the marriage to be for life and that neither she nor the husband should take further marriage partners during its subsistence.

The husband, Vincent Oluoma Maxwell Ohochuku, came to England as a student in 1950. The wife joined him here in 1953. On July 24, 1953, they went through a second ceremony of marriage at St. Pancras register office in London. They did this to enable the wife to produce a marriage certificate in England, not because they had any doubt about the validity of the Nigerian ceremony. On complaint made by the wife to the metropolitan magistrate at Old Street magistrates' court that the husband had been guilty of persistent cruelty to her the magistrates' court found, on June 19, 1959, that her complaint was proved, and ordered that she be no longer bound to cohabit with him and further ordered the husband to pay the wife a nominal sum per week, he having custody of the child of the marriage, born in 1955, the wife to have access. On Sept. 5, 1957, the husband, with the consent of the wife, asked for the order to be varied, as the wife wished the child to return to Nigeria. The magistrate varied the order, as requested, and since 1957 the child had, with consent of the parties, been living with the husband's parents in Nigeria.

P. H. Ripman for the wife.

WRANGHAM, J.: The parties are Nigerians. I am not satisfied on the evidence given to me that the husband ever abandoned his Nigerian domicil of origin, so that this court only obtains jurisdiction to dissolve the marriage (such marriage as there might be between the parties) by virtue of the section of the Act of Parliament which entitles a wife to obtain a decree of dissolution of her marriage if she is resident in England and has been ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings—and if certain other requirements of the statute are fulfilled (1).

[HIS LORDSHIP then stated the facts as summarised above and continued:] The wife has satisfied me that her husband treated her with cruelty and that she is entitled to a decree to dissolve her marriage. The only question is, which marriage is it that has to be dissolved? Recent authorities have shown that it is important that the court which dissolves a marriage should make it clear in the decree what marriage it has dissolved (2). That raises the question whether this court has jurisdiction to dissolve this Nigerian marriage or only jurisdiction to dissolve the marriage celebrated in London. It is established by authority, to which I need not refer, that an English court of divorce will not assume jurisdiction to dissolve a polygamous marriage (3). Polygamous marriages are recognised now by the courts for various other purposes but they are not recognised for that purpose. This marriage in Nigeria was a polygamous marriage.

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(1) Section 18 (1) of the Matrimonial Causes Act, 1950, reads " . . . the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife . . . notwithstanding that the husband is not domiciled in England . . . (b) in the case of proceedings for divorce . . . if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

I have considered whether the fact that the parties at the time were of the Christian faith, as they were, and would therefore regard this ceremony as monogamous, because the obligations of their faith so required, makes any difference for this purpose. It is relevant in this connexion to note that Dr. Elias proved before me that, whether the parties were Christian or not, the Nigerian law would recognise a subsequent union between the husband and another woman as being a lawful marriage: in other words would not forbid polygamy even if that were contrary to the religious tenets of the spouses.

In those circumstances, I have come to the conclusion that whatever might be the effect of the parties being Christians on the marriage for other purposes and in other courts, in this court and for this purpose the Nigerian marriage must be regarded as a polygamous marriage over which this court does not exercise jurisdiction. I, therefore, pronounce a decree nisi for the dissolution not of the Nigerian marriage but of the marriage in London. I am told that in fact that will be effective by Nigerian law as at present understood to dissolve the Nigerian marriage; but that forms no part of my judgment: that is for someone else to determine and not for me. There will, therefore, be a decree nisi for the dissolution of the marriage celebrated on July 24, 1953. I ought to add, there being one child of the marriage, that I am satisfied that proper arrangements have been made for looking after that child. The arrangements made are in accordance with those agreed between the parties and approved by a stipendiary magistrate in London by whom the matter has already been considered (4).

Decree nisi.

Solicitors: *Marshal & Co.* (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(2) I.e., *Thynne* v. *Thynne*, [1955] 3 All E.R. 129; [1955] P. 272; *Hewett* v. *Hewett & Dupin*, (1929), 73 Sol. Jo. 402; *Reder* v. *Reder*, [1948] W.N. 238.

(3) See *Hyde* v. *Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 and cases which follow it, such as *Baindail* v. *Baindail*, [1945] 2 All E.R. 374; [1946] 1 All E.R. 342; [1946] P. 122; *Risk* v. *Risk*, [1950] 1 All E.R. 973; [1951] P. 50; and *Muhammad* v. *Suna*, 1956 S.C. 366.

(4) See p. 254, letter F, ante.

R. *v.* SMITH.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery and Pearson, JJ.), December 14, 1959.]

Criminal Law—Corruption—Ingredients of offence—Gift offered to officer of public body in respect of transaction in which the public body was concerned —Whether gift " corruptly " offered if offeror had no intention of carrying out transaction—Public Bodies Corrupt Practices Act, 1889 (52 *&* 53 *Vict. c.* 69), *s.* 1 (2).

The object of s. 1 (2)* of the Public Bodies Corrupt Practices Act, 1889, being to prevent officers or servants of public bodies being put in a position where they are subject to temptation, a person acts " corruptly ", within the meaning of the subsection, if he offers a fee or reward to an officer of a public body deliberately and with the intention that the person to whom the offer is made should enter into a corrupt bargain, even if the offeror himself has no intention of carrying out the transaction and accepting the favour which he has sought.

Appeal dismissed.

[As to corruptly offering a gift to an officer of a public body, see 10 HALSBURY'S LAWS (3rd Edn.) 617, para. 1159.

For the Public Bodies Corrupt Practices Act, 1889, s. 1 (2), see 5 HALSBURY'S STATUTES (2nd Edn.) 919.]

Case referred to:

Cooper v. *Slade*, (1858), 6 H.L. Cas. 746; 27 L.J.Q.B. 449; 31 L.T.O.S. 334; 22 J.P. 511; 10 E.R. 1488; 20 Digest 66, *464*.

Appeal.

The appellant, John Smith, and another man, Leslie Lockyer, were charged at Leeds Assizes on July 22, 1959, before PAULL, J., sitting with a jury, of corruption, contrary to s. 1 (2) of the Public Bodies Corrupt Practices Act, 1889, in that on Jan. 27, 1959, they corruptly offered a gift (i.e., a part of the sum of £500) to Adam James, mayor and alderman of the borough of Castleford, Yorkshire, as an inducement to him to do something in respect of which the council of the borough was concerned, i.e., to use his influence in the consideration of the sale of a portion of land by the council to the appellant. On July 27, 1959, both the appellant and Lockyer were convicted of the offence and were sentenced to twelve months' imprisonment. The appellant appealed against conviction, the ground of appeal being that the learned judge's direction in the summing-up in regard to the word " corruptly " in s. 1 (2) of the Act of 1889, was incorrect.

P. Stanley Price, Q.C., and *D. M. Savill* for the appellant.
W. A. B. Goss for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant, John Smith, together with a man called Lockyer, was convicted at Leeds Assizes of corruption contrary to s. 1 (2) of the Public Bodies Corrupt Practices Act, 1889. Both of them were sentenced to twelve months' imprisonment. The present appeal is by John Smith only against that conviction.

It is a curious case, and some of the facts need to be stated. The appellant's wife apparently had a plot of land adjoining their house which, it was thought, would be suitable, together with other land if it could be obtained, as a petrol filling station. The appellant was minded to persuade the Castleford Borough Council to let him have part of their land adjoining his wife's plot for that purpose. There is no doubt that on Jan. 27, 1959, when Lockyer, who was an insurance agent, came to collect a premium, the appellant drew up an I.O.U. for £500 and handed it to Lockyer, and there is no doubt that, when Lockyer left the house, the appellant knew that Lockyer would offer it as a bribe to some councillor. That is what he said. Lockyer in fact went to the town hall and obtained an interview with the mayor and offered him what is said to be the lion's share of that £500. The mayor did not agree to any such thing, and eventually the appellant and Lockyer were charged.

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* The subsection is printed at p. 257, letter E, post.

That is really only half the story because the appellant, on any view, is an extraordinary man. For years and years he has been convinced that there is corruption among the police. Then his mind turned to corruption among the magistrates, and at this time his mind was on corruption among members of the Castleford Borough Council. He wrote a number of letters, just after the time when this offer was made by Lockyer, inviting members of the Press, the police, and others to come down because he was going to expose some fraud. His case was that, although he intended Lockyer when he left the house to take the I.O.U. to the mayor or a councillor and to offer it or part of it as a bribe, he never intended to carry the matter any further. In other words, his intention was to get the mayor or councillor to accept in principle the idea that the appellant would pay money in exchange for favours, and that then he would possibly hand over marked notes or at any rate be in a position to expose the mayor or councillor, and he never intended the matter to go through so that he would obtain in fact any favour from the council. That was his case.

When the learned judge came to sum up, that case in effect was withdrawn from the jury. It was never left to the jury to consider what the appellant might have done in the long run. The learned judge ruled that, whatever the appellant's motive, if he did intend to get the mayor's agreement to accept money for a favour to be shown, an offence had been committed.

Section 1 (2) of the Act of 1889 reads:

> " Every person who shall by himself or by or in conjunction with any other person corruptly give, promise or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour."

The learned judge, after reading that subsection to the jury and pointing out that the object of the subsection was to protect people in public life from having the temptation of being offered gifts to do something in carrying out their public duties, went on in these terms:

> " The next thing to note is the word ' corruptly '. You will notice the words ' corruptly give . . . or offer '. What does the word ' corruptly ' mean? This is law and I am telling you this as law: ' corruptly ' there means ' with the intention to corrupt '. In other words, if I offer you a reward in order that you should do something which may help me, I am doing it corruptly—if I am offering and hoping that the offer will induce you to act in the way in which I want you to act. Motive does not matter: it may be that I do it because I am anxious to help myself; it may be that I am anxious to help a widow, who, perhaps, is starving and whom I think I can help by getting a public official, a person in public life, to do something which would help her. In one sense, I suppose, it could be said that any such motive sprang from the best possible motive, the endeavour to help. It does not matter. When I offer you that gift, I do it with the intention that you should so receive a reward for doing something in connexion with your public duties. This is the meaning of the word ' corrupt ', intent to corrupt, the intention to corrupt the person to whom the offer is made."

It is that direction which is challenged on this appeal and is said to be wrong. It is, perhaps, a matter, to some extent, of words. I do not think that counsel for the appellant, who has argued this matter with great care, would object to that definition of " intent to corrupt " if by that is meant to corrupt in the full sense, namely, an intention not merely (to take the present case) that the mayor would accept the offer in principle but that money would thereafter be paid and accepted and a favour be received—in other words, if the intention was throughout that the transaction should go through to the benefit of the appellant. Read in that sense, counsel for the appellant would not object to the definition; but, in the sense in which it was used by the learned judge, it is quite clear that he was saying that the undoubted intention of the appellant to offer the I.O.U. in order to get the mayor's agreement in principle to the transaction was in itself an intention to corrupt which was sufficient to support the conviction.

It should be observed that by s. 1 (1) of the Act of 1889 it is provided:

> " Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive . . . any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour."

In the present case, the admitted intention was that the mayor would agree to receive money and, accordingly, the intention undoubtedly was that the mayor should agree to something which itself constituted an offence and, indeed, constituted an offence of corruption within the very same section. The sole question, for the purposes of this case, is whether the word " corruptly " in its context means deliberately offering money, or whatever it may be, with the intention that it should operate on the mind of the person to whom the offer is made so as to make him enter into what I may call a corrupt bargain, or whether it means that the intention must be that the transaction should go right through and that the offeror should obtain the favour for which he sought. It seems to this court that the word " corruptly " here used (and it is a word which appears throughout the Act of 1889 and other Acts dealing with corruption) is used in the former sense, namely, that it denotes that the person making the offer does so deliberately and with the intention that the person to whom it is addressed should enter into a corrupt bargain.

The real argument to the contrary, and it is an argument which has been pressed on this court, quite rightly, is that, if that is all that " corruptly " means, then it really adds nothing to the words which are already there in s. 1 (2) of the Act of 1889. That, to a large extent, may be true, but it seems to this court that the word "corruptly" in the sense to which I have referred may well be necessary in that subsection in the case of rewards or fees given for services or favours already rendered. The matter has arisen in dealing with election petitions under s. 2 of the Corrupt Practices Prevention Act, 1854, (1). It is unnecessary to read the action in detail, but, broadly speaking, it provided that every person who should give or offer money to a person to vote in a particular way would be guilty of an offence, and, secondly, that anybody who " corruptly " did such an act on account of a voter having voted in a particular way should also be guilty of an offence. In regard to the offer to vote in a particular way, the word " corruptly " is not used, but in so far as it is dealing with the past, the reward for voting in a particular way, the word " corruptly " does appear.

The matter came before the House of Lords in *Cooper* v. *Slade* (2) in 1857. Three questions were referred by the Lord Chancellor to the judges (3). There

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(1) The Act of 1854 was repealed by the Representation of the People Act, 1949, s. 175, and Sch. 9. The relevant provisions are now contained in s. 99 of the Act of 1949; see 8 HALSBURY'S STATUTES (2nd Edn.) 662.

(2) (1858), 6 H.L. Cas. 746.

(3) Question 3 was whether there was evidence that the defendant (a candidate) corruptly paid money to a voter on account of his having voted at the election.

A was a division of opinion but, in the opinion of the majority, the word "corruptly", where used in connexion with a reward to somebody who had voted, was held in effect to add nothing. WILLES, J., who was one of the majority, said this (4):

> "In answer to the third question, I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having B voted at the election. I think the word 'corruptly' in this statute means not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act 'corruptly'. The word 'corruptly' seems to be used as a designation of the act of rewarding a man C for having voted in a particular way as being corrupt, rather than as part of the definition of the offence."

The minority view, which was expressed by, among others, COLERIDGE, J., was to the effect that "corruptly" did add something. He said (5):

> "As a general rule, no doubt, the party's knowledge of the law is immaterial, D or perhaps is to be conclusively presumed; but here the statute expressly makes the operating motive in the mind of the party material, and it adds that that motive must be corrupt; which is as much as to say, that it may operate honestly and without intent to interfere with the purity of election."

Although the view of the majority was that the word "corruptly" added E nothing, the words in the present case are different and there is certainly force in the view that the word "corruptly" may be necessary in dealing with the case of a reward for services rendered. Accordingly, it is wrong to say that the word "corruptly" cannot be given some meaning additional to what is provided by the words of the section without it.

The view which we have formed is, we think, confirmed by the passage which F I have already quoted from WILLES, J., in *Cooper* v. *Slade* (4). I will read it again:

> "I think the word 'corruptly' in this statute means not 'dishonestly', but in purposely doing an act which the law forbids as tending to corrupt voters . . ."

G It seems to this court that these words apply in the present case. The object of the Act, as the learned judge told the jury, is to prevent public officers or public servants being put in a position where they are subject to temptation. Accordingly, to adopt the words of WILLES, J., the appellant, even in his own case, was here "purposely doing an act which the law forbids as tending to corrupt voters". It seems to this court, therefore, that on the facts of this H case the direction given by the learned judge was perfectly correct and that there are no grounds for quashing this conviction. Accordingly, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(4) (1858), 6 H.L. Cas. at p. 773

(5) (1858), 6 H.L. Cas. at p. 785.

R. *v.* WELHAM.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery, Cassels, Salmon and Edmund Davies, JJ.), December 16, 21, 1959.]

Criminal Law—Forgery—Uttering a forged document—" Intent to defraud "—Hire-purchase and credit-sale agreements forged and used to obtain loans from hire-purchase finance companies—No intention to defraud finance companies —Intention to evade current credit restrictions by deceit—Forgery Act, 1913 (3 *&* 4 *Geo.* 5 *c.* 27), *s.* 6 (2).

Intention by deceit to induce another to act to his detriment, or in a manner contrary to what would otherwise have been his duty, is such " intent to defraud " as is requisite to constitute that mental element in the offence of forgery or of uttering forged documents*, notwithstanding that there is no intention to cause economic loss.

Dictum of BUCKLEY, J., in *Re London & Globe Finance Corpn., Ltd.* ([1903] 1 Ch. at p. 732) considered.

Dictum of LORD TUCKER in *Board of Trade* v. *Owen* ([1957] 1 All E.R. at p. 414) applied.

R. v. *Bassey* ((1931), 22 Cr. App. Rep. 160) followed.

Hire-purchase finance companies advanced money on a hire-purchase proposal form and agreement and on credit-sale agreements witnessed by W.; the form and agreements were forgeries. W. was charged with offences of uttering forged documents with intent to defraud. It was not proved that he had intended to cause any loss of money to the finance companies. W.'s admitted intention had been by deceit to induce any person who was charged with the duty of seeing that the credit restrictions then current were observed to act in a way in which he would not act if he had known the true facts, namely, not to prevent the advancing of large sums of money exceeding the limit allowed by law at the time. W. was convicted. W. appealed against conviction on the ground that his intention was not an intent to defraud.

Held: W.'s admitted intention amounted to intent to defraud, and accordingly he had been rightly convicted of uttering forged documents with that intent.

Appeal dismissed.

[As to the intent to defraud in offences relating to forgery, see 10 HALSBURY'S LAWS (3rd Edn.) 839, para. 1614, and 871, para. 1689; and for cases on the subject, see 15 DIGEST (Repl.) 1238, 1239, *12,672-12,685*.

For the Forgery Act, 1913, s. 4 (1) and s. 6, see 5 HALSBURY'S STATUTES (2nd Edn.) 985, 986.]

[COURT OF CRIMINAL APPEAL (Hilbery, Gorman and Paull, JJ.), December 18, 1959.]

Criminal Law—Bail—Appeal dismissed by Court of Criminal Appeal—Application for fiat of Attorney-General for appeal to House of Lords—

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* Uttering a forged document is an offence under s. 6 of the Forgery Act, 1913. Section 6 reads: " (1) Every person who utters any forged document . . . shall be guilty of an offence of the like degree . . . and on conviction thereof shall be liable to the same punishment as if he himself had forged the document . . .

"(2) A person utters a forged document . . . who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document . . . uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence, or puts off the said forged document . . ."

By s. 4 of the Act: "(1) Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour and punishable with imprisonment . . .

"(2) Forgery of any public document . . . if committed with intent to defraud or deceive, shall be a misdemeanour and punishable with imprisonment . . .".

Whether prisoner entitled to bail before certificate granted—"Appellant" —Criminal Appeal Act, 1907 (7 *Edw.* 7 *c.* 23), *s.* 14 (2), *s.* 21.

Where the Court of Criminal Appeal has dismissed an appeal against conviction and the prisoner has applied for the certificate of the Attorney-General authorising an appeal to the House of Lords under s. 1 (6) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal has jurisdiction, under s. 14 (2)* of the Act, to grant bail to the prisoner while the grant of the certificate is under consideration, because the prisoner is an "appellant" within the meaning of s. 14 (2), as he is "a person who has been convicted and desires to appeal under this Act" within the definition in s. 21 of the Act.

[As to an application for bail by an appellant, see 10 HALSBURY'S LAWS (3rd Edn.) 526, para. 967.

For the Criminal Appeal Act, 1907, s. 14 (2) and s. 21, see 5 HALSBURY'S STATUTES (2nd Edn.) 934, 939.]

Cases referred to:

London & Globe Finance Corpn., Ltd., Re, [1903] 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 15 Digest (Repl.) 1115, *11,078.*

R. v. *Bassey,* (1931), 22 Cr. App. Rep. 160; 14 Digest (Repl.) 129, *911.*

R. v. *Hodgson,* (1856), Dears. & B. 3; 25 L.J.M.C. 78; 27 L.T.O.S. 144; 20 J.P. 309; 15 Digest (Repl.) 1239, *12,681.*

R. v. *Owen,* [1956] 3 All E.R. 432; [1957] 1 Q.B. 174; 120 J.P. 553; 41 Cr. App. Rep. 11; [1956] 3 W.L.R. 739; *affd.,* H.L., sub nom. *Board of Trade* v. *Owen,* [1957] 1 All E.R. 411; [1957] A.C. 602; 121 J.P. 177; 41 Cr. App. Rep. 11; [1957] 2 W.L.R. 351; 3rd Digest Supp.

R. v. *Potter,* [1958] 2 All E.R. 51; 122 J.P. 234; 42 Cr. App. Rep. 168; [1958] 1 W.L.R. 638; 3rd Digest Supp.

R. v. *Thompson,* (1917), 12 Cr. App. Rep. 278; *subsequent proceedings,* sub nom. *Thompson* v. *R.,* [1918] A.C. 221; sub nom. *Thompson* v. *Public Prosecutions Director,* 87 L.J.K.B. 478; 118 L.T. 418; 82 J.P. 145; 13 Cr. App. Rep. 61; 14 Digest (Repl.) 180, *1461.*

R. v. *Toshack,* (1849), 1 Den. 492; T. & M. 207; 13 J.P. 794; 4 Cox, C.C. 38; 15 Digest (Repl.) 1252, *12,848.*

See also cases referred to in footnote†, infra.

Appeal.

The appellant, Robert John Welham, and two other men (Kenneth Frank Prater and Philip Goodman) were charged at the Central Criminal Court, on Dec. 11, 1958, before the Common Serjeant and a jury, on an indictment containing six counts against all of them. Count 1 charged them with conspiring together between Jan. 1, 1956, and July 1, 1957, to cheat and defraud Consortium Finance, Ltd. and Masterton Finance & Trading Services, Ltd. of their moneys by false representations as to the nature and value of goods forming the subject of hire-purchase and credit-sale agreements, by putting forward forged hire-purchase and credit-sale agreement forms and other forged documents and by other fraudulent means. Count 2 charged them with uttering on Jan. 16, 1957, with intent to defraud, a forged hire-purchase proposal form and hire-purchase agreement, purporting to be signed by J. Murray, knowing the same to be forged. Count 3 charged them with uttering on Mar. 2, 1957, with intent to defraud, five credit-sale agreements, purporting to be signed by R. A. Wolf, knowing the same to be forged. The documents to which counts 2 and 3 referred had been signed by the appellant as a witness. Counts 4, 5 and 6 related to uttering forged documents on other dates. On Dec. 19, 1958, the appellant was acquitted on counts 1, 4, 5 and 6, and was convicted on counts 2 and 3. He was sentenced to nine months' imprisonment on each count, the sentences to run concurrently. He now appealed against conviction on the grounds (i) that there had been misdirection as to the law and/or facts, and (ii) that the question whether the appellant uttered the documents with intent to defraud or whether he had no such intention should have been left to the jury.

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* The terms of the subsection are printed at p. 267, letter F, post.

† Counsel also referred to the following cases: *R.* v. *Marcus,* (1846), 2 Car. & Kir. 356; 175 E.R. 147; 15 Digest (Repl.) 1238, *12,679*: *R.* v. *Hoatson,* (1847), 2 Car. & Kir. 777; 175 E.R. 326; 15 Digest (Repl.) 1241, *12,702*: *R.* v. *Moah,* (1858), Dears. & B. 550 (169 E.R. 1116); 27 L.J.M.C. 204; 31 L.T.O.S. 121; 22 J.P. 273; 7 Cox, C.C. 503; 15 Digest (Repl.) 1252, *12,850*: *R.* v. *Newton & Bennett,* (1913), 109 L.T. 747; sub nom. *R.* v. *Bennett, R.* v. *Newton,* 9 Cr. App. Rep. 146; 15 Digest (Repl.) 1192, *12,094*: *R.* v. *Kritz,* [1949] 2 All E.R. 406; [1950] 1 K.B. 82; [1949] L.J.R. 1535; 113 J.P. 449; 33 Cr. App. Rep. 169; 14 Digest (Repl.) 652, *6633*: *Kat* v. *Diment,* [1950] 2 All E.R. 657; [1951] 1 K.B. 34; 114 J.P. 472; 2nd Digest Supp.: *R.* v. *Wines,* [1953] 2 All E.R. 1497; 118 J.P. 49; 37 Cr. App. Rep. 197; [1954] 1 W.L.R. 64; 15 Digest (Repl.) 1117, *11,088.*

C. W. G. Ross-Munro for the appellant.

The Solicitor-General (*Sir Jocelyn Simon, Q.C.*), *J. H. Buzzard* and *M. D. L. Worsley* for the Crown.

Cur. adv. vult.

Dec. 21. **HILBERY, J.,** read the following judgment of the court: The judgment which I am about to deliver is the judgment in the case of Robert John Welham which was heard before a court of five judges on Wednesday, Dec. 16, 1959.

The appellant was at all material times the sales manager of a company known as Motors (Brighton), Ltd., which carried on business in Brighton in motor lorries. One Prater was a director and the secretary of the company. Prater was also a director and the secretary of a company known as Pacca, Ltd., which carried on business in London in furniture. One Goodman was also a director of Pacca, Ltd. In connexion with the business of Pacca, Ltd., Prater had dealings with two hire-purchase finance companies, Consortium Finance, Ltd., and Masterton Finance & Trading Services, Ltd. (hereinafter called the "finance companies"). Between May, 1956, and July, 1957, the finance companies advanced very large sums of money to the Brighton company and the London company on hire-purchase agreements and credit-sales agreements which had been witnessed by either the appellant or Goodman and which, it is said, were forgeries.

The appellant, Prater and Goodman were all tried at the Central Criminal Court before the Common Serjeant on an indictment containing six counts charging conspiracy to defraud the finance companies and also with uttering forged documents with intent to defraud. Goodman pleaded guilty to count 1, the conspiracy charge, and to counts 5 and 6, charging him with uttering false documents with intent to defraud on which Pacca, Ltd. had obtained advances. Prater was found guilty on all counts, and the appellant, though acquitted on count 1, was found guilty on counts 2 and 3 charging him with uttering forged documents with intent to defraud on which Motors (Brighton), Ltd. had obtained advances. There was no evidence against him on counts 4, 5 and 6, and the jury were directed to and did acquit him on those counts. It is against his conviction on counts 2 and 3 that he has appealed by leave of the court.

His defence was that there was no intent to defraud the finance companies. He said that Prater had told him that the finance companies had money lying idle which they were anxious to lend; that they could not do so because of the current credit restrictions; but that they were prepared to do so if they could have documents which would make it appear to anyone inspecting their records that they were advancing money in the way of their business as finance companies. Prater, he said, had informed him that this was further necessary because under their memorandum and articles the finance companies could not act as money-lenders. The appellant said that he believed Prater and, accordingly, that he had no intention to defraud the finance companies but was merely uttering forged documents in order, as it was said, to pull wool over the eyes of anyone

A who might inspect the records of the companies in order to see that the credit restrictions were being observed. The Common Serjeant thereupon properly directed the jury that, if they thought that the appellant's story might well be true, they should acquit him on count 1, since the conspiracy alleged was a conspiracy to defraud the finance companies and no one else. The jury, as already indicated, apparently took this view, and acquitted the appellant on B count 1.

The Common Serjeant went on to say to the jury that the matter did not end there, since under counts 2 and 3 it was not necessary to allege an intent to defraud any particular person and they did not do so. He directed the jury that, if they were satisfied that the appellant knew that the documents, the subject of these counts, were false, then on his own story he was guilty of the offences C alleged in those counts. Thus, in his summing-up, he said:

> "It is not incumbent on the prosecution in these two counts, as it is in the case of the first count, to prove an intent to defraud any particular person, and, therefore, if the prosecution have succeeded in proving against [the appellant] that he was a party to putting forward documents which he knew to be forged, and he put them forward with the dishonest intention, as he D himself said, of defrauding the Capital Issues Committee, well, then, he would be guilty on these two counts."

Again, a little later in his summing-up, he said:

> "They have got to prove an intent to defraud, and [the appellant's] own case is that the intention here in respect of these bogus documents was to E defraud the Capital Issues Committee by deceiving them in not preventing something which it was their duty in law to prevent, namely, the advancing of large sums of money over a certain limit which was provided by law at the time."

Finally, after the jury had retired and had returned into court to put a question, the Common Serjeant gave them a further direction to the same effect. F

It is true that the appellant's story was that he thought he was being a party to deceiving the Capital Issues Committee whereas the person who might inspect the companies' books would be an inspector of the Board of Trade, but, provided that there was an intent to defraud someone, it matters not who would be defrauded. It was in these circumstances that the jury returned a verdict of G guilty on counts 2 and 3, and the sole question in this appeal is whether the Common Serjeant's direction was right in law in saying that the appellant's story amounted to an admission of an intent to defraud. If it amounted merely to an intention to deceive, then, since the offences charged were offences of uttering forged documents and an essential ingredient of the offences against the Forgery Act, 1913, was an intent to defraud (1), the direction was wrong.

H The classic definition of intent to defraud is that laid down by BUCKLEY, J., in *Re London & Globe Finance Corpn., Ltd.* (2), where he said:

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive I is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

That passage has been quoted and approved many times by this court. No doubt the last sentence, beginning with the words "more tersely put", must be read with reference to what has gone before and was not intended to enlarge the definition. The course of action induced by deceit must clearly be a course of action which involves some real deprivation or injury. But it is said here that the true definition, and that intended to be laid down by this passage, ends with the words: "To defraud is to deprive by deceit". It is said that the essential element in an intent to defraud is an intent to deprive the person deceived of something of value, whether money or a chattel, and thus the causing of some economic loss. This view is well stated by the editor of Russell on Crime (11th Edn.) (1958), Vol. 2, at pp. 1428-1430, and is adopted by Professor Glanville Williams in his Criminal Law at pp. 76, 77.

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(1) The counts alleged intent to defraud; see counts 2 and 3, pp. 261, 262, ante. The meaning of uttering a forged document is stated in s. 6 (2) of the Forgery Act, 1913, which is set out in the footnote at p. 260, ante, and the necessary intents are either of the intents necessary to constitute the offence of forging, the relevant intent here being the intent to defraud required by s. 4 (1).

(2) [1903] 1 Ch. at p. 732.

We have, however, come to the conclusion that this is too narrow a view. While, no doubt, in most cases of an intention to defraud the intention is to cause an economic loss, there is no reason to introduce any such limitation. Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived. Moreover, to hold otherwise would, we think, involve holding that at least one case, *R.* v. *Bassey* (3) was wrongly decided and that the observations of Lord Tucker in his speech in the House of Lords in *Board of Trade* v. *Owen* (4) were misconceived. Thus in *R.* v. *Bassey* (3) the appellant had produced false documents to the Benchers of the Inner Temple in order to obtain his admission as a student to the Inn. It was argued that, at most, he intended to deceive and that the Benchers by admitting him were not being deprived of anything. Swift, J., however, in giving the judgment of the court, said (5):

> "In this case there was, in the opinion of this court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right, but also their duty, to exclude."

There was thus no question of the Benchers being deprived of anything which involved economic loss and, if the present appellant's argument is right, that case was wrongly decided.

In *R.* v. *Owen* (6) the point decided was that no indictment for conspiracy to obtain a lawful result by unlawful means would lie in England, where the unlawful means and the ultimate object were both outside the jurisdiction. Count 3, however, charged the defendants with conspiracy to defraud a government department in Germany by causing that department to grant export licences. In dealing with that matter Lord Goddard, C.J., in this court, after referring to the definition given by Buckley, J. (7), said (8):

> "It may well be doubted whether a government department can be said to act to its injury merely by issuing a certificate which it would not have granted had the true facts been known. Certainly it has not been deprived of anything. It is, however, unnecessary to decide this point because of the view the court has formed on the main question raised by the certificate of appeal granted by the learned judge."

On appeal, however, to the House of Lords, *R.* v. *Bassey* (3) was relied on in argument (9), and Lord Tucker said (10):

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(3) (1931), 22 Cr. App. Rep. 160. (4) [1957] 1 All E.R. 411; 41 Cr. App. Rep. 11.
(5) (1931), 22 Cr. App. Rep. at p. 162.
(6) [1956] 3 All E.R. 432; 41 Cr. App. Rep. 11.
(7) In *Re London & Globe Finance Corpn., Ltd.*, [1903] 1 Ch. at p. 732.
(8) [1956] 3 All E.R. at p. 434; 41 Cr. App. Rep. at p. 15.
(9) [1957] A.C. at p. 609; 41 Cr. App. Rep. at p. 29.
(10) [1957] 1 All E.R. at p. 414; 41 Cr. App. Rep. at p. 40.

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> "If, however, a conspiracy of this nature is aptly included in the wide category of conspiracies known as conspiracies to cheat and defraud and if it is necessary to aver and prove that the acts designed to be done or the object to be achieved will result in some person acting to his detriment, I feel little doubt that a government department so acts if it issues a licence which enables something to be done which the department is charged with
B the duty to prevent."

Both by his reasoning and by the very words he used, LORD TUCKER in that passage is, we think, clearly giving tacit approval to the decision in *R.* v. *Bassey* (11). It is true that this passage in LORD TUCKER's speech can be said to be obiter, but it is to be observed that all their Lordships were content to approve what he said without qualification. It has been urged that LORD TUCKER's
C observations can be justified on the ground that in that case the person deceived was induced to part with something, namely, the piece of paper by which the licence was granted and that that licence was, at any rate in the hands of the deceiver, of economic value. Not only, however, was that not the ground on which LORD TUCKER made his observations, but it would, in our opinion, have been a highly artificial ground. It would have been absurd if a different con-
D clusion were necessitated had the licence granted been an oral licence.

Reference may also be made to *R.* v. *Potter* (12), a decision of PAULL, J., on assize. False documents had in that case been put forward with the intention of inducing a county council to issue a driving licence. The learned judge said (13):

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> "It was to induce the county council to take a course of action which they would not otherwise have taken and which it was not only their right but their duty not to take if they had known the true facts."

It is true that he went on to say that the intent to defraud could be justified on another ground, namely, an intention to cause the county council to part with a chattel, that is, the piece of paper on which the licence was printed, but in our
F judgment the first ground given by him was the correct one.

It is further to be observed that in the earlier editions of the text-books no suggestion is to be found of the need for an economic loss. Thus, there is no suggestion of this in the earlier editions of RUSSELL ON CRIME. In KENNY'S OUTLINES OF CRIMINAL LAW (13th Edn.) (1929), the last edition by that author, it is specifically stated at p. 263 that pecuniary detriment is unnecessary. To the
G same effect is the 15th Edition (1936) by MR. GODFREY PHILLIPS at p. 303. It is further to be observed that in STEPHEN'S HISTORY OF THE CRIMINAL LAW OF ENGLAND, Vol. 2, at p. 121, the following definition is given:

> "I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the
H definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy."

I There is no suggestion there that the injury must take the form of an economic loss. Moreover, as there stated, "a risk of possible injury" is enough.

This view is further supported by a reference to the old cases decided before forgery was made a statutory offence, since at common law forgery was the making of a false document with intent to defraud. Thus, in *R.* v. *Toshack* (14), the Court of Criminal Appeal decided that counts alleging that the defendant had uttered forged documents with intent to induce the Corporation of the Trinity House to issue to him a master's certificate were good counts for forgery at common law. It is true that the indictment set out that the pieces of paper on which certificates were granted were of the value of one penny each, but ALDERSON, B., in delivering the judgment of the court, did not proceed on that basis but proceeded on the following ground (15):

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(11) (1931), 22 Cr. App. Rep. 160.
(12) [1958] 2 All E.R. 51; 42 Cr. App. Rep. 168.
(13) [1958] 2 All E.R. at p. 55; 42 Cr. App. Rep. at p. 174.
(14) (1849), 4 Cox, C.C. 38.

> "It is a very important public duty which the Trinity House have to discharge, important to owners of property of this description, and important to the lives of those entrusted to their care; and if insufficient seamen or persons otherwise than of good character and conduct are appointed, the unfortunate subordinates of the ship are often subjected to harsh and improper treatment."

It is further to be observed that ERLE, J., in *R.* v. *Hodgson* (16), read the judgment of ALDERSON, B., in the same way. Thus, in reference to *R.* v. *Toshack* (17), he said (18):

> "This seems very analogous to forging the certificate in that case. The prisoner used the diploma in his endeavours to get appointed to the poor house. If an incompetent man were appointed to such a situation, in consequence of his appearing to have this qualification, a large class of persons might suffer. I do not see any great distinction between the danger of loss of life at sea through the employment of an incompetent pilot, and the danger of loss of life on land through the employment of an incompetent surgeon."

Perhaps the strongest argument in favour of the view that the intention must be an intention to cause some economic loss is that otherwise there is for practical purposes little distinction between an intent to defraud and an intent to deceive. Yet the Forgery Act, 1913, in sub-s. (1) and sub-s. (2) of s. 4, clearly draws such a distinction. While, however, there may be in practice few occasions when a false document is not uttered with intent to defraud, there may well be cases in which the only intent is an intent to deceive. *R.* v. *Hodgson* (16) is a good example of that. In that case the defendant had forged a diploma of the College of Surgeons and hung it up in his sitting-room. At the time when he did so he had no intent to cause anyone to act on it, but only the intent to induce those that might come to his room to believe that it was genuine. In those circumstances it was held that there was no intent to defraud and, accordingly, the conviction for forgery was quashed.

Turning now to the facts of the present case, the admitted intent of the appellant was by deceit to induce such person as was charged with the duty of seeing that the credit restrictions were observed to act in a way in which he would not act if he knew the true facts. This the appellant was doing in order that he might benefit by getting further loans. In the judgment of this court, the appellant was intending by deceit to induce the person deceived to act to his detriment and thus was intending to defraud. Indeed, on the facts of the present case it could be said that the appellant was intending by deceit to deprive the person deceived of the opportunity of exercising a right, namely, a right to prosecute for breach of the credit restrictions, thus depriving the community of the protection afforded by them. Accordingly, this appeal is dismissed.

Appeal dismissed.

Dec. 18. Application for bail.

The applicant, whose appeal against conviction had been dismissed by the Court of Criminal Appeal, and who had applied, under the Criminal Appeal Act,

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(15) (1849), 4 Cox, C.C. at p. 41.
(16) (1856), Dears. & B. 3.
(17) (1849), 4 Cox, C.C. 38.
(18) (1856), Dears. & B. at p. 5.

1907, s. 1 (6), for the certificate of the Attorney-General enabling there to be an appeal to the House of Lords now applied for bail while awaiting the decision of the Attorney-General.

C. W. G. Ross-Munro for the applicant.

M. D. L. Worsley for the Crown.

HILBERY, J., delivered the following judgment of the court: Counsel applies for bail on behalf of a prisoner named Robert John Welham (referred to hereinafter as " the applicant "), whose appeal against his conviction came before the full Court of Criminal Appeal on Dec. 16, 1959. At the conclusion of the hearing on that date the court dismissed the appeal stating that it would give its reasons for dismissing the appeal later. Counsel then intimated to the court that the applicant would apply for the fiat of the Attorney-General, and he informs us now that since Dec. 16 the applicant has so applied for leave to take that decision of the Court of Criminal Appeal to the House of Lords (19). In those circumstances counsel asks the court for bail for the applicant, who had been on bail pending the hearing of his appeal in the Court of Criminal Appeal. The court expressed some doubt whether it had jurisdiction to grant bail and, refusing bail for the time being, gave leave to renew the application for bail, and it is such renewed application for bail that counsel makes today.

The question which we have to decide, therefore, is whether this court in those circumstances has jurisdiction to grant bail. There is authority by a decision of this court in *R.* v. *Thompson* (20) that, where a prisoner who has appealed to the Court of Criminal Appeal obtains the fiat, the court has jurisdiction then to grant bail pending the hearing of the appeal by the House of Lords in respect of which the fiat has been granted. But the question which we have to determine is whether, while the application for the fiat is pending, the court has power to grant bail to the prisoner who is making that application for the fiat. Section 14 (2) of the Criminal Appeal Act, 1907, which deals with the admission of appellants to bail, says:

> " The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal."

No difficulty arises in such circumstances as obtained in *R.* v. *Thompson* (20), in applying that subsection, because when the fiat had been granted there clearly was an appeal pending in the House of Lords from the decision of the Court of Criminal Appeal by virtue of or under the Criminal Appeal Act, 1907. The question, therefore, narrows itself in the circumstances of the present case into whether, when an appellant's case in the Court of Criminal Appeal has been dismissed and he expresses a wish to obtain the fiat of the Attorney-General in order that he may appeal to the House of Lords, he is in those circumstances an appellant and has an appeal pending. In those circumstances one must look to see what is the definition of " appellant " given in the Criminal Appeal Act, 1907. In s. 21, which is called the definition section, and which is one of those sections which does not define but says what is to be included in an expression used in the Act, it is stated: " The expression ' appellant ' includes a person who has been convicted and desires to appeal under this Act ". If we were to limit the right of an appellant whose appeal has been dismissed by the Court of Criminal Appeal to obtain bail during the period when he is applying for the fiat and the matter of granting the fiat is under consideration, if we were to say he was not within the definition of a person wishing to appeal so that he becomes an appellant under the Act to whom bail may be granted, we should be limiting the effect of that definition section. We should be saying that in those circumstances he is not an appellant until the fiat has been granted and there is an appeal pending in the House of Lords. That would be treating as an appellant only a person who has an appeal actually in being. It would not be giving full effect to the words of the definition, which goes further than that, and says that a person is an appellant who desires to appeal under the Act. The applicant in this case falls, in our view, within that definition because he is a person desiring to appeal under the Act by virtue of the provisions in the Act which give him a right to apply for the fiat (21), and if he obtains the fiat to have his case carried up to the House of Lords. The situation would, indeed, be strange if we had not this power. A man convicted and sentenced to a short term of imprisonment who was granted bail pending the hearing of his appeal in the Court of Criminal Appeal might, if our decision were otherwise, have to serve possibly the whole of his sentence in prison before the fiat was granted, because, if the court dismissed his appeal and said that it would give its reasons for that dismissal later, the time necessarily spent in preparing those reasons, and the time while the Attorney-General was considering whether to grant his fiat, might mean that the man would have served his whole sentence before the fiat could be granted and his appeal taken to the House of Lords. It would be strange if that were the position whereas, once the right to appeal to the House of Lords were given, the decision in *R.* v. *Thompson* (22) would apply and the court would have jurisdiction to grant bail. In the circumstances, we think that we have the power, and the applicant should be granted bail in the same recognisances as he was under when his appeal to the Court of Criminal Appeal was pending. As a matter of convenience he can enter into those recognisances at Wandsworth Prison; the recognisances can be taken by the governor of the prison in which he is at present detained. Then he must surrender on notice to do so from the prosecution. If the fiat is not granted, he will be sent notice to surrender to this court. He will have to surrender at the time and place designated in the notice given by this court. The sureties will be in the same amount, and if there is any change in the personnel of the sureties they will have to be accepted by the police.

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(19) Under s. 1 (6) of the Criminal Appeal Act, 1907; see 5 HALSBURY'S STATUTES (2nd Edn.) 927.

(20) (1917), 12 Cr. App. Rep. 278.

Application for bail granted.

Solicitors: *Bellamy, Bestford & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(21) See s. 1 (6) of the Act.

(22) (1917), 12 Cr. App. Rep. 278.

SAJAN SINGH *v.* SARDARA ALI.

[PRIVY COUNCIL (Lord Cohen, Lord Denning and Lord Jenkins), October 26, December 16, 1959.]

Detinue—Illegality—Title to motor vehicle acquired by illegal transactions—Whether court will grant relief—" Ex turpi causa non oritur actio."

Privy Council—Malaya—Motor vehicle—Sale of vehicle by illegal transaction—Transfer of property—Whether buyer entitled to return of vehicle or its value—Registration of Motor Vehicles Regulations, 1945 (*of Malaya*), *reg.* 2—*Motor Vehicles Commercial Use Regulations* (*of Malaya*), *reg.* 3 (3), *as amended.*

When two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them transfers property to the other in pursuance of the conspiracy—then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin (see p. 272, letter H, post).

Dictum of PARKE, B., in *Scarfe* v. *Morgan* ((1838), 4 M. & W. at p. 281) applied.

A., who wanted to acquire a lorry but to whom a haulier's permit would not be granted, entered into an arrangement whereby a lorry should be bought by and registered in the name of S., he obtaining a haulier's permit. The lorry was bought by S., was registered in his name and he obtained the permit. It was possessed, used and operated by A. to whom it was ultimately sold, he having paid for it. These transactions were in contravention of reg. 2 of the Registration of Motor Vehicles Regulations, 1945, of Malaya, and reg. 3 of the Motor Vehicles Commercial Use Regulations, of Malaya, as amended, and were in deceit of the responsible authority. After some time S. took possession of the vehicle without A.'s consent and refused to return it to A., denying that it had been sold to him. In an action by A. for a declaration that the lorry was his and for the return of the vehicle or its value, the action being framed in detinue,

Held: although the transaction whereby A. bought the lorry was illegal and the parties might be punished for their parts in it, yet A. acquired title to the lorry notwithstanding that it was not registered in his name; accordingly A. was entitled to relief either in detinue or in trespass, and, as the vehicle had not been returned, was entitled to its value.

Bowmakers, Ltd. v. *Barnet Instruments, Ltd.* ([1944] 2 All E.R. 579) applied.

Appeal dismissed.

[As to actions on contracts involving illegality, see 8 HALSBURY'S LAWS (3rd Edn.) 148-150, para. 257; and for cases on the subject, see 12 DIGEST (Repl.) 310-312, *2390-2402.*]

Cases referred to:

Bishopsgate Motor Finance Corpn., Ltd. v. *Transport Brakes, Ltd.*, [1949] 1 All E.R. 37; [1949] 1 K.B. 322; [1949] L.J.R. 741; 2nd Digest Supp.

Bowmakers, Ltd. v. *Barnet Instruments, Ltd.*, [1944] 2 All E.R. 579; [1945] K.B. 65; 114 L.J.K.B. 41; 172 L.T. 1; 12 Digest (Repl.) 310, *2391.*

Muckleston v. *Brown*, (1801), 6 Ves. 52; 31 E.R. 934; 8 Digest (Repl.) 386, *794.*

Scarfe v. *Morgan*, (1838), 4 M. & W. 270; 7 L.J.Ex. 324; 150 E.R. 1430; 32 Digest 233, *180.*

Appeal.

Appeal by Sajan Singh from an order of the Supreme Court of the Federation of Malaya in the Court of Appeal at Kuala Lumpur (THOMSON, C.J., HILL and BARAKBAH, JJ.), dated Mar. 15, 1957, allowing an appeal by the respondent, Sardara Ali, from an order of the Supreme Court of the Federation of Malaya,

Settlement of Malacca (SMITH, J.), dated Sept. 19, 1956, whereby he dismissed A
the respondent's claim for a declaration that he was the owner of a certain
motor vehicle, for the return of the vehicle or its value, alternatively damages
for its detention, and for damages for loss of profit. The facts are set out in the
judgment of the Board, infra letter H.

R. Millner and *W. R. T. Macaulay* for the appellant.
The respondent did not appear and was not represented. B

LORD DENNING: The respondent, Sardara Ali, is a lorry driver living
at No. 132 Lorong Panjang, Malacca. The appellant, Sajan Singh, is a haulier
living at Bukit Asahan Estate, Malacca. The two of them entered into an illegal
transaction about a lorry. They broke the regulations which governed the
transfer and use of motor vehicles. The question is what are their rights consequent C
on this illegality.

The regulations in question were made soon after the war by the Commissioner
for Road Transport under the powers conferred on him by the Road Transport
Proclamation, dated Oct. 6, 1945: and they were affirmed and continued afterwards
by the Road Transport (Amendment) Ordinance, 1949. They fell into
two groups: (i) The regulations which required vehicles to be *registered* with the D
Registrar of Motor Vehicles; under these regulations, any person who had a
motor vehicle had to register it and give particulars of his title to it. And it
was provided that no person should

> " sell, exchange, part with the possession of, purchase, acquire or take
> possession of any motor vehicle without a permit in writing from the E
> registrar."

(See reg. 2 of the Registration of Motor Vehicles Regulations, dated Oct. 10,
1945.) (ii) The regulations which controlled the *use* of vehicles for the carriage
of goods. Under these regulations, it was provided that no person should " use
a goods vehicle or cause suffer or permit a goods vehicle to be used for the
carriage of goods " unless it was an *authorised vehicle*, that is to say, unless there F
was a haulage permit authorising it to be so used. The regulations said that a
vehicle

> " shall not be deemed to be an authorised vehicle unless it is used by the
> holder of a permit in accordance with the conditions of such permit."

(See reg. 3 (3) of the Motor Vehicles Commercial Use Regulations, as amended G
by the Motor Vehicles Commercial Use (Amendment) Regulations, 1948.)
For some years after the war it was very difficult for a newcomer to get a haulage
permit. The policy of the Road Transport Department at that time was to
grant haulage permits only to those persons to whom they had been granted
before the war.

Their Lordships can now turn to the facts of the case. The respondent, H
Sardara Ali, is a lorry driver. In 1948 he wanted to acquire a lorry and use it
to carry goods on his own account. But he had no chance of getting a haulage
permit as he had never had one before the war. The appellant, Sajan Singh,
was a haulier who had apparently had a haulage permit previously and had
every chance of getting one. So they came to an arrangement whereby the
appellant, Sajan Singh, was to acquire a second-hand lorry and to register it in I
his own name and to get a haulage permit for it in his own name, but all the time
it was intended that it should belong to the respondent, Sardara Ali, and be used
by him on his own account. The transaction was carried out in this way:
In December, 1948, the British Military Disposals Board were offering six second-hand
motor lorries for sale. The appellant, Sajan Singh, bought them in his
own name but the respondent, Sardara Ali, paid $1,500 towards the cost on the
understanding that one of them should belong to him. This vehicle was a
Dodge lorry numbered M.2207. It was registered in the name of the appellant,

Sajan Singh, and the haulage permit was issued in his name. On Aug. 4, 1950, the respondent, Sardara Ali, with a friend, Nihal Singh, paid another $3,500, and the appellant, Sajan Singh, gave the respondent, Sardara Ali, a document in the Punjabi language which, being translated, was as follows:

> " I, Sajan Singh (Malacca) have sold a Dodge lorry No. M.2207 to Nihal Singh and Sardara Ali jointly for $3,500. Both of them can sell this lorry but cannot sell the haulage permit. The haulage permit is to be returned to Sajan Singh. If anyone asks for the lorry after my death he cannot get it. Even if (anyone) takes it by force then (he or she) must pay $3,500. If there is anything concerning the lorry then Nihal Singh and Sardara Ali can represent. Sajan Singh."

In 1953 Nihal Singh sold his share in the lorry to the respondent, Sardara Ali, who was thenceforward the sole person interested on the purchaser's side. He used the lorry as his own. He kept it at his own address, 132 Lorong Panjang, and used that address as his base of operations with it. He received the incomings and, according to his own story (which the trial judge in substance accepted), paid for the petrol and other outgoings. But as the lorry was registered in the name of the appellant, he did it all in the appellant's name. And as the appellant was liable for income tax, insurance, and so forth, the respondent delivered accounts to the appellant showing incomings and outgoings; and the respondent paid to the appellant the amounts due for insurance, taxes, and so forth. In short, the lorry belonged to the respondent but was operated in the name of the appellant.

All this method of operation was quite illegal. Although the respondent used the vehicle as his own, it was registered in the name of the appellant " Sajan Singh, Bukit Asahan Estate, Malacca ". The haulage permit, too, was issued in the appellant's name. It was issued subject to the express condition that " The permit holder shall use the vehicle from a base at Bukit Asahan Estate, Malacca "; and to the condition that " This permit is personal to the permit holder. It may not be transferred or assigned "; and to the further condition that

> " The permit holder shall not suffer or permit any authorised vehicle to be driven by a person who is not a bona fide employee of the permit holder."

It was, therefore, quite illegal for the appellant to permit the respondent, Sardara Ali, to use it at all on his own account. The two of them were, as SMITH, J., said, fellow conspirators engaged in practising a deceit on the public administration of the country. For aught that appears, both were equally guilty.

In 1954 the respondent and the appellant fell out. The appellant said that the lorry belonged to him and that the respondent was only a driver employed by him. The respondent said it was his, and he applied to the Commissioner of Road Transport for a haulage permit in his own name. His solicitors, on Dec. 29, 1954, wrote to the Commissioner of Road Transport and said:

> ". . . what we are asking for is the removal of the present permit holder and the re-issue of the permit in our client's own name."

The appellant promptly took counter-measures. He seized the lorry. In the afternoon of Jan. 26 or 27, 1955, whilst the respondent was absent from his home, the appellant came and took the lorry away. He has always since refused to return it, claiming that it belongs to him. In June, 1955, the Commissioner for Road Transport refused to grant a haulage permit to the respondent. The refusal was in some way connected with government policy about the entry of Malays into the road transport industry. Undeterred by this refusal, the respondent continued to claim the lorry. In November, 1955, he brought these proceedings against the appellant. In his statement of claim, he relied on the document of sale of Aug. 4, 1950, and set it out in full. He said he had paid the appellant $5,000. He further alleged that the vehicle was in his possession until Jan. 27, 1955, when the appellant took it away and had since refused to return it. By his prayer he asked: (i) for a declaration that the respondent was the owner of the authorised vehicle; (ii) for the return of the Dodge motor lorry No. M.2207 as an authorised vehicle, i.e., together with the use of the haulage permit; (iii) in the alternative damages for detinue $5,000; (iv) damages at $400 per month for loss of earnings or profit from Jan. 27, 1955. The appellant in his defence claimed that the lorry belonged to him and that the respondent was employed by him as a driver. He denied having signed the document of sale dated Aug. 4, 1950.

At the trial, the principal issue was whether the document was a forgery or not. A handwriting expert was called. The judge (Smith, J.) held the document was genuine. He said he was satisfied of the truth of the respondent's claim. But he drew attention to the illegality of the transaction. No question of illegality appeared on the pleadings, but in the course of the trial counsel for both parties agreed that the Registrar and Inspector of Motor Vehicles was deceived during the period of the British Military Administration. When the judge came to give judgment he took notice of this illegality and held that there was a "moral estoppel" which prevented the respondent from recovering. It was the duty of the court, he said, when it realised that a litigant was setting up his own fraud to refuse him aid. He said:

> "The principle is 'ex turpi causa non oritur actio' . . . The [respondent] on his own showing was party to a deceit whereby the Registrar of Motor Vehicles issued a haulage permit for lorry M.2207 which he would not have done if he had not been deceived."

The Court of Appeal reversed this decision. Thomson, C.J. (with whom Syed Sheh Barakbah, J., agreed), said that "The action was not in contract. It was an action for trespass to goods". They held that the respondent could recover damages for trespass and that the amount should be the value of the lorry at the time of the trespass, that is to say, in January, 1955, but no damages for loss of profits. Hill, J., would have gone further and given the respondent the declaration he sought and ordered the appellant to return the lorry or pay the value at the time of seizure.

It is not, perhaps, strictly accurate to say that the action was laid in trespass. It was an action for a declaration coupled with a claim in detinue. In order to get a declaration, it was essential for the respondent to show that he was the owner of the lorry and that it was an authorised vehicle. In order to succeed in detinue, it was essential for the respondent to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it: see Bullen & Leake's Precedents of Pleadings (3rd Edn.), p. 312. And in detinue their Lordships think he succeeded. Although the transaction between the respondent and the appellant was illegal, nevertheless it was fully executed and carried out; and on that account it was effective to pass the property in the lorry to the respondent. There are many cases which show that, when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them transfers property to the other in pursuance of the conspiracy—then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin: see *Scarfe* v. *Morgan* (1), per Parke, B. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it—he cannot throw over the transfer. And the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his

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(1) (1838), 4 M. & W. at p. 281.

A own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality—it has no power to do so—so it says, in the words of LORD ELDON, L.C.: " Let the estate lie, where it falls ": see *Muckleston* v. *Brown* (2). This principle was applied by the Court of Appeal recently in *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* (3). The parties to the fraud are, of course, liable to be punished for the part they played in the B illegal transaction, but nevertheless the property passes to the transferee.

Their Lordships do not overlook the fact that the appellant remained registered as the owner of the lorry and that no permission was given for the sale; but this did not prevent the property in it passing to the respondent. The registration book is not in Malaya, any more than it is in England, a document of title. The title passed by the sale and delivery of the lorry to the respondent. The absence C of registration would, no doubt, put the respondent in difficulty if he had to prove his title, but it would not invalidate it: see *Bishopsgate Motor Finance Corpn., Ltd.* v. *Transport Brakes, Ltd.* (4).

In this case, on the facts pleaded and the findings of the trial judge, the respondent had a clear cause of action. He had actual possession of the lorry at the moment when the appellant seized it. Despite the illegality of the con- D tract, the property had passed to him by the sale and delivery of the lorry: compare *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.* (5) referred to above. When he commenced this action, he had the right to immediate possession. Their Lordships think that, in these circumstances, he had a claim in detinue. But he had also, as the Court of Appeal has found, a clear claim in trespass. Trespass was not in terms pleaded, but the facts were pleaded. And, on the E facts, the respondent was entitled to rely on his possession. The Court of Appeal did not actually direct amendment of the pleadings, but it is clear from their judgment that, had they been asked to do so, they could have done so. Their Lordships think that, on the facts pleaded, they were fully justified in reversing the decision of the trial judge. The respondent would have been entitled to an order for the return of the vehicle or its value. As it had not been returned, he F was clearly entitled to its value. That is the order made by the Court of Appeal, and their Lordships agree with it. Their Lordships would only add this: if the law were not to allow the respondent to recover in this case, it would leave the appellant in possession of both the lorry and the money he received for it. Their Lordships are glad to have been able to reach the conclusion that, on the facts of the present case, this is not the law.

Their Lordships will, therefore, report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(2) (1801), 6 Ves. at p. 69.
(3) [1944] 2 All E.R. at p. 582; [1945] K.B. at p. 70.
(4) [1949] 1 All E.R. at p. 46; [1949] 1 K.B. at p. 338.
(5) [1944] 2 All E.R. 579; [1945] K.B. 65.

BEETHAM AND ANOTHER *v.* TRINIDAD CEMENT, LTD.

[PRIVY COUNCIL (Lord Denning, Lord Jenkins and Mr. L. M. D. de Silva), November 11, 12, December 16, 1959.]

Privy Council—Trinidad and Tobago—Master and servant—Trade dispute—Board of inquiry—Jurisdiction—" Trade dispute "—Dismissal of workmen by employers—Non-recognition of union by employers—Power of governor to appoint board of inquiry—Trade Disputes (Arbitration and Inquiry) Ordinance (Laws of Trinidad and Tobago, 1950 (c. 22 *No.* 10)), *s.* 2 (1), *s.* 8 (1).

Trade Union—Trade dispute—Recognition—Claim by union for recognition—Claim made after refusal of company to negotiate over dismissal of employees—Whether trade dispute—Trade Disputes (Arbitration and Inquiry) Ordinance (Laws of Trinidad and Tobago, 1950 (c. 22 *No.* 10)), *s.* 2 (1).

The respondent company employed from three hundred to five hundred men at their factory in Trinidad, of whom between one hundred and two hundred had formed themselves into a branch of the Federated Workers' Trade Union. In October, 1955, the company dismissed a workman who was a member of the union, and about a month later dismissed another workman who was also a member. The company ignored the union's attempts to discuss these two cases, as it also did the Commissioner of Labour's attempts, on the ground that it did not recognise the union. The company later refused to discuss the matter with the Minister for Labour. In March, 1956, the union, through its executive committee, claimed general recognition by the company (i.e., status to bargain on behalf of all employees in the factory), but the company ignored the claim, and refused to adopt a suggestion by the Commissioner of Labour as to the checking of the union's membership to confirm their claim for recognition. On Apr. 16, 1956, the Commissioner of Labour reported to the Governor of Trinidad and Tobago, who, on the same day, appointed a board of inquiry under the Trade Disputes (Arbitration and Inquiry) Ordinance, s. 8 (1)*, to inquire into the trade dispute between the company and the union. By s. 2 (1) of the ordinance, " trade dispute " meant any dispute or difference between employers and workmen connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person. The company objected to the appointment, on the ground that there was no trade dispute to be inquired into, and claimed a declaration that the governor's appointment was ultra vires and, therefore, null and void.

Held: the governor's appointment was valid, because—

(i) there was a " difference " between the union and the company at the time of the appointment, viz., the union had claimed bargaining status and the company refused to recognise the union, and

(ii) it was within the scope of the authority of the executive committee of the union to put forward on its own initiative a claim to bargaining status, and, accordingly, the union in so doing was acting on behalf of its members and, therefore, a trade dispute within the meaning of s. 2 (1) of the ordinance existed at the date of the governor's appointment.

Dictum of LORD WRIGHT in *National Assocn. of Local Government Officers* v. *Bolton Corpn.* ([1942] 2 All E.R. at p. 435) applied.

Appeal allowed.

[As to the meaning of " trade dispute ", see 32 HALSBURY'S LAWS (2nd Edn.) 526-528, paras. 826, 827; and for cases on the subject, see 43 DIGEST 120-122, *1237-1246*.]

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* The terms of s. 8 (1) are set out at p. 275, letter I, post.

Cases referred to:

Anderson v. *Thornton*, (1853), 8 Exch. 425; 20 L.T.O.S. 250; 155 E.R. 1415; 29 Digest 51, *151*.

Local Government Board v. *Arlidge*, [1915] A.C. 120; 42 Digest 783, *2128*.

R. v. *Industrial Disputes Tribunal, Ex p. American Express Co., Inc.*, (July 23, 1954), "The Times" newspaper; reported on another point, [1954] 2 All E.R. 764, n.; 3rd Digest Supp.

R. v. *Industrial Disputes Tribunal, Ex p. Courage & Co., Ltd.*, [1956] 3 All E.R. 411; [1956] 1 W.L.R. 1062; 3rd Digest Supp.

R. v. *National Arbitration Tribunal, Ex p. Bolton Corpn.*, [1941] 2 All E.R. 800; [1941] 2 K.B. 405; *revsd.* H.L. sub nom. *National Assocn. of Local Government Officers* v. *Bolton Corpn.*, [1942] 2 All E.R. 425; [1943] A.C. 166; 111 L.J.K.B. 674; 167 L.T. 312; 106 J.P. 255; 2nd Digest Supp.

R. v. *National Arbitration Tribunal, Ex p. Keable Press, Ltd.*, [1943] 2 All E.R. 633; 2nd Digest Supp.

Appeal.

Appeal by Sir Edward Betham Beetham, K.C.M.G., C.V.O., O.B.E., Governor and Commander in Chief in and over the Colony of Trinidad and Tobago, and Bernard Benjamin Gillis, Q.C., from an order of the Supreme Court of Trinidad and Tobago (ARCHER, J.), dated Nov. 14, 1957, whereby a declaration was granted to the respondents, Trinidad Cement, Ltd., that the appointment by the first appellant in purported exercise of the powers conferred on him by the Trade Disputes (Arbitration and Inquiry) Ordinance, s. 8, of the second appellant to be a board of inquiry, as set out in a minute of appointment dated Apr. 16, 1956, was null and void. The facts are set out in the judgment of the Board.

Sir Lionel Heald, Q.C., and *J. G. Le Quesne* for the appellants.

R. W. Goff, Q.C., and *Raymond Walton* for the respondents.

LORD DENNING: On Apr. 16, 1956, the Governor of Trinidad appointed a Board of Inquiry. It consisted of Mr. Bernard Gillis, Q.C., sitting alone. His duty was to inquire into a trade dispute which was said to exist in the island between a company called Trinidad Cement, Ltd. and certain of its workmen. On the next day, Apr. 17, 1956, Mr. Gillis sat to hold the inquiry, but the company at once objected to it. It said there was no trade dispute for him to inquire into. Mr. Gillis thereupon adjourned the hearing so as to enable the company to challenge the validity of the governor's action. On May 25, 1956, the company issued a writ in the Supreme Court of the colony claiming that the appointment by the governor of the board of inquiry was ultra vires and, therefore, null and void. The case was tried before ARCHER, J., who, on Nov. 14, 1957, made an order declaring the appointment null and void. The governor appeals from his decision to Her Majesty in Council.

In making the appointment, the governor purported to act under an ordinance called the Trade Disputes (Arbitration and Inquiry) Ordinance, which says, in s. 8 (1), that:

> "Where any trade dispute exists or is apprehended the governor may, whether or not the dispute is reported to him under this ordinance, inquire into the causes and circumstances of the dispute, and, if he thinks fit, refer any matters appearing to him to be connected with or relevant to the dispute to a board of inquiry (hereinafter referred to as the board) appointed by him for the purpose of such reference, and the board shall inquire into the matters referred to it and report thereon to the governor."

Section 8 (3) says that the board may, if the governor thinks fit, consist of one person appointed by the governor. The phrase "trade dispute" is defined by s. 2 (1) in these terms:

> "'Trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen, connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person."

Their Lordships observe that the ordinance follows the pattern of the legislation in the United Kingdom and uses the self-same words: see s. 4 (1) of the Industrial Courts Act, 1919, and the definition of "trade dispute" in s. 5 (3) of the Trade Disputes Act, 1906. Their Lordships also observe that, although the ordinance gives the governor power to act, not only when a trade dispute *exists*, but also when it *is apprehended*, nevertheless in the present case the governor was content to assert, as the basis of his jurisdiction, that a trade dispute *existed*. The minute of appointment, after reciting the ordinance, went on to say:

> "And Whereas *a dispute exists* between Trinidad Cement, Ltd. and certain of its workmen, members of the Federated Workers' Trade Union.
>
> "Now therefore the governor by virtue of the powers vested in him by the said ordinance and of all other powers enabling him in that behalf, appoints Mr. Bernard B. Gillis, M.A. (Cantab.), one of Her Majesty's Counsel, to constitute a board of inquiry.
>
> "And the governor directs that the terms of reference to the board shall be as follows:—(a) To inquire into and report on the causes and circumstances of the said dispute; (b) To inquire into and report on the likely effect (if any) of the said dispute . . . upon industrial relations between employers and employed in the colony generally . . ."

Their Lordships draw attention to the fact that the governor, in the minute of appointment, did not define the dispute. He did not say what it was. He left it to be gathered by those concerned from the facts known to them. To these facts, therefore, their Lordships now turn.

Trinidad Cement, Ltd. (which their Lordships will call "the company") had a factory at Claxton Bay where they employed from three hundred to five hundred men. The Federated Workers' Trade Union (which their Lordships will call "the union") sought to get the workers at the factory to join the union and succeeded in getting a hundred or two hundred to do so. These formed a branch of their own within the union. On Oct. 15, 1955, the company dismissed a workman called Clifford Bobb, who was a member of the union. The union took up his case and wrote to the company asking "for an early interview along with Mr. Bobb and his witnesses so that an amicable settlement can be reached". The company did not reply. The union wrote again to the company. This letter too was ignored. The union thereupon wrote to the Commissioner of Labour in the island and asked him if he could arrange a meeting with both parties under his chairmanship "to go into this most important matter". As it happened, just about this time in November, 1955, the company dismissed another workman called Edmund Simon, who was also a member of the union. So the union took up his case too. They asked the Commissioner of Labour if he could arrange for his case to be discussed at the same time as that of Mr. Bobb. The Commissioner of Labour was willing to do as he was asked. He tried to arrange a meeting between both parties; but he failed because of the attitude taken up by the company. The commissioner's representative went to see the company's works manager on Nov. 29, 1955. He was told quite bluntly that the company

> "do not recognise the union and are therefore not prepared to accede to the union's request for a meeting to discuss the dismissal of Clifford Bobb or Edmund Simon."

The works manager said that the company had its own machinery by way of a works committee for dealing with the grievances of workmen; and it was not willing to meet the union to discuss the dismissals. On Jan. 7, 1956, the matter reached a higher level. The commissioner having failed to arrange a meeting, the Minister for Labour himself intervened. He asked the company to come and see him. At this meeting he told the company's representative that the company's refusal to meet the union was a source of embarrassment to the government; and that, if the company persisted in its attitude, be would have to consider reporting the matter to the executive council with a view to having an inquiry instituted. Even this had no effect on the company. On Jan. 9, 1956, the works manager wrote to the Minister saying: " We are quite unable to discuss the matters referred to any further ". On Mar. 15, 1956, the men at the factory, who were members of the union, held a branch meeting. They thought that the inquiry to deal with Bobb and Simon matters was too long delayed. A resolution was passed unanimously recommending that the head office of the union should write to the government to have the matter expedited. The men at this meeting were concerned about the delay with the Bobb and Simon matters and nothing else.

Thus far their Lordships consider that there were two matters in dispute: the first was whether or not the dismissals of Bobb and Simon were justified; but this had merged into the second, which was whether the union had any locus standi to take up such matters with the company. The company refused to recognise the union as being authorised to act on behalf of its members (like Bobb and Simon) who had individual grievances; and the union took strong exception to this refusal.

On Mar. 26, 1956, the union staked out its claim to recognition by the company. The union claimed not merely " limited recognition " but " general recognition". This needs a little explanation. If the members of a union are in a minority in a factory, the union may well claim to represent its own members in cases of individual grievances, but it cannot claim to bargain on behalf of all the workmen in the factory. In such a case, the employers may afford the union " limited recognition ", that is, recognition limited to individual grievances. But if the members of a union are in a majority, then the union may claim to make representations on behalf of everyone—whether members of the union or not—and may claim full bargaining rights on general questions of wages and working conditions. In such a case, the employers may afford the union " general recognition ". The claim which the union made on Mar. 26 was not merely for limited recognition (which would cover the Bobb and Simon cases) but for general recognition as a majority union. On that day, the general secretary wrote to the company:

> " I am directed by the executive committee of the above-named union to inform you that the union now represents a substantial majority of your employees and is applying for bargaining status for the manual workers of your company."

In addition, he asked for the membership to be checked to confirm the claim. (It should be noticed that the general secretary brought this letter to the attention of the branch. He sent a copy to the secretary of the branch at the same time as he sent the original to the company.) The company did not reply to this letter. It ignored it as it had done the earlier letters. So the union took the matter up again with the Commissioner of Labour. And he again did his best. He wrote to the company asking whether they were agreeable to the membership being checked. The reply of the company was short and to the point. It was dated Apr. 14, 1956, and addressed to the commissioner:

> " As we have no intention of becoming involved in any way with the union concerned, we do not feel that any useful purpose would be served by adopting the suggestion contained in your letter."

Apr. 14, 1956, was a Saturday. The letter was received (as the judge finds) by the Commissioner of Labour on Apr. 16, 1956. He did not wait to tell the trade union about it. He seems to have reported it straightway to the governor who, on the self-same day, appointed Mr. Gillis, Q.C., to hold an inquiry. The inquiry, A as their Lordships have already pointed out, proved abortive because the validity of it was challenged by the company.

From that time forward the branch of the union at Claxton Bay disintegrated rapidly. The men said: "If we cannot get any result from these two cases, what is the use of belonging to the union." By the end of August or September, 1956, not a single member was paying his subscriptions. The branch died and B with it all the disputes, whatever they were, petered out. No longer were the dismissals a live issue. No longer could the union claim limited or general recognition at Claxton Bay, for it had no members there whom it could represent. No issue was left between the union and the company. But serious issues remain between the company and the Governor of Trinidad; because the company has successfully challenged his authority in the courts and he appeals to Her Majesty C in Council so as to know whether his action was lawful or not.

The principal question is this: Did a trade dispute exist on Apr. 16, 1956? The governor did not give any particulars of the dispute in the order which he made on that day. But he did in the pleadings in the action. The dispute, he said, was this:

> "Whether workmen, being hourly paid employees in the employment of D the [respondent] company . . . should be permitted to have as their bargaining agent, or otherwise to be represented by, the Federated Workers (or any other) Trade Union . . ."

That pleading was so comprehensive that the dispute might be said to be the wide question whether the company ought to permit its workmen to be repre- E sented by any trade union at all. No dispute of that width was ever proved. As the trial judge said:

> "Non-recognition of trade unions was something that neither of the parties had fought about and it had been brought into the arena by the Minister without their knowledge or consent."

But the governor is not to be tied down by the wide words of the pleading. It F is a well-established rule of pleading that any words in an averment can be treated as surplusage and struck out provided that, after they have been struck out, that which is left is sufficient to maintain the claim or defence, as the case may be: see *Anderson* v. *Thornton* (1). The governor is, therefore, entitled under this pleading to contend that, even though there was no dispute on the wide question, nevertheless there was a dispute (i) G

> "Whether workmen . . . in the employment of the [respondent] company . . . should be permitted . . . to be represented by, the Federated Workers . . . Trade Union";

or alternatively (ii) there was a dispute

> "Whether workmen . . . in the employment of the [respondent] company H . . . should be permitted to have as their bargaining agent . . . the Federated Workers . . . Trade Union."

As to the first of these alternatives, their Lordships are clearly of opinion that, following on the dismissals of Bobb and Simon, there was a dispute whether the workmen should be permitted to be represented by the union. The facts are plain enough. The union claimed to represent the two men. The company refused I to recognise the union; and it did so in terms which showed that the company refused to recognise the union as being authorised to act for any men in respect of their individual grievances. The union resented this. So, indeed, did the men themselves, if their attitude at the branch meeting of Mar. 15, 1956, is anything to go by. The only question that can arise about this dispute is whether or not it still existed on Apr. 16, 1956. The judge thought it did not then exist. It had been relegated to the background and had become submerged in the claim of the union for bargaining status. Their Lordships are prepared to assume that this was the case; but, if so, the second alternative has to be considered: Was there, on Apr. 16, 1956, a dispute whether the workmen should be permitted to have the union as their bargaining agent? The trial judge thought not. His reasoning is to be found in this key passage of his judgment:

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(1) (1853), 8 Exch. 425.

> "The issue which the union was now seeking to raise [by its letter of Mar. 26, 1956] was separate and distinct from the Bobb and Simon issue . . . For the first time the union was asking for collective bargaining status and on the ground that it represented a substantial majority of the company's workmen . . . There had been no ultimatum on either side and the negotiations had not progressed beyond the initial bargaining stage . . . The prime characteristic of a trade dispute is deadlock and the determination on the part of both sides to the dispute to stand firm. A mere difference in point of view cannot by itself constitute a trade dispute and it is necessary that the view on each side should be persisted in to the point of rigidity."

Whilst their Lordships appreciate to the full the great ability and care which the judge brought to bear on the case, they cannot agree with him in this part of it. By definition, a trade dispute exists wherever a "difference" exists; and a difference can exist long before the parties become locked in combat. It is not necessary that they should have come to blows. It is sufficient that they should be sparring for an opening. And it seems to their Lordships that the parties had reached that point here, even in regard to the claim for bargaining status. The union had applied for bargaining status. The company had ignored the request, just as it had ignored previous requests. The union had sought the mediation of the Commissioner of Labour; but when he came forward, the company rejected his approach out of hand, just as it had rejected his previous approach. "We have no intention of becoming involved in any way with the union concerned." When this statement is taken in its setting—with the background of repeated refusal by the company to recognise the union over the two dismissals—the position at Apr. 16, 1956, can be put simply thus:

> "Here is this union knocking at the door of the company asking to be let in to negotiate; and the company time and time again refusing to open it, nay more, keeping it locked and barred against the union."

That was clearly a difference between them which subsisted at that very time.

But then it was said that this was not a difference between the company and *the workmen*, as the ordinance requires, but only a difference between the company and *the union;* and attention was drawn to the statement by BENNETT, J., that a dispute between such bodies is not a trade dispute: see *R.* v. *National Arbitration Tribunal, Ex p. Bolton Corpn.* (2). To this their Lordships think that LORD WRIGHT gave a sufficient answer when that case reached the House of Lords. He said (3):

> "It would be strangely out of date to hold, as was argued, that a trades union cannot act on behalf of its members in a trade dispute, or that a difference between a trade union acting for its members and their employers cannot be a trade dispute."

Accepting this statement, however, it was said that, in this case, the trade union was not acting *for its members*, but for itself. The claim for bargaining status was never authorised or approved, so it was said, by any of the members of the branch at Claxton Bay. It was done by the head office acting on its own initiative. And reliance was placed on observations in some of the cases that, if a trade union acts " on a frolic of its own ", there is not a trade dispute: see *R.* v. *National Arbitration Tribunal, Ex p. Keable Press, Ltd.* (4), *R.* v. *Industrial Disputes Tribunal, Ex p. Courage & Co., Ltd.* (5). Their Lordships cannot accept this argument. The claim was made by the executive committee who were, by the rules, entrusted with the general management of the union; and it was clearly within the scope of their authority to put forward a claim for bargaining status. If the union were able to obtain bargaining status, it would be able to promote the interest of its members far better than if it were unrecognised. Moreover, the claim had been brought to the attention of the branch who may fairly be assumed to have approved of it. The union can, therefore, properly be considered as acting for its members; and in consequence, the difference was one " between employers and workmen ". Their Lordships are glad to find that in England a Divisional Court presided over by LORD GODDARD, C.J., in a somewhat similar case came to a similar conclusion: see *R.* v. *Industrial Disputes Tribunal, Ex p. American Express Co., Inc.* (6).

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(2) [1941] 2 All E.R. 800 at p. 815; [1941] 2 K.B. 405 at p. 421.
(3) [1942] 2 All E.R. 425 at p. 435; [1943] A.C. 166 at p. 189.

There remain, however, two further points. It was said that the governor was, under the ordinance, under a duty to " inquire into the causes and circumstances of the dispute " before he appointed the board of inquiry; and that he had not inquired as he ought to have done. He ought, it was said, to have given a fair opportunity to both parties to make representations before he acted; and the familiar passages in *Local Government Board* v. *Arlidge* (7) were cited. Their Lordships reject this contention. True it is that the governor had to inquire and, no doubt, he did—in his administrative capacity—but he had not to conduct anything in the nature of a judicial or quasi-judicial inquiry.

Then it was said that the governor did not make a valid reference to the board of inquiry because he did not, in the minute of appointment, specify the nature of the dispute. There is nothing in this point. If there is a dispute in existence, the parties must know of it and there is no need to tell them about it. They may not be able to formulate it themselves, at that stage, or at any rate, not precisely. So how can the governor be expected to do so? Suffice it for it to be formulated by the parties themselves when they get before the board.

Their Lordships find, therefore, nothing invalid in the appointment by the governor of the board of inquiry. It was not null and void. Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed and judgment entered for the appellants with costs. The respondents must pay the costs of the appeal to Her Majesty.

Appeal allowed.

Solicitors: *Charles Russell & Co.* (for the appellants); *Braby & Waller* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(4) [1943] 2 All E.R. 633.

(5) [1956] 3 All E.R. 411.

(6) " The Times " newspaper, ~~July 23, 1954.~~

(7) [1915] A.C. 120.

A FALLON *v.* CALVERT.

[COURT OF APPEAL (Hodson and Pearce, L.JJ.), December 4, 18, 1959.]

Practice—Trial—Evidence—Recall of witness by judge—Recall for cross-examination—Right not personal to judge—Subsequent interlocutory reference to official referee to report on one matter in issue—Jurisdiction of B *official referee to order defendant to appear before him for cross-examination —R.S.C., Ord.* 36A, *r.* 7 (1) (*a*).

The court has not power to order a party to attend a civil action for the purpose of giving evidence, but if a party chooses to give evidence he submits himself to the court to be asked all such questions as justice requires until the case is concluded (see p. 283, letters C and F, post).

C The right to recall a witness who has already given evidence is not personal to the judge before whom the evidence was given, but is the right of the court which is properly seized of the matter at the time in question (see p. 284, letter A, post).

At the trial of an action, after the defendant had given evidence, the judge made an interim order requiring the defendant to deliver a list of his D earnings, and subsequently another judge referred the matter to an official referee to "hear and report on" the defendant's earnings. The official referee made an order directing the defendant to attend before him to assist in making the report, the purpose of this order being to enable the defendant to be cross-examined.

Held: the official referee had jurisdiction to order the defendant to E attend before him for cross-examination, since the official referee was conducting what was in substance a continuation of the trial and could exercise (by virtue of R.S.C., Ord. 36A, r. 7 (1) (a)*) the trial judge's power to recall a witness at any stage.

Appeal dismissed.

F [**Editorial Note.** The plaintiff could have procured the attendance of the defendant by subpoena, but would then have had to examine him as his own witness (see p. 282, letter G, post).

As to the power of a judge to recall a witness, see 15 HALSBURY'S LAWS (3rd Edn.) 445, 446, para. 804, text and note (p); and for cases on the subject, see 22 DIGEST (Repl.) 460, *5038-5040*; 471-473, *5188-5217*.

G As to the powers of an official referee on a reference for a report, see 30 HALSBURY'S LAWS (3rd Edn.) 442, para. 832.]

Cases referred to:

Coulson v. *Disborough*, [1894] 2 Q.B. 316; 70 L.T. 617; 58 J.P. 784; 22 Digest (Repl.) 454, *4969*.

Enoch & Zaretzky, Bock & Co., Re, [1910] 1 K.B. 327; 79 L.J.K.B. 363; 101 L.T. 801; 22 Digest (Repl.) 460, *5040*.

H *R.* v. *Harris*, [1927] All E.R. Rep. 473; [1927] 2 K.B. 587; 96 L.J.K.B. 1069; 137 L.T. 535; 91 J.P. 152; 20 Cr. App. Rep. 86; 14 Digest (Repl.) 298, *2777*.

R. v. *Seigley*, (1911), 6 Cr. App. Rep. 106; 14 Digest (Repl.) 323, *3130*.

R. v. *Sullivan*, [1923] 1 K.B. 47; 91 L.J.K.B. 927; 126 L.T. 643; 86 J.P. 167; I 16 Cr. App. Rep. 121; 14 Digest (Repl.) 323, *3129*.

Interlocutory Appeal.

The defendant appealed against an order of an official referee that the defendant should appear before him. The facts are stated in the judgment.

J. G. Wilmers for the defendant.

Frank Whitworth and *P. J. Crawford* for the plaintiff.

Cur. adv. vult.

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* The relevant part of R.S.C., Ord. 36A, r. 7 (1) (a), is printed at p. 283, letter I, post.

A Dec. 18. **PEARCE, L.J.**, read the judgment of the court: This is an appeal from an order of His Honour PERCY LAMB, Q.C., Official Referee, who on Nov. 4, 1959, directed the defendant to attend before him to assist in making a report pursuant to an order of PAULL, J. The defendant contends that the official referee had no jurisdiction to make such an order.

The plaintiff is a manager and agent for theatrical artistes, and the defendant is a professional trumpeter. B Substantially the claim of the plaintiff is for commission on the defendant's earnings due to him under a contract in writing. The defendant counterclaimed rectification of that agreement. At the trial before DEVLIN, J., evidence was given by the plaintiff, the defendant and others. Details of the defendant's earnings were not given, but the defendant admitted through his counsel that he had sworn a false answer to interrogatories, and that his books contained false entries. C On Mar. 3, 1959, the learned judge made an interim order containing inter alia the following paragraph:

> "It is ordered that the defendant do within seven days from the date hereof deliver to the plaintiff a list of the gross earnings of the defendant as a solo artiste or for himself and orchestra for a period of five years commencing on Nov. 1, 1951."

D No order for an account has so far been made, although a claim for an account is included in the statement of claim. The defendant's purported compliance with this order of DEVLIN, J., did not satisfy the plaintiff, and on Apr. 23, 1959, PAULL, J., by consent made an order containing the following paragraph:

> "And it is ordered that this matter be referred to an official referee to hear and report on the gross earnings of the defendant as a solo artiste or E for himself and orchestra for a period of five years commencing on Nov. 1, 1951."

On attending before the official referee the plaintiff was minded to secure the attendance of the defendant for cross-examination, and in order to establish, if he could, the extent of the earnings on which commission would be due, having in his possession (as we were told) certain contracts between the plaintiff F and third parties which would or might assist to that end. It is conceded by both counsel that the real object of the official referee in ordering the defendant to attend the hearing was to procure that he should enter the witness-box to answer the cross-examination of plaintiff's counsel. The plaintiff can, of course, ensure the defendant's attendance by a subpoena, but in that case his counsel would have to call and examine the defendant as his own witness. G

In a civil suit the function of a court in this country (unlike that of courts in some other countries) is to decide cases on the evidence that the parties think fit to call before it. It is not inquisitorial. *Re Enoch & Zaretzky, Bock & Co.* (1) decided that a judge or umpire had no right to call a witness in a civil action without the consent of the parties. FLETCHER MOULTON, L.J., in dealing with a previous case, *Coulson* v. *Disborough* (2) says (3): H

> "One of the learned judges, the Master of the Rolls, LORD ESHER, does, however, give utterance to a dictum which has been relied on by counsel for the respondents. He says this (4): 'If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself I entitled to call him'. If that means to call him when either side objects, I am satisfied that there is no basis for that dictum; but it must be remembered that there is no suggestion in the report or the judgments that the witness was called by the judge against the will of either of the parties. It certainly was not necessary for the decision; and the consequences to which it would lead if so interpreted are such that I am satisfied that the

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(1) [1910] 1 K.B. 327. (2) [1894] 2 Q.B. 316. (3) [1910] 1 K.B. at p. 332.
(4) [1894] 2 Q.B. at p. 318.

> A Court of Appeal would never have given in the form of a mere dictum a decision so wide-reaching and so destructive of the fundamental principles of our laws of procedure. It does not purport to be based on any course of reasoning, and no authority was cited for it."

In *R.* v. *Harris* (5) the court said:

> B " With regard to the first question, it was clearly laid down in the Court of Appeal in *Re Enoch & Zaretzky, Bock & Co.* (6), that in a civil suit the judge has no power to call a witness not called by either side unless with the consent of both parties. It also appears to be clearly established that that rule does not apply at a criminal trial, where the liberty of the subject is at stake, and where the sole object of the proceedings is to make certain C that justice is strictly done between the Crown and the accused."

We cannot find, therefore, that the court has any power of its own motion to order a defendant to attend the hearing of a civil suit for the purpose of calling him as a witness.

In this case, however, the defendant has already given evidence, and the D official referee is conducting what amounts to a continuation of the trial, which has not yet been concluded by a final judgment. In general, a judge has power to recall a witness who has given evidence, though he would not have had power to call him initially. In *R.* v. *Seigley* (7) HAMILTON, J., said:

> " A prisoner, when once he has made himself a witness, is liable, like any other witness, to be recalled for the purpose of answering such questions E as the judge permits to be put to him."

TAYLOR ON EVIDENCE (12th Edn.), Vol. 2, para. 1477, states:

> " The judge has always a discretionary power, with which the court above is very unwilling to interfere, of recalling witnesses at any stage of F the trial, and of putting such questions to them as the exigencies of justice require."

This passage was approved by the Court of Criminal Appeal in *R.* v. *Sullivan* (8) and the principle, so far as civil cases are concerned, has never been doubted. If a party chooses to give evidence, he submits himself to the court to be asked all such questions as justice requires until the case is concluded.

G Under R.S.C., Ord. 36A, r. 2:

> " . . . the court or a judge may . . . refer to an official referee for inquiry and report any question or issue of fact arising therein; and, unless the court or a judge otherwise orders, the further consideration of the cause or matter shall stand adjourned until the receipt of the official referee's H report."

That is the course that has been pursued here. In hearing the reference, the official referee has under R.S.C., Ord. 36A, r. 7 (1) (a):

> " . . . the same jurisdiction, powers and duties (including the powers of attachment and committal and discretion as to costs) as a judge, exercisable I or, as the case may be, to be performed as nearly as circumstances admit in the like cases, in the like manner and subject to the like limitations . . ."

Had the learned judge continued the trial himself instead of adjourning to the official referee the " question or issue of fact " on the accounts, he could have recalled the defendant in order that he might be asked questions about them.

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(5) [1927] All E.R. Rep. 473 at p. 475; [1927] 2 K.B. 587 at p. 594.
(6) [1910] 1 K.B. 327.
(7) (1911), 6 Cr. App. Rep. 106 at p. 107.
(8) [1923] 1 K.B. 47.

On the face of it, under the words of R.S.C., Ord. 36A, r. 7 (1) (a), the judge's power to recall could be exercised by the official referee at this stage of the trial " in the like manner and subject to the like limitations ", unless that right of recall is in some way personal to the particular judge who heard the defendant give evidence in the first place. We see no reason why the right to recall should be regarded as the personal right of a particular judge rather than the right of the court which is properly seized of the matter at the time in question. We are confirmed in this view by R.S.C., Ord. 36A, r. 9. On receipt of the official referee's report, the court may (a) adopt it in whole or in part; (b) vary the report; (e) decide the question or issue originally referred to him on the evidence taken before him either with or without additional evidence. If in this case the learned trial judge adopted course (e), it is clear, we think, that he could at that stage recall the defendant. It seems unreal to suppose that there is an intervening stage during which the court that is investigating the matter with all the powers of the trial judge is unable to recall the defendant.

It is suggested on the defendant's behalf that it would be a wrong use of discretion to recall the defendant since, it is said, the onus is still on the plaintiff. We do not agree. In this case the plaintiff has proved that the defendant is an accounting party, and (by admissions) that he has kept false books and lied in interrogatories in respect of the amounts received by him. That calls for some answer by him. Merely supplying through his legal advisers lists not verified in evidence by himself is no answer. Had the learned judge ordered an account to be taken (as he might well have done) the defendant would have had to verify his account by affidavit (R.S.C., Ord. 33, r. 4) and he could have been cross-examined on his affidavit after due notice given of the items to which the plaintiff objects. If no evidence from the defendant were available, it may be that the court would try to secure justice by drawing inferences; but in fact the defendant, who knows the truth of the matter, is available to be recalled. We cannot in such circumstances see that it would be a wrong use of discretion if the court were to recall him in the hope of finding out the truth.

We therefore dismiss the appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Kenneth Brown, Baker, Baker* (for the defendant); *J. H. Williams*, Dartford (for the plaintiff).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

SOUTH AFRICAN DESPATCH LINE *v.* OWNERS OF THE PANAMANIAN S.S. NIKI.

[Court of Appeal (Hodson and Ormerod, L.JJ., and Gorman, J.), November 10, 11, 12, December 18, 1959.]

Shipping—Charterparty—Exceptions—Strikes—Charterers not responsible for delay if intended cargo cannot be provided—Alternative cargoes—Duty of charterers to provide alternative cargo—Reasonable time allowable for its provision—Whether cargo intended for shipment must be identifiable.

A charterparty dated June 3, 1952, provided for loading "a full and complete cargo of lumber and/or timber and/or wood goods and/or wheat in bulk and/or lawful merchandise . . ." at ports in four districts in the Coos Bay/British Columbia range with alternative rotations of the ports of loading at the charterers' option. By cl. 4 it was agreed that the "charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of riots, strikes or lockouts of any class of workmen or stoppage of labour connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo . . ." By June 13, 1952, the charterers had arranged for 540 mille lumber to be loaded at Victoria, British Columbia; and on that date it was their intention to load at the following ports in the following sequence, 4,050 tons of wheat at Vancouver, British Columbia, and 540 mille lumber at Victoria, British Columbia, completing with lumber at Coos Bay and Portland, Oregon. At that time the possibility of a strike of lumber men in British Columbia was known to the charterers. The strike broke out on June 16 and continued until July 30, 1952. On June 27 the charterers exercised their option for the rotation of loading ports in favour of the rotation mentioned above, but suggested to the owners that they should alter the rotation of loading, so as to begin at Coos Bay, should load wheat instead of lumber at Victoria if the strike continued, and, in that event, should be allowed $11,000 for loss of revenue and cost of restowing lumber. The suggested alternative was carried out and wheat was loaded in lieu of the 540 mille lumber. It was agreed that the issue "whether owners allowed count time lost Victoria because of strike as laytime if vessel loads intended cargo" should be submitted to arbitration, and that if this were answered in the negative the charterers should be allowed $11,000 by the owners.

Held: as it was the duty of the charterers under this charterparty, since the provision of a cargo of lumber was delayed by the strike, to load an alternative cargo that was not so delayed, the exceptions in cl. 4 only gave the charterers reasonable time within which to provide the alternative cargo, and did not entitle them to keep the vessel waiting at a strike-bound port, without laytime running, until the cargo originally intended could be shipped.

Bunge Y Born Limitada Sociedad Anonima etc. v. *H. A. Brightman & Co.* ([1925] All E.R. Rep. 607) applied.

Decision of Diplock, J. ([1958] 3 All E.R. 590) affirmed.

[As to exceptions protecting a charterer, see 30 Halsbury's Laws (2nd Edn.) 354, para. 534; 439, para. 605 (5); 449, para. 609 (4).]

Case referred to:

Bunge Y Born Limitada Sociedad Anonima Commercial Financiera Y Industrial of Buenos Aires v. *Brightman (H. A.) & Co.*, [1925] All E.R. Rep. 607; [1925] A.C. 799; 94 L.J.K.B. 840; 133 L.T. 738; 16 Asp. M.L.C. 545; *affg.* S.C. sub nom. *Brightman & Co.* v. *Bunge Y Born Limitada Sociedad*, [1924] 2 K.B. 619; 41 Digest 442, *2776*.

Appeal.

The charterers, South African Despatch Line, the claimants in an arbitration, appealed against the decision of Diplock, J., dated Nov. 13, 1958, and reported [1958] 3 All E.R. 590, in favour of the owners of the Panamanian steamship Niki, the respondents to the claim, on a Special Case stated by the umpire at the instance of the owners. There was an agreed statement of facts for the purpose of the arbitration, and the following statement of the facts is taken substantially from the judgment of Diplock, J.

The charterparty was entered into on June 3, 1952. It was a single voyage charter on a lump sum freight, and provided for shipment in four districts

> " in Coos Bay/British Columbia Range within British Institute Warranty limits (with certain exclusions) maximum six berths; as ordered by charterers, loading rotation to be North/South or South/North at charterers' option, with charterers' option of commencing loading on the Columbia River or Coos Bay, then British Columbia, thence South to Columbia River to complete."

Then there were alternatives giving a very wide range of alternative rotations. The range having been completed, the charterparty continued: " (orders for first loading place to be given by wireless on captain's application four days before due off Estevan wireless station)." The cargo to be loaded was " a full and complete cargo of lumber and/or timber and/or wood goods and/or wheat in bulk and/or lawful merchandise "; then there was an exclusion of dangerous cargo, and there is a provision for shipment to " four safe ports in Cape Town/ Lourenço Marques range ". It was, therefore, a voyage charter with a wide possibility of variations of port of loading, and one which entitled the charterer to load a great variety of cargo, including all lawful merchandise.

Clause 4 was the exceptions clause. Clause 7 provided that " cargo is to be loaded in fourteen weather working days . . . laydays at first loading port to commence twenty-four hours . . . after receipt of . . ."—and provided for notice of readiness to load, and contained similar provisions for subsequent loading ports. Clause 8 provided for twenty-five days' discharging time, and cl. 9 that loading and discharging time, should be reversible. Clause 23 provided for laydays—" Laydays not to commence before . . . June 25 "—and the cancelling date, if the vessel was not ready to load, was July 19. Clause 32 was an arbitration clause which provided that the arbitration should be in London, that the arbitrators should be " not lawyers, and no members of the legal profession to be present ", and there was the usual provision for an umpire.

On June 13 the charterers had made arrangements for certain cargo to be loaded, and their intention on June 13 was as follows (as set out in the agreed statement of facts): Load at Vancouver, British Columbia, 4,050 tons of wheat, at Victoria, British Columbia, 540 mille lumber, and at Coos Bay, Oregon, and thereafter at Portland, Oregon, to complete with lumber from two shippers, who were both subsidiaries of, or connected with, the charterers. It was found by the umpire that on June 13 it was probable but not inevitable that a strike affecting the loading of lumber in British Columbian ports would break out shortly after June 14, and that the charterers' must be deemed to have had knowledge of that. It was not known, however, and the charterers did not know, how long the strike was likely to last.

On June 27, 1952, the charterers exercised their option of using the vessel in the rotation indicated, namely, first Vancouver for wheat, second Victoria for lumber, and thereafter Coos Bay and Portland; but, in view of the position of the strike on that day they suggested to the owners a variation to the rotation which they would be prepared to adopt. This was in the following terms:

> " Present itinerary 4,050 tons wheat Vancouver B.C. 540 lumber Victoria thence Coos Portland. 540 mille Victoria subject indefinite delay account Canadian mill strike therefore we make owners following proposal. Will

> A commence Coos first loading district then British Columbia completing Portland. If 540 M. Victoria still unready due strike will take 4,900 tons wheat provided owners allow $11,000 for loss revenue and cost restowing lumber."

The charterers' contention at that time was that the exceptions clause would entitle them, if they so insisted, to send the vessel to Victoria and there to wait B until such time as the strike ended and the lumber could be loaded. The owners' contention was that if the vessel was sent to Victoria to load lumber the laydays would run irrespective of the strike. Those two contentions having been put forward, the owners' alternative rotation and alternative cargo was adopted, and the alternative cargoes suggested there were carried. In the meantime the $11,000 was held in escrow to abide the result of an arbitration. Notice of C readiness was given on July 2, loading of the vessel was completed at Portland in accordance with the alternative rotation on July 30, 1952, and the strike ended in British Columbia on that date. The loading time in fact taken was fifteen days and thirteen hours. The exceptions clause of the charterparty, after the ordinary provision for excepted perils, provided:

> D "Charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of riots, strikes or lockouts of any class of workmen or stoppage of labour connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo, or by reason of floods, fire, ice, frosts, fogs, bad weather, and all accidents or hindrances or other E cause or causes beyond the control of shippers or receivers which may prevent or delay the providing, delivery, loading or discharging of the cargo, including all accidents to piers, mines, mills, factories or machinery, railway and canal stoppages and hindrances, political disturbances, insurrections or interventions of constituted authorities."

On July 6, 1952, the charterers sent to the owners a telegram, which set out the F issues which it was proposed to submit to arbitration, as follows:

> "We without prejudice propose to submit to arbitration the issue whether owners allowed count time lost Victoria because of strike as laytime if vessel loads intended cargo. If owners' contention correct owners should not compensate charterers for alternative cargo and cost rearranging rotation if owners' contention wrong owners to pay for expense of bagging."

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Subsequent arrangements were that, instead of there being payment of the exact sum of the cost of bagging, the $11,000, which was in escrow, should be released to the charterers if the issue was decided in their favour, and if otherwise should be released to the owners. The agreed facts included a statement that:

> "It is not customary to separate, mark or identify lumber for loading in H any particular vessel until shortly before the lumber is in fact loaded on the vessel, and there would have been no difficulty or delay about the loading of the 540 mille lumber if the said strike had not occurred."

The umpire found that if the 540 mille lumber had been loaded cl. 4 of the charterparty would in the circumstances have protected the charterers from I responsibility towards the owners for any delay in the loading thereof caused by the strike, and the owners would not therefore have been able to count time lost because of such strike as laytime if the vessel had loaded the lumber.

Subject to the opinion of the court on the point of law next stated, the umpire awarded that the charterers were entitled to the $11,000. The question of law for the opinion of the court was whether on the facts agreed and found the charterers were entitled to the $11,000 placed in escrow.

Diplock, J., answered this question in the negative, and ordered the $11,000 to be released to the owners. The charterers appealed.

M. R. E. Kerr for the charterers.
R. A. MacCrindle for the owners.

Cur. adv. vult.

Dec. 18. The following judgments were read.

HODSON, L.J.: This is an appeal by charterers from a decision of DIPLOCK, J., given on Nov. 13, 1958 (1) on a Special Case stated by a commercial umpire arising out of the lumber strike in British Columbia in 1952. The case raises a question of the constructions of an exceptions clause in a charterparty of which the relevant words are:

> " Charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of riots, strikes or lockouts of any class of workmen or stoppage of labour connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo . . ."

The remaining relevant clauses of the charterparty, and the facts as found by the Special Case, are set out in the introduction to the judgment of the learned judge (2) and need not be repeated. Suffice it to say that the dispute referred to arbitration was the detention of $11,000 which the charterers deducted from the freight paid and placed in escrow in the hands of agents in New York to await decision of the arbitrator.

This deduction of $11,000 followed communications passing between the owners and the charterers which read as follows:—June 27. Charterers to owners:

> " Niki now dry-docked Victoria understand ready to load July 1 Vancouver. Present itinerary 4,050 tons wheat Vancouver B.C. 540 lumber Victoria thence Coos Portland. 540 mille Victoria subject indefinite delay account Canadian mill strike therefore we make owners following proposal. Will commence Coos first loading district then British Columbia completing Portland. If 540 M. Victoria still unready due strike will take 4,900 tons wheat provided owners allow $11,000 for loss revenue and cost restowing lumber."

July 6. Charterers to owners:

> " We without prejudice propose to submit to arbitration the issue whether owners allowed count time lost Victoria because of strike as laytime if vessel loads intended cargo. If owners' contention correct owners should not compensate charterers for alternative cargo and cost re-arranging rotation. If owners' contention wrong owners to pay for expense of bagging 500 tons of grain and loss of revenue from shipment of grain instead of Victoria lumber."

The owners agreed to submit the issue stated to arbitration, and the main contentions before the umpire and the learned judge were to the effect, on the part of the owners, that they were entitled to the $11,000 under the charterparty, and on behalf of the charterers that they were protected by the exceptions clause on the footing that, if the lumber had been loaded, cl. 4 of the charterparty would have protected them from responsibility for delay in the loading thereof caused by the strike, and accordingly they were entitled to have the $11,000 released to them.

The argument of the charterers is simple and direct. It is that on the hypothesis which the court is asked to assume the meaning of cl. 4 is clear, and that in order to decide whether it applies in the present case two facts must be ascertained: (i) What is the intended cargo under this charterparty? (ii) Did the strike prevent that intended cargo being loaded? It is said that there is no doubt on the facts found (i) that the intended cargo was 540 mille lumber which the charterers had booked at Victoria, and (ii) that the strike of lumbermen prevented it from being loaded. This being so, it is said that delay in loading the cargo intended for shipment is excused by cl. 4 because the clause expressly says so. Accordingly, it is said that if the charterers provided the cargo intended for shipment, and it cannot be loaded because of the strike, they are entitled to keep the ship waiting for the strike to end, subject only to frustration of the charterparty.

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(1) Reported [1958] 3 All E.R. 590; [1959] 1 Q.B. 238.
(2) The facts are set out at p. 286, letter B, to p. 287, letter H, ante.

The argument of the charterers is at first sight attractive, but the exceptions clause must be considered against the background of the charterparty as a whole, and the obligations of the charterers contained therein. The charterparty is a fixed lay time charterparty which imposes on the charterers a duty to load and discharge in the fixed time subject only to any exception within which they can bring themselves, otherwise they must pay demurrage. The charterparty is not one to load lumber. The charterers could have loaded any lawful merchandise except dangerous cargo, and certain other named goods. The charterparty is not converted into a contract of affreightment for a particular commodity by the nomination of that commodity. The right to nominate carries with it the duty to land a full and complete cargo of one of the range so that if the charterer cannot load one he has intended to load, prima facie he has to load some other cargo out of the range. So far as the facts of this case are concerned, the strike at Victoria did not affect other merchandise, and the charterer has a right (though it may be in a given case unprofitable) to change his mind and switch to another cargo.

The delay in cl. 4 is delay in the performance of the obligation which, under this charterparty, is an obligation to provide any number of alternative cargoes. The learned judge said (3) and I respectfully agree:

> " If, therefore, the particular cargo in this case, timber, could not be provided, they [the charterers] were under a duty to provide another. Their inability to provide the intended cargo may result, and would result, in their having a reasonable time to make alternative arrangements to provide another cargo. That, and that only, is the extent of the delay caused by a strike affecting only one of the alternative cargoes which the charterer is entitled, and indeed under a duty, to supply. In this case the strike affected only timber or lumber. It did not affect wheat or any other of the cargoes concerned."

I accept the owners' contention that the word " if " (4) has a causal significance, and is equivalent to " caused by the fact that " rather than equivalent to " so long as ", as the charterers contend.

The charterers contend that the words " intended for shipment " following the word " cargo " must show that they are covered by the exception, because it is defined as the cargo fixed on June 13; but cargo " intended for shipment ", whether it relates to the cargo fixed on June 13, or any other goods mentioned in cl. 1, does no more than extend the word cargo from its limited meaning of goods carried on board to something which is going to become cargo when it arrives on board.

It is unnecessary to speculate why the word " intended " was inserted before the word cargo. It may well have been for the reason given by DIPLOCK, J., but it does not in my view have the effect contended for by the charterers that if the cargo fixed on June 13 is delayed by a strike, they are entitled to sit with folded arms until the strike ends. The question must always be what is the delay which flowed from the inability to load the lumber, and the answer given by the learned judge is, in my judgment, correct, namely, the delay involved in switching to another cargo within the range. There is nothing in the exceptions clause which exempts the charterer from the duty to look for alternative cargo. If that were so, he would be protected by his exception clause from a breach of his duty when other cargoes are available, and not only in respect of one particular cargo. If this is correct, there would, of course, have been a necessity, if the vessel had gone to Victoria, to consider what protection is given by the exceptions clause in respect of the particular delay with which we are concerned. The charterer's duty would be to make preliminary arrangements, as the learned judge said, before they sent the ship to Victoria if there was a reasonable likelihood of the strike continuing when the vessel arrived, and to make definite arrangements as soon as it was clear that it would continue. I agree with the learned judge that they would then be entitled to a reasonable time to make those arrangements. This seems to me to follow from the reasoning of the judgments in the Court of Appeal in *Brightman & Co.* v. *Bunge Y Born Limitada Sociedad* (5) and by the opinion given by LORD ATKINSON in the House of Lords in the same case (6). Subject to LORD DUNEDIN's reservations (7) this case supports the view that where a charterparty permits the loading of a selection of different cargoes, the fact that the exceptions clause would excuse delay in loading one type of cargo does not excuse a failure to load an alternative type of cargo the loading of which is not affected by an excepted peril, and that in such a case the exceptions clause does excuse delay in loading for such time as is reasonably required for the charterers to obtain an alternative cargo. It is true that in *Bunge's* case (5) the particular question before this court was not decided, since the decision did not turn on the construction of an exceptions clause, but on the effect of a prohibition which prevented the loading of a particular cargo out of a range, and the word cargo was not, as here, preceded by the word "intended", but the principle involved applies to the situation in this case.

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(3) [1958] 3 All E.R. at p. 594; [1959] 1 Q.B. at p. 249.

(4) Viz., the words in the exceptions clause of the charterparty " if the cargo intended for shipment . . . cannot be provided."

The remaining question is how is the charterer's right to a reasonable time to be dealt with in this arbitration? The vessel never having gone to Victoria, how is this now to avail the charterers who contend that they should even now be allowed credit for a sum to compensate them for the reasonable time which, in the view of the court, would have been available to them if they had sent the vessel to Victoria, and ask for a remission in order to ascertain what sum (if any) is due to them in this respect? I do not think that the charterers are now entitled to this. They committed themselves, as the telegrams show, to an arbitration on the footing that they were entitled to all or none of the $11,000. They could not then bring themselves within the exceptions clause for the purpose of ascertaining what would have been a reasonable time if they had made attempts to obtain an alternative cargo, and had not taken the stand that they were entitled to do nothing but wait for the strike to end.

I would dismiss the appeal.

ORMEROD, L.J.: There is no dispute on the facts of this appeal. They are set out in the statement of facts annexed to the award of the umpire. The question to be decided is whether in the circumstances the charterers are entitled to the protection of the exceptions clause in the charterparty. In considering the effect of that clause it is necessary to consider the nature of the charterparty itself. This is well summed up by the learned judge when he says (8):

> "It was therefore a voyage charter with a wide possibility of variations of port of loading, and one which entitled the charterer to load a great variety of cargo, including all lawful merchandise."

The material words of the exceptions clause, which is cl. 4 of the charterparty, are:

> "Charterers shall not be responsible for any delay if the cargo intended

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(5) [1924] 2 K.B. 619.

(6) [1925] All E.R. Rep. at pp. 610-613; [1925] A.C. at pp. 808-814.

(7) [1925] All E.R. Rep. at p. 610; [1925] A.C. at p. 808. (8) [1958] 3 All E.R. at p. 592.

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> for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of riots, strikes or lockouts of any class of workmen or stoppage of labour connected in any way with, or essential to the providing, delivery, loading or discharging of the cargo . . ."

According to para. 6 of the agreed statement of facts it was on June 13, 1952, B the intention of the charterers to load certain cargo of a kind and in a rotation there set out, and on June 27, 1952, they declared their intention to the owners. The intended rotation involved proceeding to Victoria to load timber. On June 16, however, a strike of lumbermen broke out in British Columbia which prevented the loading of timber at Victoria. The charterers' contention is that on a true construction of the charterparty they would nevertheless have been C entitled to proceed to Victoria, and wait for the strike to end without incurring any penalty. The owners, on the other hand, submitted that the obligation put on the charterers by the charterparty was to load the ship within the prescribed time with one or more of the permitted varieties of cargo; and the fact that one of these varieties could not be loaded because of a strike did not entitle the charterers to the protection of the exceptions clause, even though D the cargo in question was cargo which the charterers "intended to load". DIPLOCK, J., rejected the charterers' contention, but held that the charterers would be entitled in the circumstances to a reasonable time to arrange for an alternative cargo. In his judgment he said (9):

> "I think, therefore, that on the true construction of the clause, if this vessel had gone to Victoria, as the charterers were entitled to send it, they E would not have been entitled, as they claimed, to sit with folded arms and keep it there and hold it until the strike ended on July 30. They would have been entitled to send it there, or it would have been their duty to make alternative arrangements. It would have been their duty to make preliminary arrangements before they sent the vessel there, if there was a reasonable likelihood of the strike going on or continuing when the vessel F arrived, or to make definite arrangements as soon as it was clear that the strike would continue. They were being limited, therefore, to a reasonable time to make those arrangements, but to nothing more."

This passage from the judgment of DIPLOCK, J., crystallises, as I read his judgment, his opinion of the amount of the relief to which the charterers were entitled by virtue of the exceptions clause in the particular circumstances which had G arisen.

The issue between the parties as it came before the umpire, and indeed as it comes before this court, is contained in a series of cablegrams which passed between the parties between June 27, 1952 and July 7, 1952. The umpire had to decide whether, if the ship had gone to Victoria to load timber pursuant to an order by the charterers on June 27, 1952, the time she would have had to H wait until the cargo could be loaded at the end of the strike would have counted as laytime. In the ordinary way, the laytime would commence once the ship was at Victoria ready to load, but it would not so commence if the charterers were exempted from delay under cl. 4. The submission of the charterers is really a simple one. It is sufficient, they submit, if they can show (i) what the intended cargo was, and (ii) that it could not be loaded by reason of the strike. I There could be no question as to the intended cargo. It was clearly defined in para. 6 of the agreed statement of facts. It is equally clear from paras. 7 and 12 that the timber could have been loaded at Victoria but for the strike, which would have prevented it. It was argued that in these circumstances, cl. 4 must apply; that the ordinary meaning of the words "delay if the cargo intended for shipment cannot be loaded by reason of strikes" was such as to cover a case of this kind where the intended cargo had been declared. It was pointed out by counsel for the charterers that the words " cargo intended for shipment " occurred only in cl. 4, and that the words used in cl. 1 of the charterparty when referring to the obligation to load were " a full and complete cargo ", and that the words in cl. 4 must, therefore, be given a narrower meaning.

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(9) [1958] 3 All E.R. at p. 594; [1959] 1 Q.B. at p. 250.

The learned judge, in coming to his decision, relied on the authority of *Brightman & Co.* v. *Bunge Y Born Limitada Sociedad* (10). In that case the obligation on the charterers was to load a cargo of " wheat and/or maize and/or rye ", and the exceptions clause provided as follows:

> " If the cargo cannot be loaded by reason of . . . obstruction . . . beyond the control of the charterers on the railways . . . the time for loading . . . shall not count during the continuance of such causes."

There was delay because of a " go-slow " movement on one of the railways used for carrying wheat to the port of loading, and there was further delay because of a prohibition to load wheat imposed by the authorities. It was held that on neither cause for delay could the charterers succeed. Their obligation was to load " wheat and/or maize and/or rye "; and if the cargo intended by the charterers to be loaded was not available, the obligation remained to load with an alternative one. In the Court of Appeal it was held that the charterers were entitled to a reasonable time to see if the prohibition was likely to be removed, and to make arrangements for an alternative cargo, although LORD DUNEDIN in the House of Lords indicated (11) that he was not satisfied that this question might not require examination at some future time.

Counsel for the charterers sought to distinguish *Brightman's* case (10) first by submitting that it was not an authority on the obligation to switch cargoes in the case of an excepted peril, as it was held that the circumstances of the " go-slow " movement did not entitle the charterers to the protection of the exceptions clause. It was a case in prohibition. This, of course, is true, but it would seem that the same reasoning on this point might well apply in the case of an excepted peril as in the case of a prohibition. But the distinction on which counsel for the charterers chiefly relied was in the difference of language in the exceptions clause. In his submission, the words " cargo intended for shipment under the charterparty " were vital; and if the cargo, the loading of which would have been delayed by the strike, could be brought within the meaning of those words (as was clearly so in this case) then the charterers were entitled to the protection of the clause.

Counsel for the owners argued that this was a fixed time charterparty the effect of which was to impose on the charterers an absolute duty to load and discharge within a fixed time subject to any exceptions in the charterparty. He submitted that the charterparty was not one to load timber, and that the nomination by the charterers of a cargo did not transform it into one. They could have shipped any of a wide range of cargoes. Therefore, in the absence of an express provision to the contrary, the obligation of the charterers to load a full and complete cargo meant that if they were unable to load one cargo, they were bound to load something else. Again the question comes back to the true construction of the exceptions clause. Is there anything in it to negative that duty on the charterers? The charterers argue that the words " cargo intended for shipment " are sufficient to do so. The owners, on the other hand, say that the word " delay " refers to delay in loading a full and complete cargo, and not to delay in loading the cargo intended for shipment.

In my judgment, the submission of the owners is the right one. On the true construction of the exceptions clause, the charterers would not be entitled to wait at Victoria until the strike was settled simply because they had declared that they intended to load timber there. The charterers were under no obligation to elect to load any particular cargo. They had a wide range from which to choose; and if they selected one particular cargo within the range from which to choose, there was nothing in the charterparty to prevent them from changing their minds and substituting another cargo if circumstances seemed to warrant it. The construction contended for by the charterers would mean that the effect of the clause is that the charterers, once having declared their intention of loading a particular cargo at a particular port, could insist on waiting to carry out that intention so long as one of the perils specified in the clause existed, in spite of the fact that their obligation under the charterparty could be discharged by loading other cargoes at other ports within the permitted range. That is not, in my judgment, the meaning of the clause, and I am in full agreement with the view expressed by Diplock, J. I would, therefore, dismiss the appeal.

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(10) [1924] 2 K.B. 619; *affd.* H.L., [1925] All E.R. Rep. 607; [1925] A.C. 799.

(11) [1925] All E.R. Rep. at p. 610; [1925] A.C. at p. 808.

GORMAN, J. (read by Hodson, L.J.): This is a fixed time, not a reasonable time, charterparty. This imposes on the charterers an absolute duty to load or discharge the cargo in the fixed time, subject to the exceptions clause. The charterparty was not a charterparty to load lumber. The charterers had the right to ship a cargo within a wide range. There was a selection of cargoes open to them. The selection of any one of the permitted cargoes did not, in my view, amount to an election in the sense in which the term is generally used. There was on the charterers a correlative duty, in the absence of exceptions clauses, to load a full load out of the range of cargoes open to their selection. If the charterers could not load the cargo which they had in mind, they ought to have loaded another cargo within such range.

The words in the exceptions clause in the charterparty are:

> " Charterers shall not be responsible for any delay if the cargo intended for shipment under this charterparty cannot be provided, delivered, loaded or discharged by reason of . . . strikes . . ."

The delay referred to in the clause is the delay in the performance of the obligations for which the charterers would otherwise be liable, that is, the obligation to load a full cargo within the range of cargoes referred to in the charterparty. The conception introduced by the word " if " would seem to be that of causation —that is, that there shall not be responsibility for the delay to which I have referred caused by the fact that the cargo intended for shipment cannot be provided by reason of strikes.

In my view, the expression " intended for shipment " indicates that the charterers had decided, from the permitted range of cargoes, to load one of such cargoes. It is a cargo selected by the charterers out of such range.

In his judgment (12) Diplock, J., considers the reason for the insertion of the words " the cargo intended for shipment under the charterparty ". I agree with the learned judge when he says (12) that it was

> " . . . necessary to define the extent to which interference with provision or loading should bring it within the clause, and to define it very sensibly by limiting it to the cargo which it was the intention of the charterer to load."

There is nothing in the expression " cargo intended for shipment " to permit the charterer to sit with his arms folded merely because, in a charterparty of this kind, one of the cargoes which happens to have been selected for shipment by the charterers cannot be provided or delivered by reason of a strike. In my view, the learned judge was correct in saying (12) that this expression was

> " to give him [the charterer] a reasonable time to make provision for other arrangements, when the provision he had already made, that is to say, the intended cargo, ' fell through ' because of the excepted peril."

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(12) [1958] 3 All E.R. at p. 594; [1959] 1 Q.B. at p. 250.

In my view, there is nothing in the exceptions clause to take away from the charterer the obligation to select something else from the permitted cargoes when the excepted peril arose. I do not agree with the contention advanced by counsel for the charterers that the charterer is entitled to adhere to the selection of cargo which he has made, and to rely on the exceptions clause.

Appeal dismissed.

Solicitors: *Botterell & Roche* (for the charterers); *Stokes & Mitcalfe* (for the owners).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

NOTE.

DINGLE *v.* ASSOCIATED NEWSPAPERS, LTD. AND OTHERS.

[QUEEN'S BENCH DIVISION (Pearson, J.), December 2, 3, 4, 7, 8, 9, 10, 1959.]

Parliament—Privilege—Report of select committee—Impugning validity of report contrary to Bill of Rights—Whether comment on report permitted—Bill of Rights (1 *Will. & Mar. c.* 2), *s.* 1, *art.* 9.

Libel—Privilege—Qualified privilege—Parliamentary papers—Report of select committee—Comment on proceedings and report of committee—Parliamentary Papers Act, 1840 (3 *&* 4 *Vict. c.* 9), *s.* 3.

[As to freedom of speech, debates and proceedings in Parliament, and as to the control over publication of proceedings in Parliament, see 28 HALSBURY'S LAWS (3rd Edn.) 457-459, paras. 899, 900.

For cases on privilege regarding acts done in Parliament, see 36 DIGEST (Repl.) 394, 395, *414-420*.

As to qualified privilege in defamation proceedings for publishing extracts from parliamentary reports, see 24 HALSBURY'S LAWS (3rd Edn.) 67, para. 119.

For the Bill of Rights, s. 1, see 4 HALSBURY'S STATUTES (2nd Edn.) 152. For the Parliamentary Papers Act, 1840, s. 3, see 13 HALSBURY'S STATUTES (2nd Edn.) 1126.]

Case referred to:

Bradlaugh v. *Gossett*, (1884), 12 Q.B.D. 271; 53 L.J.Q.B. 209; 50 L.T. 620; 36 Digest (Repl.) 394, *415*.

Action.

This was an action by Philip Burrington Dingle, the plaintiff, town clerk of Manchester, for damages for libels contained in the issues of the "Daily Mail" newspaper for June 16 and June 26, 1958. The first defendant, Associated Newspapers, Ltd., were the proprietors of the "Daily Mail". The second defendant, Arthur George Wareham, was the editor of the "Daily Mail" and the third defendant, Michael Kelly, was a journalist employed by the first defendant. The plaintiff alleged that in the issue of the "Daily Mail" for June 16, 1958, the defendants falsely and maliciously printed and published an article concerning the circumstances in which Manchester Corporation acquired the shares in Ardwick Cemetery, Ltd. The article, which stated that it was written by the third defendant, purported to be a report of an interview with the chairman of the cemetery company; it contained allegations by the chairman that while negotiations for the sale of shares in the company were going on between the company's board and Manchester Corporation, the plaintiff went behind the backs of the board by sending a letter to the shareholders in which the plaintiff offered them £1 for each share, a sum which was less than the offer for which the company were then negotiating. The chairman alleged in the article that the shares of the company were worth more than double the £1 each that, as a result of the plaintiff's letter to the shareholders, the corporation paid for them. The article then continued with the following paragraph:

> " Objections.
>
> " Twice there have been formal objections in the House of Commons to a Bill dealing with the cemetery. A debate has been arranged for Thursday, but this may be shelved. Sir John Barlow, M.P. for Middleton and Prestwich, has put down a motion that there should be an independent valuation of the shares. If it proved more than £1 the balance would be paid by the corporation for all shares bought after Dec. 2, last. If not, the original £1 deal would stand. Last month, a committee of the House of Commons, examining the Bill—it was intended to enable Manchester to take over the cemetery for conversion to playing fields or an open space —reported:—' It was clear to the committee that the corporation obtained the shares by presenting a one-sided view, which failed to disclose the true position of the company on a break-up '."

The article concluded with a report of the chairman of the cemetery company's views on the take-over of the company by Manchester Corporation. The plaintiff complained of the whole of this article alleging that it meant and was understood to mean that he had by a statement which he knew to be misleading, false or deceptive or by dishonest concealment of material facts induced the shareholders of Ardwick Cemetery, Ltd., to enter into or offer to enter into an agreement to sell their shares and that the plaintiff was guilty of an offence under s. 12 (1) of the Prevention of Fraud (Investments) Act, 1939.

The defendants denied that the article of June 16, 1958, was defamatory of the plaintiff or that it bore the meaning which the plaintiff attributed to it. In relation to the paragraph in the article headed " Objections ", which is set out above, they contended that in so far as the words in that paragraph consisted of statements of fact they were a fair and accurate report of parliamentary proceedings published by the defendants bona fide and without malice, and in so far as they consisted of expressions of opinion they were fair and honest comment on a matter of public interest, namely, the parliamentary proceedings referred to. The defendants further contended in relation to this paragraph, that the words therein extracted from the report of the House of Commons' Committee were an extract from a parliamentary paper within the Parliamentary Papers Act, 1840, namely, from the report of the select committee on the Manchester Corporation Bill, and were published bona fide and without malice to the plaintiff. This report was laid on the table of the House and made public and by a standing order the committee were required to report to the House any circumstances relating to the Bill of which they thought the House should be informed.

By his reply the plaintiff denied, inter alia, that publication of the extract from the select committee's report was privileged and contended that the extract was not a report of parliamentary proceedings but was an extract of what purported to be a report from the committee.

In the course of the trial questions arose on parliamentary privilege in respect of the proceedings and report of the select committee, on the defence raised under the Parliamentary Papers Act, 1840, and on the effect of the publication of extracts from the report of the select committee on the assessment of damages. The case is reported only for the observations of HIS LORDSHIP, PEARSON, J., on these matters.

Geoffrey Lawrence, Q.C., and *W. D. T. Hodgson* for the plaintiff.

Neville Faulks, Q.C., and *David Hirst* for the defendants.

The Solicitor-General (*Sir Jocelyn Simon, Q.C.*) and *J. R. Cumming-Bruce* appeared as amici curiae on the questions of parliamentary privilege.

PEARSON, J., said that there was one other introductory matter which it was convenient to mention before coming to the facts, and that was the subject of parliamentary privilege as it affected this action. In counsel for the plaintiff's opening speech something was said which indicated, or seemed to indicate, that there was going to be an attack on the report of the select committee of the House of Commons, and that the attack was perhaps to be carried to the extent of impugning the validity of the report, on the ground of some defect of procedure. In consequence of that, the Solicitor-General and Mr. Cumming-Bruce attended in this court on the second day of the trial as amici curiae and pointed out the difficulties arising in the sphere of parliamentary privilege.

Reference was made to the Bill of Rights (1688), s. 1, art. 9, on freedom of speech which provides:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

Reference was also made to *Bradlaugh* v. *Gossett* (1) and it is sufficient to read a short portion of the headnote:

> "The House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute law which has relation to its internal procedure only. What is said or done within its walls cannot be inquired into in a court of law. A resolution of the House of Commons cannot change the law of the land. But a court of law has no right to inquire into the propriety of a resolution of the House restraining a member from doing within the walls of the House itself something which by the general law of the land he had a right to do . . ."

There was clear affirmation of the exclusive right of Parliament to regulate its own internal proceedings.

In HIS LORDSHIP's view, it was quite clear that to impugn the validity of the report of a select committee of the House of Commons, especially one which had been accepted as such by the House of Commons by being printed in the House of Commons Journal, and so on, would be contrary to s. 1 of the Bill of Rights. Clearly, no such attempts could properly be made outside Parliament.

The next point was that the Solicitor-General and Mr. Cumming-Bruce had made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but to HIS LORDSHIP it seemed quite clear that it was easy to give effect to that request because, once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality: indeed, to a large extent, any such comment would be not relevant at all.

Accordingly, for those two reasons, because of the desire which the courts had to co-operate as far as possible in matters where there might be some debatable ground on which a conflict might arise, any comment had been ruled out throughout the proceedings.

HIS LORDSHIP said that he had better explain briefly why any comment of that kind was of no materiality and possibly of no relevancy to the issues in the action. As to the basic facts of the case, clearly, the court should make its own findings based on the evidence adduced and on the arguments presented to the court, and that should be done without regard to any decisions reached or opinions expressed or findings made by a different tribunal having a different

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(1) (1884), 12 Q.B.D. 271.

A function, and, probably, different issues before it and having received different evidence and a different presentation of the case.

As to the other issue in the matter, in so far as there was an issue under the Parliamentary Papers Act, 1840, the fact that a report of the select committee was made was simply an event which happened, and it was not relevant to inquire how it came to be made or what led up to it. If the defendants could B show that they printed and published extracts from that report, and did so in good faith and without malice, they were entitled to the statutory defence provided by s. 3 of the Act of 1840, and no amount of comment on the report or on the proceedings leading up to it would deprive them of that defence or make it any worse or any better.

Finally, on the issue as to the assessment of damages, here again the report C of the select committee was something which happened, an event which happened, and, in so far as the making of the report and the printing of extracts from it in various newspapers caused damage to the plaintiff's reputation, the defendants were not responsible for that damage and, again, any amount of comment would have very little materiality.

So on those two main points no difficulty arose at all. There were other D matters, and also minor details of evidence, and the Solicitor-General and junior counsel with him had supplied further information and explanations with regard to the production of certain documents and other matters of evidence in which parliamentary privilege might be involved (2), but those were points of detail. HIS LORDSHIP said that manifestly the parliamentary authorities had given the fullest co-operation to facilitate the administration of justice without E detriment to parliamentary privilege. This court was indebted to the Solicitor-General and to junior counsel with him for their intervention as amici curiae and for the friendly help which they had afforded in that capacity.

Judgment for the plaintiff for £1,100.

Solicitors: *Stephenson, Harwood & Tatham,* agents for *Grundy, Kershaw, Farrar & Co.,* Manchester (for the plaintiff); *Swepstone, Walsh & Son* (for the F defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(2) With regard to the minutes of proceedings of the select committee, which were not published but were laid on the table of the House, the Solicitor-General said that the Speaker of the House of Commons had refused a request made on the plaintiff's behalf for production of these minutes on the ground that the proper course was for the plaintiff to petition the House for their production; no such petition was made. H It followed, in the Solicitor-General's submission, that any evidence relating to the minutes of proceedings would be a breach of parliamentary privilege.

As to the minutes of evidence given before the select committee, the Solicitor-General said that these minutes were taken down and transcribed by an official shorthand writer who was an officer of the House and by a standing resolution he could not be called on to produce the transcript or give evidence without leave of the House. In the present case leave was not requested; however, since the public could buy copies of I the transcript, it was unlikely that the House would treat proof of these minutes by evidence other than that of the officer of the House, as a breach of parliamentary privilege. The correct procedure to get production of minutes of evidence was to present a petition to the House; there was little doubt that if a petition had been made in the present case it would have been granted. Reports by government departments to the select committee fell within the same class as minutes of evidence and the correct procedure to get production of such reports was to petition the House.

The Solicitor-General also said that it was not an infringement of parliamentary privilege to call independent evidence of matters canvassed before the select committee provided that no imputation of dishonesty was made against any member of the committee.

R. *v.* PRATER.

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[COURT OF CRIMINAL APPEAL (Hilbery, Cassels and Edmund Davies, JJ.), December 21, 1959.]

Criminal Law—Evidence—Corroboration—Witness, whether fellow-prisoner or Crown witness, having purpose of his own to serve.

B Where a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow-prisoner or a witness for the prosecution, it is desirable that the judge should warn the jury of the danger of convicting on that witness's evidence unless it is corroborated; but, if there be such clear and convincing evidence as satisfies the Court of Criminal Appeal that no miscarriage of justice has occurred by reason of the omission of the warning, that court will not interfere (cf. the proviso to s. 4 (1) of the Criminal Appeal Act, 1907). C

Dictum of HUMPHREYS, J., in *R.* v. *Garland* ((1941), 29 Cr. App. Rep. 46, n.) applied.

Appeal dismissed.

[As to corroboration of the evidence of accomplices and other interested witnesses, see 10 HALSBURY'S LAWS (3rd Edn.) 459-462, paras. 844-848; and for cases on the subject, see 14 DIGEST (Repl.) 533-537, *5177-5216*. D

For the Criminal Appeal Act, 1907, s. 4 (1), proviso, see 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

Cases referred to:

Davies v. *Public Prosecutions Director*, [1954] 1 All E.R. 507; [1954] A.C. 378; 118 J.P. 222; 38 Cr. App. Rep. 11; [1954] 2 W.L.R. 343; 14 Digest (Repl.) 527, *5108*. E

R. v. *Barnes*, *R.* v. *Richards*, [1940] 2 All E.R. 229; 27 Cr. App. Rep. 154; 14 Digest (Repl.) 533, *5181*.

R. v. *Barrow*, (1934), 24 Cr. App. Rep. 141; 15 Digest (Repl.) 1145, *11,532*.

R. v. *Garland*, (1941), 29 Cr. App. Rep. 46, n.; 14 Digest (Repl.) 545, *5301*. F

R. v. *Martin*, (1910), 5 Cr. App. Rep. 4; 14 Digest (Repl.) 527, *5107*.

R. v. *Scott*, (1909), 2 Cr. App. Rep. 215.

R. v. *Wright*, (1934), 25 Cr. App. Rep. 35; 14 Digest (Repl.) 669, *6785*.

Appeal.

The appellant, Kenneth Frank Prater, and two other persons, Robert John Welham and Philip Goodman, were charged at the Central Criminal Court, on G Dec. 11, 1958, before the Common Serjeant and a jury, on an indictment containing six counts. In count 1 they were charged with conspiring together (and with others whose names were unknown) between Jan. 1, 1956, and July 1, 1957, to cheat and defraud two hire-purchase finance companies, Consortium Finance, Ltd. and Masterton Finance & Trading Services, Ltd., of their moneys by false representations as to the nature and value of goods forming the subject H of hire-purchase and credit-sale agreements, by putting forward forged hire-purchase and credit-sale agreement forms and other forged documents and by other fraudulent means. Counts 2-6 charged them all with uttering (on five different dates in 1957), with intent to defraud, forged hire-purchase proposal forms and agreements or credit-sale agreements, purporting to be signed by certain persons (whose names and addresses were given), knowing the same to I be forged. The appellant and Welham pleaded not guilty to all the counts. Goodman pleaded guilty to counts 1, 5 and 6 and his plea was accepted by the Crown.

At the material time the appellant was a director and the secretary of two companies, Motors (Brighton), Ltd. and Pacca, Ltd. Welham was sales manager of Motors (Brighton), Ltd., and Goodman was a director of Pacca, Ltd. At the hearing, evidence, which was not disputed, was given that these two companies obtained moneys from the two finance companies on hire-purchase and credit-sale agreement forms purporting to be signed by non-existent persons or by existing persons who had not actually signed them. Welham gave evidence in his own defence, and said that he had signed certain forms in blank, ostensibly as a witness, at the request of the appellant. The appellant gave no evidence. The prosecution called (among other witnesses) a Mr. Truman, whose evidence related to counts 4, 5 and 6, in regard to hire-purchase agreements purporting to be signed by persons who did not live at the addresses stated on the forms. In cross-examination, counsel for the appellant put certain questions to Mr. Truman from which the jury were invited to infer that Mr. Truman had acted fraudulently and was an accomplice of Goodman.

On Dec. 19, 1958, the appellant was convicted on all counts, and was sentenced to two years' imprisonment on count 1, and to six months' imprisonment on each of counts 2-6, the terms of six months to run concurrently and to be consecutive to the term of two years. He now appealed against his conviction on the ground (among others) that Welham was an accomplice, and so was Mr. Truman, and that the Common Serjeant had failed to warn the jury of acting on their evidence unless it was corroborated.

W. R. Fitch for the appellant.
M. D. L. Worsley for the Crown.

HILBERY, J.: EDMUND DAVIES, J., will give the judgment of the court.

EDMUND DAVIES, J.: The circumstances giving rise to the appeal now before this court by Prater have already been sufficiently summarised in the judgment of the court which has been delivered in the appeal of his co-accused (1).

Prater (referred to hereinafter as " the appellant ") was convicted on one count of conspiracy and on five counts of uttering forged documents. His learned counsel, whose industry is equalled only by the clarity and cogency of his submissions, urged three matters before this court as being grounds on which the appellant's conviction should be quashed. He said, in the first place, that Welham was an accomplice. Welham was called on his own behalf, and it is said that, although a co-accused and not a Crown witness, his evidence required to be corroborated, that the learned Common Serjeant should have given a warning of the danger of acting on Welham's evidence. The second ground is that one of the Crown witnesses, Mr. Truman, was likewise an accomplice, and that a warning of the danger of acting on his testimony, unless corroborated, should have been given. The third ground was that neither Welham nor Mr. Truman could corroborate each other.

As to the third ground, there has been no sort of contest; it is too well established. In relation to the first matter, that Welham was called on his own behalf and was an accomplice and that a warning of the danger of acting on his uncorroborated evidence should have been given, the authorities by no means all point in the same direction. We have been referred to a number of cases where judgments have been delivered by learned judges of high authority, by CHANNELL, J., in *R.* v. *Scott* (2), by LORD ALVERSTONE, C.J., in *R.* v. *Martin* (3), and by this court recently in 1940 in *R.* v. *Barnes*, *R.* v. *Richards* (4), on the one hand; on the other hand, by AVORY, J., in *R.* v. *Barrow* (5), by HUMPHREYS, J., in *R.* v. *Garland* (6) and again by AVORY, J., in *R.* v. *Wright* (7).

For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve.

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(1) See *R.* v. *Welham*, p. 260, ante.
(2) (1909), 2 Cr. App. Rep. 215.
(3) (1910), 5 Cr. App. Rep. 4.
(4) [1940] 2 All E.R. 229; 27 Cr. App. Rep. 154.
(5) (1934), 24 Cr. App. Rep. 141.
(6) (1941), 29 Cr. App. Rep. 46, n.
(7) (1934), 25 Cr. App. Rep. 35.

A It is to be observed that in *Davies* v. *Public Prosecutions Director* (8), which went to the House of Lords, LORD SIMONDS, L.C., in initiating what was described as the third proposition, dealt with the matter in these terms (9):

> "'Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to s. 4 of the Criminal Appeal Act, 1907.' The rule, it will be observed, applies only to witnesses for the prosecution." B

This court, in the circumstances of the present appeal, is content to found itself on the view which it expresses that it is desirable that, in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given. But every case must be looked at in the light of its own facts and in *R.* v. *Garland* (10) HUMPHREYS, J., delivering the judgment of this court, used words which this court finds completely apposite to the circumstances of the present case, namely, that it is clear that, if there be clear and convincing evidence to such an extent that this court is satisfied that no miscarriage of justice has arisen by reason of the omission of the direction to the jury, the court will not interfere. C

D On those grounds, and bearing in mind also the proviso to s. 4 (1) of the Act of 1907 (11), this court sees no reason to disturb the finding of the jury in respect of the first ground relied on by counsel for the appellant. I should have said in dealing with the first ground that the appellant gave no evidence on his own behalf and none was called for him. Mr. Truman was called as a witness for the prosecution, and a number of suggestions were made to him, of course on instructions, by learned counsel for the appellant which appear to have been wholly denied by Mr. Truman. E This court has looked in vain at the transcript of the summing-up, and has listened in vain, with respect to counsel for the appellant, for any satisfactory indication that there was material on which the learned Common Serjeant would have been justified in presenting Mr. Truman to the jury as being an accomplice. As HILBERY, J., said, it is easy to make suggestions to a witness. F That is one thing. More than that is required to cloak a witness for the Crown or any other witness with the garment of an accomplice. This court is unable on the material before it to hold that it is shown that any warning was in prudence called for, for it is by no means satisfied that there was any material on which Mr. Truman could properly be described as an accomplice. Here, again, had the matter arisen, this court is satisfied that there was ample and overwhelming evidence of a compulsive character which would have necessitated G the court saying that this conviction ought not to be quashed. For these reasons, shortly stated, this court is of the opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* KEVIN WINSTAIN, ESQ., *Barrister-at-Law.*]

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(8) [1954] 1 All E.R. 507; [1954] A.C. 378.

(9) [1954] 1 All E.R. at p. 513; [1954] A.C. at p. 399.

(10) (1941), 29 Cr. App. Rep. 46, n.

(11) The proviso to s. 4 (1) of the Criminal Appeal Act, 1907, reads: "Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

GREEN *v.* BOWES-LYON.

[QUEEN'S BENCH DIVISION (Pearson, J.), December 1, 21, 1959.]

Landlord and Tenant—" *Reversionary tenancy* " *or agreement for the grant of a* " *future tenancy* "—*Distinction*—*Landlord and Tenant Act*, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 28, *s.* 65 (3).

R. was the head lessor, under a long lease, of the whole of certain premises; W. held a sub-lease of the whole premises from R. expiring on Apr. 4, 1959. W., in turn, had sublet to the plaintiff the ground floor shop and basement of the premises for a term which expired on Apr. 1, 1959. By an instrument dated Mar. 19, 1958, which described itself as a reversionary lease, R., the head lessor, granted the defendant a lease of the ground floor shop for a term of seven years beginning on Apr. 5, 1959, viz., immediately after the expiration of W.'s lease, at a stated rent; the instrument recited that R. was the superior landlord of the whole premises and that the whole premises were let to W. for a term expiring on Apr. 4, 1959. The defendant was then in occupation of the ground floor shop. The grant of the reversionary lease was conditional on the defendant first obtaining a lease of the shop until Apr. 1, 1959. In fulfilment of that condition the defendant obtained a sub-lease of the ground floor shop from the plaintiff for the period June 17, 1958 until Mar. 31, 1959, at a yearly rent of £750. The defendant occupied the shop under this sub-lease for business purposes. The plaintiff occupied the basement for business purposes. The plaintiff claimed £187 10s. rent, being a quarter's rent to June 24, 1959, in respect of the defendant's tenancy of the shop under the sub-lease. Under s. 65 (3)* of the Landlord and Tenant Act, 1954, the lease of Mar. 19, 1958, to the defendant, if it created a " reversionary tenancy ", would take effect subject to any tenancy of the ground floor shop continued by s. 24 of the Act, and both the plaintiff's and the defendant's tenancies were so continued. The defendant contended that by the instrument of Mar. 19, 1958, the landlord agreed to grant the defendant a " future tenancy " of the holding and that the case, therefore, was within s. 28† of the Act with the consequences that her sub-tenancy of the shop from the plaintiff ended when the term granted by the instrument of Mar. 19, 1958, began and the sub-lease of June 17, 1958, did not create a tenancy to which Part 2 of the Act of 1954 applied.

Held: the distinction between the reversionary tenancy referred to in s. 65 (3) of the Landlord and Tenant Act, 1954, and the agreement for a future tenancy referred to in s. 28 was the difference between that which created an estate and that which created merely a set of contractual rights and obligations, and, on the true construction of the instrument of Mar. 19, 1958, it granted a reversionary tenancy within the meaning of s. 65 (3); accordingly, the plaintiff was entitled to the rent claimed under the sub-lease of June 17, 1958, for the reversionary lease of Mar. 19, 1958, took effect subject to the tenancy created by the sub-lease and continued by s. 24 of the Landlord and Tenant Act, 1954.

[**Editorial Note.** Both the plaintiff's tenancy of the shop and basement, and the defendant's under tenancy of the shop, were continued by the Landlord and Tenant Act, 1954. It seems, therefore, that the reversionary lease of Mar. 19, 1958, took effect subject to the plaintiff's tenancy, by virtue of which, as continued, she could be landlord of the defendant. In this way the reversionary lease took effect subject also to the defendant's sub-lease, dated June 17, 1958, of the shop, but with the interposition, it seems, of the plaintiff's continued tenancy between the two interests of the defendant in the shop under her sublease and her reversionary lease.

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* The terms of s. 65 (3) of the Landlord and Tenant Act, 1954, are printed at p. 304, letter E, post.

† The terms of s. 28 of the Landlord and Tenant Act, 1954, are printed at p. 304, letter G, post.

As to the creation of a tenancy by contract, see 23 HALSBURY'S LAWS (3rd Edn.) 407, para. 986.

For the Landlord and Tenant Act, 1954, s. 28 and s. 65 (3), see 34 HALSBURY'S STATUTES (2nd Edn.) 413, 442.]

Action.

In this action the plaintiff, Olga Mary Green, claimed from the defendant, Edith Katherine Bowes-Lyon, the sum of £187 10s. as rent which the plaintiff alleged was due to her on June 24, 1959, in respect of the defendant's tenancy of the ground floor shop at 64, South Molton Street, London. By her defence the defendant admitted that on June 17, 1958, the plaintiff granted her an underlease, expiring on Mar. 31, 1959, of the ground floor shop at a yearly rent of £750. The defendant contended that though this underlease was continued by the Landlord and Tenant Act, 1954, s. 24, it was continued only until Apr. 5, 1959, at which date a term of seven years at an annual rent of £520 granted by the head lessor to the defendant by deed called a reversionary lease dated Mar. 19, 1958, was by the terms of that deed to begin, and that the tenancy created by the underlease then ceased by virtue of s. 28 of the Act of 1954. The defendant further contended that this deed was binding on the plaintiff under Sch. 6, para. 3 (1) to the Act of 1954. The plaintiff contended that the interest granted to the defendant under the deed of Mar. 19, 1958, was a reversionary tenancy within the meaning of s. 65 (3) of the Act of 1954, not a future tenancy within s. 28, and that under s. 65 (3) the reversionary tenancy took effect subject to the defendant's underlease which was continued indefinitely by the Act of 1954, on which basis the defendant was still the plaintiff's tenant and owed the plaintiff the rent claimed. The facts are set out in the judgment.

C. Lawson for the plaintiff.

J. G. Wilmers for the defendant.

Cur. adv. vult.

Dec. 21. **PEARSON, J.**, read the following judgment: In this case the facts are not in dispute, and there is no oral, but only documentary, evidence. The issue arises under the Landlord and Tenant Act, 1954. It is common ground that the defendant is somebody's sub-tenant of the ground floor shop of number 64, South Molton Street, but she is claimed as sub-tenant by the plaintiff on the one side and by a Mr. Rye on the other side, and the real dispute is between the plaintiff and Mr. Rye. In form the action is a claim by the plaintiff against the defendant for £187 10s. rent due on June 24, 1959, and the defence is that the defendant is not the plaintiff's sub-tenant and therefore does not owe any rent to the plaintiff.

Mr. Rye holds a very long lease of the whole of the premises 64, South Molton Street. On Apr. 5, 1945, he demised the whole premises to a Mr. Wells for a term of fourteen years from Apr. 4, 1945, so that the term would expire on or about Apr. 4, 1959. On Feb. 18, 1946, Mr. Wells demised the ground floor and basement of the premises to a Mr. Alvine for a term of ten years from Feb. 1, 1946. That term would have expired on or about Feb. 1, 1956, but there was a supplemental lease, dated Jan. 11, 1956, from Mrs. Wells, widow and successor in title of Mr. Wells, to the plaintiff, who together with another lady then held the residue of the term which had been granted by the lease of Feb. 18, 1946. By this supplemental lease Mrs. Wells demised the ground floor and basement of the premises to the plaintiff from Feb. 1, 1956, for a term of three years and fifty-nine days expiring on Apr. 1, 1959.

On Mar. 19, 1958, Mr. Rye granted a reversionary lease to the defendant. The reversionary lease recited that the lessor was the superior landlord of the whole of the premises, number 64, South Molton Street, and that by an underlease dated Apr. 5, 1945, between the lessor of the one part and Mr. Wells of the other part the whole of the building was let to Mr. Wells from Apr. 4, 1945, for a term of fourteen years expiring on Apr. 4, 1959. That is the underlease to which I have already referred. There was a further recital that the interest of Mr. Wells had now passed to his widow, Mrs. Wells. There was also a recital that the lessee, that is to say, the defendant, was the sub-tenant of the ground floor only on which she carried on the business of the sale of light refreshments and farm produce. The reversionary lease then provided as follows:

> " The lessor conditionally upon the lessee obtaining a lease of the demised premises until the first day of April, 1959, hereby demises [the ground floor shop of 64, South Molton Street] for a term of seven years from the fifth day of April, 1959 "

at a stated rent. The defendant thus had to fulfil a condition in order to have the benefit of the reversionary lease. She obtained that underlease from the plaintiff who, as mentioned, had the supplemental lease of the ground floor and basement. By that underlease, which was dated June 17, 1958, the plaintiff demised the ground floor shop to the defendant from June 17, 1958, to Mar. 31, 1959. That has been treated as a fulfilment of the condition, no question being raised as to the apparent slight discrepancy in date as between " until the first day of April, 1959 " and " until the 31st day of March, 1959 ".

Early in 1959, therefore, the position at common law, if we disregard for the moment the effect of the Landlord and Tenant Act, 1954, would be this:

(1) Mr. Rye as head lessor has a very long lease on the whole of the premises;

(2) Mrs. Wells holds from Mr. Rye a sub-lease of the whole of the premises expiring on Apr. 4, 1959;

(3) The plaintiff holds from Mrs. Wells a sub-lease of the ground floor and basement expiring on Apr. 1, 1959;

(4) The defendant holds from the plaintiff a sub-lease of the ground floor expiring on Mar. 31, 1959;

(5) The defendant has the reversionary lease commencing on Apr. 5, 1959, which is evidently timed to take effect immediately after the expiration of Mrs. Wells' lease, although it has also the curious effect of leaving a gap of four days between the expiry of the defendant's sub-lease from the plaintiff and the commencement of the defendant's reversionary lease granted by Mr. Rye.

Next comes the impact on this situation of Part 2 of the Landlord and Tenant Act, 1954. I will read s. 23, sub-s. (1) and sub-s. (3):

> " (1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes . . .
>
> " (3) In the following provisions of this Part of this Act the expression ' the holding ', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

As the plaintiff was occupying the basement for business purposes, so that the property comprised in her tenancy of the ground floor and basement included premises occupied by her for business purposes, it follows that Part 2 of the Act applied to her tenancy. Moreover the defendant was occupying the ground floor for business purposes, and therefore Part 2 of the Act, prima facie at any rate, applied to her tenancy. Mrs. Wells, as I understand the position, was not occupying any part of the premises for business purposes and was not personally occupying any part of it at all and so Part 2 of the Act did not apply to her tenancy. Then we come to s. 24 of the Act of 1954 and I will read sub-s. (1) and sub-s. (2).

> " (1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of s. 29 of this Act, the tenant under such a tenancy may apply to the court for a new tenancy—(a) if the landlord has given notice under the next following section to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with s. 26 of this Act.
>
> " (2) The last foregoing subsection shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy."

The effect of that section was to continue the plaintiff's tenancy of the ground floor and basement beyond Apr. 1, 1959, indefinitely until it should be terminated in one of the several ways provided by the Act. Similarly the defendant's tenancy is, prima facie at any rate, continued indefinitely until terminated in one of the ways provided by the Act. The question now arises, how is the defendant's position affected by the instrument dated Mar. 19, 1958? That is really the issue in this case. That is the instrument which was called, indeed, it calls itself, a reversionary lease.

The plaintiff's contention is that the instrument is what it calls itself, namely, a reversionary lease, and therefore the position is governed by s. 65 (3) of the Act of 1954, which provides as follows:

> " Where by virtue of any provision of this Act a tenancy (in this subsection referred to as ' the continuing tenancy ') is continued beyond the beginning of a reversionary tenancy which was granted (whether before or after the commencement of this Act) so as to begin on or after the date on which apart from this Act the continuing tenancy would have come to an end, the reversionary tenancy shall have effect as if it had been granted subject to the continuing tenancy."

If that subsection applies then the continuing tenancy is the defendant's sub-lease from the plaintiff which was originally timed to expire on Mar. 31, 1959, but was continued by s. 24 indefinitely, if s. 24 applies. On that basis the reversionary tenancy created by the instrument of Mar. 19, 1958, is to have effect only subject to the defendant's continuing tenancy. On that basis the defendant has a continuing tenancy from the plaintiff and is the plaintiff's sub-tenant and owes her the rent claimed in this action.

The defendant's contention, on the other hand, is based on s. 28 which provides as follows:

> " Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

The defendant's contention is that the instrument dated Mar. 19, 1958, that is the instrument called a reversionary lease, is in truth an agreement between the landlord and the tenant " for the grant to the tenant of a future tenancy of the holding on terms and from a date specified in the agreement " within the meaning of s. 28. If that is right then the defendant's sub-lease from the plaintiff was the " current tenancy " referred to in s. 28, and it continued only until Apr. 5, 1959, and no longer, and was not, therefore, a tenancy to which Part 2 of the Act applied. So it was not continued indefinitely under s. 24. Then on that basis it is said that the agreement binds the interest of the plaintiff under para. 3 (1) of Sch. 6 to the Act of 1954, and that para. 4 of that schedule gives the plaintiff a right to compensation.

The question in the end is a very simple one: is the instrument of Mar. 19, 1958, a reversionary lease or is it an agreement for the grant of a future tenancy?

A Having regard to its name and provisions I hold that it is a reversionary tenancy and not an agreement for the grant of a future tenancy. It creates an estate and not merely a set of contractual rights and obligations.

There is a definition of term of years absolute in the Law of Property Act, 1925, s. 205 (1) (xxvii), as a term of years " taking effect either in possession or in reversion whether or not at a rent " and so on.

B Then it is stated in WOODFALL on LANDLORD AND TENANT (25th Edn.), p. 286, that

> " A lease may be limited to take effect either immediately or from a future date. It is provided by the Law of Property Act, 1925, s. 205 (1) (xxvii), that ' term of years absolute ' includes a term of years taking effect either in possession or in reversion."

C At p. 287 of WOODFALL on LANDLORD AND TENANT (25th Edn.) it is stated:

> " Reversionary leases: All leases which are not to take effect in possession immediately, but from a future day, are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion. In legal acceptance a lease for years in reversion, and a future interest
> D for years, are one and the same: a future lease and a lease in reversion are synonymous. But strictly speaking a reversionary lease is one granted for a term which is to commence from or after the expiration or other determination of a previous lease."

In my view, this instrument is a reversionary lease which was granted for a term which was to commence from and after the expiration of the previous lease, which
E is the lease from Mr. Rye to Mr. Wells, expiring on Apr. 4, 1959, and this instrument granted is a reversionary lease commencing on Apr. 5, 1959.

It seems to me that the distinction between the reversionary lease referred to in s. 65 (3) and the agreement for a future tenancy referred to in s. 28 is the difference between something which creates an estate and something which creates merely a set of contractual rights and obligations.

F I therefore hold that the defendant was on June 24, 1959, the plaintiff's subtenant under the sub-lease dated June 17, 1958, which was being continued under s. 24 of the Act of 1954. Accordingly the rent claimed in this action is due from the defendant to the plaintiff. It is unnecessary to venture a decision or express an opinion on the interesting points which were discussed at the trial as to the application to the facts of this case of the definition of " landlord " con-
G tained in s. 44. Nor is it necessary to deal with the correspondence which was exhibited on affidavits. In the result there will be judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff.

Solicitors: *Tringhams* (for the plaintiff); *Layton & Co.* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

ELMDENE ESTATES, LTD. *v.* WHITE.

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Jenkins), December 7, 8, 1959, January 21, 1960.]

Rent Restriction—"Premium"—Payment—Third party receiving benefit—Tenant required by landlord, as condition of grant of tenancy, to sell house, owned jointly by him and his wife, to third party at undervalue of £500—Whether sale at undervalue constituted payment of premium—"Pecuniary consideration"—Whether landlord liable to repay £500 to tenant—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 40), *s.* 2 (1), (5), *s.* 18 (2).

Payment of a premium may be unlawfully required within s. 2 (1) and s. 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, although the payment is not to the person who requires it to be made (see p. 309, letter A, p. 310, letter I, p. 313, letter A, and p. 316, letter C, post).

Dictum of LORD GODDARD, C.J., in *R.* v. *Birmingham* (*West*) *Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* ([1951] 1 All E.R. at p. 202) disapproved.

In 1952 the respondent and his wife decided to sell a house, which they owned jointly, and to obtain a flat. An estate agent, acting on behalf of the appellants, offered to grant a tenancy of a flat which was subject to the Rent Restriction Acts at a weekly rent of £1 15s. The landlords of this flat were the appellants, and the offer of the tenancy to the respondent and his wife was made on the condition that they sold their house to another company, P., Ltd., at £500 less than its fair market value. The respondent and his wife accepted the offer, sold their house to P., Ltd., for £1,800 (its fair market price at that time being between £2,300 and £2,400), and were granted a tenancy of the flat by the appellants. The appellants received no direct benefit from the sale of the house being at an undervalue. The respondent sought to recover the £500 from the appellants under the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) and (5)*, on the ground that the £500 was a "premium" (viz., as defined by s. 18 (2)* of the Act, a pecuniary consideration in addition to rent) which the appellants had, as a condition of the grant of the tenancy of the flat, required the respondent to pay, contrary to s. 2 (1) of the Act.

Held: the respondent was entitled to recover the £500 from the appellants under s. 2 (1) and (5) of the Landlord and Tenant (Rent Control) Act, 1949, because

(i) the £500 was a premium within the meaning of s. 18 (2) of the Act of 1949, since there was a "pecuniary consideration" of that amount in the transaction, in that the tenant suffered a detriment and the landlords (or a third party to whom the landlords surrendered the advantage) obtained a comparable benefit expressed in terms of money (see p. 309, letter D, and p. 311, letter G, post), and

(ii) "payment" of the premium had been required within the meaning of s. 2 (1) and s. 2 (5) of the Act of 1949, for the word "payment" there bore an extended meaning covering the passing of whatever pecuniary consideration there might be (see p. 309, letter G, p. 312, letter E, and p. 315, letter H, post).

Per LORD KEITH OF AVONHOLM: the phrase "any other pecuniary consideration" [in the definition of "premium" in s. 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949,] is apt to cover any other consideration that sounds in money to the tenant, either in the way of involving him in a payment of money or of foregoing a receipt of money (see p. 312, letter D; compare p. 315, letter I, post).

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* For the relevant terms of s. 2 (1) and (5) and s. 18 (2), see p. 308, letters E to H, post.

A Decision of the COURT OF APPEAL (sub nom. *White* v. *Elmdene Estates, Ltd.*) ([1959] 2 All E.R. 605) affirmed.

[As to premiums on the grant of a tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 798, 804, paras. 1576, 1583.

For the Landlord and Tenant (Rent Control) Act, 1949, s. 2 and s. 18, see 13 HALSBURY'S STATUTES (2nd Edn.) 1097, 1110.]

B Cases referred to:

R. v. *Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.*, [1951] 1 All E.R. 198; [1951] 2 K.B. 54; 115 J.P. 45; 3rd Digest Supp.

Remmington v. *Larchin*, [1921] 3 K.B. 404; 90 L.J.K.B. 1248; 125 L.T. 749; 85 J.P. 221; 31 Digest (Repl.) 688, *7795*.

C *Samrose Properties, Ltd.* v. *Gibbard*, [1958] 1 All E.R. 502; [1958] 1 W.L.R. 235; 3rd Digest Supp.

Appeal.

Appeal by the landlords, Elmdene Estates, Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., ORMEROD and WILLMER, L.JJ.), dated D Apr. 28, 1959, and reported sub nom. *White* v. *Elmdene Estates, Ltd.*, [1959] 2 All E.R. 605, reversing a judgment of His Honour JUDGE LEON, given at Willesden County Court on Oct. 29, 1958, whereby he adjudged that the respondent, William Alfred White, was not entitled to recover from the appellants the sum of £500 as a payment made in contravention of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), and recoverable by the respondent under E s. 2 (5) of the Act. The facts are set out in the opinion of VISCOUNT SIMONDS.

L. G. Scarman, Q.C., and *C. F. Dehn* for the appellants.
R. E. Megarry, Q.C., and *Henry Palmer* for the respondent.

Their Lordships took time for consideration.
Jan. 21. The following opinions were read.

F

VISCOUNT SIMONDS: My Lords, in June, 1958, the respondent, William Alfred White, instituted proceedings in the Willesden County Court to recover from the appellant company the sum of £500 which he alleged to have been a premium required to be paid by him contrary to the provisions of the Landlord and Tenant (Rent Control) Act, 1949. The precise facts are of so much importance that I propose to state them in the words of the learned G county court judge. He said:

> " The facts as I found them to be were as follows. At the relevant time the [respondent] and his wife were joint owners of 174, The Heights, South Harrow (hereinafter called ' 174 ') where they lived. The house was subject to a mortgage, payments under the mortgage deed were in arrear and the H [respondent] and his wife decided that the only way out was for them to sell 174, repay the mortgage money out of the price obtained and obtain a flat. They had nowhere to go, they were compelled to leave their own house and were just the sort of people whom a landlord who wanted an illegal premium would have liked to meet. They were just the sort of people for whose benefit s. 2 of the Act of 1949 was passed. During their I quest for a flat they passed the window of Clifford & Clifford. Ltd. (hereinafter called ' Clifford '), who were estate agents, and they saw advertised in the window a self-contained flat to let unfurnished. They went in and asked if the flat was available and if they could see it. Clifford's representative, a Mr. Williamson, replied to their question with, ' Have you got a house to sell? ' They said ' Yes ' and Mr. Williamson then said he would take them over the flat, 108 Welldon Crescent. They went to see it and liked it. It was conceded on behalf of the [appellants] that the tenancy offered and subsequently granted was one to which the Rent Restriction

> Acts and in particular the Act of 1949 applied. Mr. Williamson then made it plain to the [respondent] and his wife that they could not have the tenancy of the flat unless they were prepared to sell 174 at £500 less than its fair market value. I was satisfied that the fair market value of that house was, at the time, between £2,300 and £2,400 and that Clifford knew this very well and on behalf of the [appellants] required the [respondent] and his wife to sell it to purchasers who turned out to be Pegasus Training Estates, Ltd. (hereinafter called 'Pegasus'), at £500 less than its value. The [respondent] and his wife thought it over and, as they had nowhere else to go, they felt they had no alternative but to agree. They accordingly sold 174 to Pegasus for £1,800 and received in return from the [appellants] a tenancy of 108 Welldon Crescent at a weekly rent of £1 15s. I hold that the sale by the [respondent] and his wife to Pegasus of 174 at an undervalue amounting to £500 was required by Clifford acting for the [appellants] as a condition of the tenancy being granted by the [appellants] to the [respondent]."

The learned judge further pointed out the close interrelation of the three companies, viz., the appellant company, Pegasus and Clifford, but I do not attach any importance to this matter. He held that the transaction was not colourable or a sham. It is, no doubt, sufficiently explained by the interrelation.

In these circumstances the respondent brought his action. He founded on s. 2 (1) of the Act to which I have referred, which provides that

> "A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent."

Subsection (5) of the same section provides that

> "Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section . . . the amount of the premium, or so much thereof as could not lawfully be required . . . shall be recoverable by the person by whom it was paid."

Subsection (6) provides that a person requiring any premium in contravention of the section should be liable on summary conviction to a fine not exceeding £100, and that the court by which he was convicted might order the amount of the premium, or so much thereof as could not lawfully be required under the section, to be repaid to the person by whom it was paid. By s. 18 (2), it was enacted that in that Act the expression "premium" included any fine or other like sum and any other pecuniary consideration in addition to rent. I do not think it necessary to refer to any other sections of the Act.

Two questions arose. Did the appellant company require the payment of a premium within the meaning of the Act as the condition of a grant of a tenancy? If they did, was the transaction nevertheless removed from the operation of the Act by the fact that it was required to be paid not to them nor to any one on their behalf but to a third party? Both these questions the learned judge would have decided in favour of the respondent, but felt himself bound to decide the second of them against him by the decision of the King's Bench Divisional Court in *R.* v. *Birmingham (West) Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (1). On appeal, the Court of Appeal unanimously allowed the appeal of the respondent. I have no doubt they were right.

My Lords, it is not quite clear that, in the *Birmingham* case (1), the ratio decidendi was that a premium could not be unlawfully required within the meaning of the section unless it was required to be paid to the person making the requisition or to someone on his behalf. But undoubtedly the court made observations which asserted that construction. It is, therefore, important that your Lordships should state clearly that this is not a tenable view. The Act does not say so, and I see no reason for reading into it words which are not there and which, if they were there, would go far to defeat its purpose. It cannot be supposed that the legislature intended that a landlord could not lawfully require the payment of a premium for his own benefit but could do so for the benefit of a wife, a son, a daughter or any third party.

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(1) [1951] 1 All E.R. 198; [1951] 2 K.B. 54.

On what I have called the first question, the learned judge held that the transaction amounted to the payment of a pecuniary consideration, and in this he was upheld by the Court of Appeal. My Lords, it has been said before and it must be said again that in the consideration of questions arising under the Rent Acts the court must look at the substance and reality of a transaction not its form: see, e.g., *Samrose Properties, Ltd.* v. *Gibbard* (2). Of the real nature of this transaction no doubt can be entertained. It was born of the determination of the landlords to obtain a considerable sum of money in addition to the rent as a condition of the grant of a tenancy. It was carried out by requiring the sale of a house at an undervalue of £500. The respondent suffered a pecuniary detriment of that amount; the appellant company (or a third party to whom it surrendered that advantage) obtained a comparable benefit. If this is not a pecuniary consideration moving from the respondent, I do not know what those words mean. That there was consideration cannot be denied. Was it not pecuniary? That word is defined as meaning " of, belonging to or having relation to money ". There may be transactions in which it is difficult to say whether the consideration is pecuniary. The line dividing valuable consideration which is pecuniary from that which is not is a twilight line, but on one side of it in broad noonday is the transaction in which one party says to the other: " I will not grant you a tenancy unless you sell me a house for £500 below its value ". It is in substance, and I would be inclined to say in form also, a consideration stated in terms of money and it is not disguised by the cloak of a sale of property at an undervalue.

The appellants sought to rely on fine distinctions between the language of the Act of 1949 and that of earlier Acts, but they appeared to me trivial and by no means to justify any departure from the plain meaning of the words we have to construe. The appellants sought, too, to get some help from the word " payment " in the subsection. The transaction, they said, did not involve any payment by the respondent. That may be conceded. But, since pecuniary consideration includes something other than (a) a premium as commonly understood, (b) a fine, and (c) any other like sum, it is clear that the word " payment " must be given an extended meaning to cover whatever the pecuniary consideration may be.

Finally, the appellants urged that, as the Act imposed a penalty for the breach of its provision, they should be given the benefit of any ambiguity in its terms. I have already indicated that I find no difficulty in determining on which side of a line that may not be easy to draw this case falls. There is no such ambiguity as to justify the invocation of the important principle asserted by SCRUTTON, L.J., and ATKIN, L.J., in *Remmington* v. *Larchin* (3) and recently reasserted in this House. Nor, I think, would your Lordships be over ready to apply it where a landlord deliberately contrives just the mischief that the Act is intended to avert but claims that its provisions are susceptible of a meaning which provides a way of escape for him.

The appeal should, in my opinion, be dismissed with costs.

LORD RADCLIFFE: My Lords, in the month of August, 1952, the appellants granted the respondent a tenancy of a first floor flat at 108, Welldon

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(2) [1958] 1 All E.R. 502.

(3) [1921] 3 K.B. 404.

Crescent, Harrow, at a weekly rent of £1 15s. In the same month, the respondent and his wife, at the direction of the appellants, conveyed the freehold of their house, 174, The Heights, South Harrow, to a limited company, Pegasus Training Estates, Ltd., for the sum of £1,800. The only feature of this convenient exchange that might be thought to have been at all unusual was that, as the appellants and the respondent both knew, the fair market value of 174, The Heights, at that time was between £2,300 and £2,400. The sale of the house to Pegasus for £1,800 was not due, however, to any impulse of benevolence on the part of the respondent and his wife. On the contrary, it was a sacrifice to which they had to submit in order to obtain the accommodation at 108, Welldon Crescent, of which they were in need. On their first inquiry of the appellants' estate agents, who were advertising the vacancy, they were met with the pregnant question: " Have you got a house to sell? " As the negotiations proceeded it was made plain to them that they could not have the tenancy of the flat unless they were prepared to sell their house for £500 less than its fair market value. Nor was the conferment of this benefit on Pegasus an act of inexplicable benevolence on the part of the appellants. It so happened that, of its 5,000 issued shares of £1 each, 1,000 belonged to a Mr. Melville Francis Van Dooren, who also held 2,500 of the 6,600 issued shares of £1 each in Pegasus; a Mabel Victoria Van Dooren, having the same address as Mr. Melville, held another 1,000 shares of the appellants and another 2,500 shares of Pegasus; while 1,000 shares in each of the companies belonged to a Mr. Elmer John Van Dooren. Thus the Van Dooren family can be seen to have enjoyed a certain community of interest in the fortunes of the two companies. The tenancy of the flat at 108, Welldon Crescent, is one within the protection of the Rent Restriction Acts. The sole question in this appeal is whether the appellants " required the payment of a premium in addition to the rent " within the meaning of s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, so as to render the amount of the premium recoverable by the respondent under sub-s. (5) of the same section. They do not dispute that, if what was done on their behalf did amount to a contravention of s. 2 (1), the amount of the premium can be recovered from them despite the fact that it was Pegasus which was the immediate recipient of the benefit of the respondent's concession.

Several points were taken by the appellants in the course of their argument to the effect that the prohibition contained in s. 2 (1) did not apply to their ingenious transaction. The first was that, to be within the Act, the " premium " had to be paid to the landlord himself and not to any other person, so that, even if payment of a sum of money or its equivalent had been required in this case, it was not a premium within the meaning of the section. This reading was said, and I think rightly said, to have been adopted by the Divisional Court in *R.* v. *Birmingham* (*West*) *Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (4), in which LORD GODDARD, C.J., said (5):

> " Here I prefer to base my judgment on the ground that on the true construction of this Act it is clear that it was intended to apply to a pecuniary consideration paid to the landlord."

In my opinion, that is not the right construction of the Act. The words of the section do not require that the prohibited payments should be only those made to landlords themselves. So far as the tenant is concerned, the cost of accommodation is raised against him just as much if he hands his money over to someone else as it is if he hands it directly to the landlord. The landlord, on the other hand, gets his benefit out of the tenant if the premium is paid at his order to his creditor, to his son or to any other person or purpose he nominates no less than if he receives what is paid directly into his own hands. I think,

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(4) [1951] 1 All E.R. 198; [1951] 2 K.B. 54.

(5) [1951] 1 All E.R. at p. 202; [1951] 2 K.B. at p. 58.

A therefore, that there is a breach of s. 2 when the premium is paid to a third party, provided that the payment is made at the landlord's direction.

Then it was said that, even if this might have been the right construction before 1951, it would be wrong to adopt it now after the *Birmingham* decision (6) had stood for eight years, particularly as a breach of the section had certain penal consequences. The Court of Appeal were not moved by this form of B argument, and I cannot say that I am. I dare say that, since 1951, some landlords have taken tribute of this kind in reliance on what was said in the *Birmingham* case (6). For all I know, Messrs. Clifford & Clifford, Ltd., the agents of the appellants, had the relevant volume of the law reports open on the table before them when they laid down their condition that Pegasus was to have the respondent's house at £500 below its value. I should not be much surprised. C But, after all, the primary duty of the House is to attribute what it believes to be the right meaning and effect to a general Act of Parliament passed for the protection of tenants of rent-controlled premises, and I do not think that we should ever get very far if a decision of a Divisional Court were to be treated as settling an important point of interpretation for all time merely because it was given eight years ago.

D The next points that were taken were that the benefit conferred on Pegasus by the conveyance of the house for £1,800 was not a premium, that no payment had been made in the mere conveyance at an undervalue, and that the consideration which the sacrifice of £500 represented was not a pecuniary consideration within the meaning of s. 18 (2) of the Act. All these aspects of the argument can be presented separately; but I have put them together because, in E my view, they all depend on the answer given to the one question: Was there a " pecuniary " consideration afforded in this case? If there was, then it was, by virtue of s. 18 (2), a " premium "; and, if it was a premium, then I should find no difficulty in saying that whatever passed it over to the recipient was a payment of it. The expression " premium " includes any fine or other like sum and any other pecuniary consideration in addition to rent. Not every F consideration given or suffered to obtain a letting is then a premium for the purpose of this Act. It must be pecuniary. On the other hand, the term " premium " evidently extends to considerations beyond the simple lump sum in addition to rent which is the ordinary form of premium or fine. The appellants suggest that the words " pecuniary consideration " are satisfied by including in " premium " monetary instruments such as cheques and bills. In my G opinion, that is not a natural interpretation and, in any event, it is much too restricted. Judging by the context of the Act there is, I think, a pecuniary consideration, whenever the benefit obtained by the landlord or the detriment suffered by the tenant is expressed in terms of money. If it is so expressed, the particular means adopted of passing the consideration from giver to taker is not significant.

H Now in this case, I do not think that there is any doubt that, on the facts found by the county court judge, what was required of the prospective tenants on behalf of the landlords was the sum of £500, to be taken out of the value of the house that they were to make over to Pegasus. The transaction was in all respects equivalent to what would have taken place if they had sold 174, The Heights, at its agreed fair market value for £2,300-£2,400 and handed I back £500 to the purchaser If that had been done, £500 would have been paid in cash at and to the order of the landlords. Although we must take the words of the statute as we find them and we are not to treat " pecuniary consideration " as a mere synonym for any consideration whatsoever, I do not think that the distinction between what is and what is not " pecuniary " depends on purely formal differences in the method of transferring the stipulated amount. What is important is that the landlords made it plain that their price was £500 and that this sum was furnished out of the resources of the tenant, which were reduced by the same amount.

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(6) [1951] 1 All E.R. 198; [1951] 2 K.B. 54.

I would dismiss the appeal.

LORD COHEN: My Lords, I agree.

LORD KEITH OF AVONHOLM: My Lords, I agree. On the first point, whether we find here a " premium ", I proceed on the construction of the definition of " premium " in s. 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949. Some meaning must be found for the words " other pecuniary consideration " in the definition, other than payment in cash. Payment in cash to a landlord is met by the words " any fine or other like sum ". It was suggested that " any other pecuniary consideration " would include payment by cheque. That would lead nowhere because, unless the cheque was honoured, there would be no payment at all and, if it were honoured, there would be a payment in cash if the cheque were cashed and, in effect, a payment in cash if it resulted in a transfer of credit from the drawer's bank account to the payee's bank account. I cannot think that the definition was introduced to cover fine distinctions of this kind. In my opinion, the phrase " any other pecuniary consideration " is apt to cover any other consideration that sounds in money to the tenant, either in the way of involving him in a payment of money or of foregoing a receipt of money. Foregoing a debt due by the landlord to the tenant would be a case in point. The difficulty arises, I think, not in giving the phrase such a construction, but from the fact that, in s. 2 of the Act, " premium " is linked with the word " payment ". Can a tenant be said to have *paid* a premium if he has agreed to discharge a debt due to him by the landlord? I would say " Yes ". If such discharge is a pecuniary consideration, he has satisfied the landlord's demand for a premium by agreeing to the discharge and such satisfaction in the context of this Act is, in my opinion, equivalent to payment.

There remains the question whether the payment of a premium must be to the landlord. This links up in some measure with the definition of " premium ". It cannot be in all respects so confined, for s. 2 (2) of the Act prohibits any person from requiring payment of a premium as a condition of the assignment of a tenancy. This would apply, I think, to a landlord whose consent was necessary to an assignment, but it clearly covers a tenant who demands a premium as a condition of assigning his tenancy. This, however, is the result of express statutory enactment and may be said to assimilate the position of an assignor to that of a landlord. This leaves unresolved the question whether the payment required to be made must be made to the landlord (or the assignor), or to someone on his behalf, in order to constitute a breach of the statute. The matter must depend on what is to be implied from the language used. No express words refer to payment to the landlord. Reliance was placed by counsel for the appellants on the words " in addition to the rent " in s. 2 (1) and " in addition to rent " in the definition. In the definition, the words are probably necessary as, without them, the words " any other pecuniary consideration " would, if taken literally, include rent. From the words in s. 2 (1), no safe inference can, in my opinion, be drawn. On any view the premium is in addition to the rent. Nor is the fact that the premium may be recoverable from the landlord under s. 2 (5), or may be ordered to be repaid by the landlord under s. 2 (6), conclusive on the point. (It is immaterial to this case to consider whether it can be recovered from the recipient of the premium.) If the landlord is the person who has required the premium to be paid as a condition of his granting a tenancy, to whomsoever it is to be paid, s. 2 (6) of the Act empowers the court which convicts him of an offence to order the premium to be repaid to the person by whom it was paid. By parity of reasoning, sub-s. (5) of s. 2 would seem to provide that it should be recoverable from the landlord by civil suit, in like case, without that subsection yielding a necessary inference that, therefore, it must have been received by him. As the Master of the Rolls (LORD EVERSHED) said in his judgment in the Court of Appeal (7), there is no logical reason why a payment made to the landlord should be recoverable as being unlawful and one made by his order to a son, or a trustee, or an associated company, should be protected as being lawful. In my opinion, this second point taken for the appellants falls with the first.

I would dismiss the appeal.

LORD JENKINS: My Lords, I also agree. In this case the plaintiff (now respondent), William Alfred White, sued the defendants (now appellants), Elmdene Estates, Ltd., in the Willesden County Court for £500, claiming that, in the circumstances hereinafter mentioned, the defendants had, within the meaning of s. 2 (1) and s. 18 (2) of the Landlord and Tenant (Rent Control) Act, 1949, required the payment of a premium of that amount in addition to the rent as a condition of the grant to the plaintiff of a tenancy of a flat at No. 108, Welldon Crescent, Harrow, being a tenancy to which the Rent Restriction Acts, 1920 to 1949, applied; and that he was, accordingly, entitled to recover from the defendants the sum in question (which he had, in fact, paid in the way I am about to describe) as an unlawful premium under the provisions of s. 2 (5) of the Act of 1949. The facts as found by the learned judge, which are not in dispute, have been fully stated in the opinion delivered by my noble and learned friend, LORD SIMONDS, and I need not repeat them at length. He also has sufficiently referred to the relevant provisions of the Act of 1949, which, for the purposes of this opinion, may, therefore, be taken as read.

The defendants admit that the tenancy of the flat was a tenancy to which s. 2 of the Act of 1949 applied, and that, if the defendants had required and received a simple payment by the plaintiff to the defendants themselves of £500 in cash as a condition of granting the tenancy, the £500 would have been an unlawful premium under s. 2 (1), and recoverable as such under s. 2 (5). The defendants did not, however, require or receive the £500 in actual cash; but they did require as a condition of the grant of the tenancy that the plaintiff and his wife should sell a house (No. 174, The Heights, South Harrow) of which they were joint owners at a price of £500 less than its fair market value. In compliance with this requirement, the plaintiff and his wife in fact sold the house, not to the defendants themselves, but, by the direction of the defendants, to another company, Pegasus Training Estates, Ltd. (hereinafter called "Pegasus"), at the stipulated undervalue.

The plaintiff's contention was that the benefit secured by the defendants by means of the sale at an undervalue of £500 constituted a premium of that amount within the meaning of s. 2 (1) and s. 18 (2) of the Act of 1949, and that, for the purposes of s. 2 of that Act, the completion of such sale amounted to payment of such premium. He contended further that the fact that the defendants chose to require that the sale should be made to Pegasus instead of being made to themselves was irrelevant. The defendants on the other hand contended that the benefit arising from the sale of the house at an undervalue of £500 was not a "premium" either in the ordinary sense of the word or within any of the wider meanings assigned to it by s. 18 (2). They contended further that, even if a benefit of this sort was otherwise capable of constituting a premium within the meaning of the Act of 1949, the benefit here in question was outside the scope of s. 2 (1) of the Act, which only applied to a premium paid to the person granting the tenancy, whereas in the present case the payment constituted by the completion of the sale of the house at the stipulated undervalue was made not to the defendants as the landlords but to a third party, namely, Pegasus.

The learned county court judge, in the course of his careful and most helpful judgment, said that, if the sale of the house had been to the defendants, he would have been prepared to hold that the sale at an undervalue amounted to a A premium within the meaning of that word as defined by s. 18 (2) of the Act of 1949. He went on to observe, and I entirely agree, that

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(7) [1959] 2 All E.R. at p. 611.

> " it would be very odd if a proposed landlord could say to a proposed tenant ' you can have a tenancy but only on the terms that you sell me your wife's necklace which is worth £1,500 for £1,000 ', without it being B held that that was a pecuniary consideration in addition to the rent."

Later in his judgment, the learned judge said this:

> " I certainly held, however, that the payment, if it was a payment, was made to Pegasus at the direction of or on the request of the defendants and C upon that finding it seemed to me that the plaintiff had brought his case within the section. He had proved to my satisfaction that the defendants had as a condition of granting a tenancy required the payment (to Pegasus) of a pecuniary consideration in addition to the rent."

From these and other passages in the judgment of the learned judge, it is plain D enough that, if he had been free to do so, he would have had little hesitation in deciding the case in the plaintiff's favour. He was, however, confronted with the case in the Divisional Court of *R.* v. *Birmingham* (*West*) *Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (8), in which the view was expressed that, in order to constitute a premium within the meaning of s. 2 (1) of the Act of 1949, the payment in question must be made to the landlord and not to E some third party. The learned judge, though with some reluctance, felt (as I think quite rightly) that he was bound to follow this decision, with the result that the defendants were entitled to succeed on the second branch of their argument because the " payment " here in question was made to Pegasus and not to the defendants as landlords. Accordingly, by his order dated Oct. 29, 1958, the learned judge gave judgment for the defendants with costs. F

In the Court of Appeal, *R.* v. *Birmingham* (*West*) *Rent Tribunal, Ex p. Edgbaston Investment Trust, Ltd.* (8) was distinguished and, while held right on its own facts, was disapproved in so far as it contained observations to the effect that no sum could be a premium within the meaning of s. 2 (1) of the Act of 1949 if it was paid to some nominee of, or to the order of, the landlord, instead of G being paid to the landlord himself. On the question whether the £500 provided by the sale of the house at an undervalue of that amount was in other respects a premium within the meaning of the Act of 1949, the Court of Appeal took the same view as the learned county court judge had expressed, but to which, in view of the *Birmingham* case (8), he had felt unable to give effect, and held that it was such a premium. Accordingly, it was held in the Court of Appeal H that the undervalue of £500 amounted to a premium within the meaning of the Act of 1949, and that it was not excluded from the operation of the Act by the circumstances that the sale was made to Pegasus at the direction of, or on the request of, the defendants instead of being made to the defendants themselves. The Court of Appeal also decided in the plaintiff's favour two subsidiary questions I which were not pursued in this House, the first being whether the £500 could be recovered from the defendants in view of the fact that it had been received by Pegasus and not by the defendants themselves; and the second being whether, in view of the fact that the plaintiff and his wife were joint tenants of the house, and the wife was not joined as a co-plaintiff, the plaintiff could recover the whole of the £500 or only half of it. Accordingly, on Apr. 28, 1959, the Court of Appeal gave judgment allowing the appeal and directing judgment to be entered for the plaintiff for the sum named with costs. From that judgment the defendants have now appealed to your Lordships' House.

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(8) [1951] 1 All E.R. 198; [1951] 2 K.B. 54.

In his able argument for the defendants, counsel relied on the words " payment . . . in addition to the rent " in s. 2 (1), and the reference to the " person by whom " the premium " was paid " in s. 2 (5) and (6), as showing that the prohibition is confined to the actual payment of money or to transactions equivalent or analogous to the actual payment of money, and contended that, in the present transaction, there was no actual payment of money or transaction equivalent or analogous to the payment of money. He did not succeed in making clear to me where the line was to be drawn once the criterion of actual payment in cash was abandoned. Moreover, the narrow construction he would place on the words " payment of any premium " appears to me to attribute no effect to the words " any other pecuniary consideration " in the extended interpretation of the expression " premium " contained in s. 18 (2). Counsel placed some reliance on s. 3 of the Act of 1949, which provides that excessive prices for furniture, etc., are to be treated as premiums, on the ground (as I understood his argument) that, if the words " any other pecuniary consideration " were wide enough to cover the present transaction, they would also cover transactions of the kind contemplated by s. 3, which would thus become otiose. I cannot attach any weight to this submission. Section 3 can well be accounted for as a provision made ex abundanti cautela to meet an obvious mode of evasion which might or might not otherwise be caught. Moreover, s. 3 covers cases in which there has been no quantification by the parties of the reasonable price or the excess over that price, and in such cases it might well be difficult, in the absence of a special provision, to apportion the total price between purchase money and premium. Counsel for the defendants also traced through earlier enactments (beginning with the Act of 1915) the history of the prohibition of premiums now appearing in s. 2 of the Act of 1949, and sought to spell out of various changes in the language in which it has been expressed from Act to Act the conclusion that it is now to be regarded as confined to actual payments in money or to transactions involving something equivalent or analogous to actual payment in money. Having given the best consideration I can to this part of counsel's argument, I find it impossible to justify by reference to the other enactments to which he has referred the narrow meaning which he seeks to place on the provisions of the Act of 1949, with the construction of which your Lordships are now concerned. Counsel also referred to cases under legislation (9) in the reign of George III designed to prohibit or restrict the sale of life annuities, in which a narrow construction had been placed on the expression " pecuniary consideration ". I can derive no assistance from the various cases referred to in the course of the argument as bearing on the meaning of the words " premium ", " fine ", " pay " or " payment " in other contexts and other Acts.

Returning to the language of s. 2 (1) and s. 18 (2) of the Act of 1949, it appears to me that the expression " pecuniary consideration " must be intended to include benefits which would not, or might not, fall within the description of a premium or fine or other like sum. It appears to me further that, given a benefit amounting to a " pecuniary consideration " moving from a prospective tenant to a prospective landlord, the " payment " of it must include any means appropriate to the subject-matter by which the consideration or benefit in question is passed from the one to the other. Without attempting any exhaustive definition of the expression " pecuniary consideration ", I may at all events safely say that the example given by my noble and learned friend, LORD KEITH OF AVONHOLM, of the foregoing of a debt owing to the prospective tenant from the prospective landlord would be within it, and that the cancellation of the debt would amount to payment of the " pecuniary consideration " in question, although no money actually passed. In the present case, the sale of the house at an undervalue was clearly consideration. It was, moreover, consideration which had a specific value in money, namely, £500, being the amount of the undervalue required by the defendants. On completion of the sale Pegasus, which became the purchaser at the direction or on the request of the defendants, gained, and the plaintiff lost, the £500. In short, the defendants required as a condition of granting the tenancy a consideration assessed at the sum of £500, which was to be provided by the sale of the house by the plaintiff and his wife at a price less by £500 than the price which could otherwise have been obtained for it, and directed or requested that the sale should be made to Pegasus instead of to the defendants. In these circumstances, I fail to see how the defendants could, with any semblance of truth, claim that they had not required a pecuniary consideration of £500, to be satisfied, or in other words paid, by the sale of the house at an undervalue of that amount.

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(9) See Statutes (1776) 17 Geo. 3 c. 26 and (1813) 53 Geo. 3 c. 141.

As to the *Birmingham* case (10), I entirely agree with the Court of Appeal that it cannot be supported so far as it proceeds on the general proposition that no sum can in any circumstances be a premium within the meaning of the Act of 1949 unless it is paid to the prospective landlord. There may, of course, be cases in which prospective tenants, with a view to obtaining tenancies, make payments to persons other than the prospective landlords for some consideration other than the granting of the tenancies in view. Examples are to be found in the sums paid by prospective tenants to the builders who were converting the property into flats in the *Birmingham* case (10), and in the sum paid to the sitting tenant to vacate the premises in *Remmington* v. *Larchin* (11). Payments such as these might well be held to fall outside the category of premiums because they are not payments required as a condition of granting the tenancy. But if the payment in question is in fact required by the prospective landlord as a condition of granting the tenancy, I cannot see why the payment should be any the less a premium because the landlord chooses to stipulate that it should be made to a third party designated by him. Illegality apart, the landlord is master of the situation and can demand any payment he pleases to be made to himself or to any third party he may please to designate. He can decide to receive the payment himself and pay it over to any third party he chooses immediately after receipt, and the fact that he requires payment to be made directly to the third party of his choice cannot, so far as I can see, make any difference.

Counsel for the defendants did not contend before your Lordships that, if the pecuniary consideration here in question was not prevented from being a premium within the meaning of the Act by the circumstance that it was received by Pegasus at the direction or on the request of the defendants, instead of being received by the defendants themselves, that circumstance would prevent it from being recoverable from the defendants under s. 2 (5).

For these reasons, I would dismiss this appeal.

Appeal dismissed.

Solicitors: *J. H. Milner & Son* (for the appellants); *M. Phillips & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(10) [1951] 1 All E.R. 198; [1951] 2 K.B. 54.

(11) [1921] 3 K.B. 404.

SOCIETY OF MEDICAL OFFICERS OF HEALTH *v.* HOPE (VALUATION OFFICER).

[HOUSE OF LORDS (Viscount Simonds, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Jenkins), December 9, 10, 1959, January 21, 1960.]

Rates—Local valuation court—Appeal—Res judicata—Scientific society's claim for exemption—Claim upheld on appeal for previous valuation list—Decision not appealed—Circumstances admitted to be unchanged—Whether valuation officer estopped from opposing claim.

In 1951 a hereditament occupied by a society was held by a local valuation court on appeal to be exempt from rating under the Scientific Societies Act, 1843, and there was no appeal by the valuation officer against that decision. In the new quinquennial valuation list which came into force in 1956 the hereditament was assessed as a rateable hereditament. On an appeal to the local valuation court arising out of the society's proposal for the alteration of the list by showing the hereditament as exempt, the valuation officer did not contend that any alteration had been made in the constitution of the society since 1951, and did not suggest that the society carried on activities which it did not then carry on. The society contended that the issue of exemption was res judicata as between the parties by virtue of the decision of 1951.

Held: no estoppel arose for the following reasons—

(i) the function of the local valuation court was to fix the assessment for a defined terminable period (the quinquennium of the valuation list), but its competency in performing that function did not extend beyond the current valuation list; accordingly, though the local valuation court could decide legal questions for the purposes of deciding on the assessment, it had no jurisdiction to pronounce judgments in rem or to decide general questions of law with that finality which was needed to set up estoppel per rem judicatam (see p. 321, letters G and H, and p. 325, letter G, post).

Opinion of LORD SELBORNE, L.C., in *R.* v. *Hutchings* ((1881), 6 Q.B.D. at p. 305) applied.

Inland Revenue Comrs. v. *Sneath* ([1932] All E.R. Rep. 739) considered; *Hoystead* v. *Taxation Comr.* ([1925] All E.R. Rep. 56) considered and criticised.

(ii) (per LORD KEITH OF AVONHOLM) a public officer, such as the respondent valuation officer, cannot be estopped from carrying out his duties under statute, viz., the recurrent duty of periodically bringing into existence a valuation list (see p. 324, letter H, post).

Maritime Electric Co., Ltd. v. *General Dairies, Ltd.* ([1937] 1 All E.R. 748) applied.

QUAERE whether an appeal to the local valuation court was a lis inter partes for the purposes of the doctrine of estoppel (see p. 320, letter I, p. 322, letters H and I, and p. 324, letter D, post).

Decision of the COURT OF APPEAL ([1959] 1 All E.R. 509) affirmed.

[**Editorial Note.** The question of estoppel has also arisen in relation to tax decisions of commissioners; the view taken is that it is in the public interest that tax and rate assessments should not be artificially encumbered with estoppels (see per LORD RADCLIFFE at p. 321, letter D, post). The position may be epitomised by saying that the issue raised by a new assessment is not the same as that raised by a former assessment, but the statement of a concise rule in that form does not show the true reasoning for there being no estoppel.

As to the essentials of res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 185, para. 358; and for cases on the subject, see 21 DIGEST 159-163, *213-221*.

For the procedure on a proposal for altering a valuation list and appeal, see the Local Government Act, 1948, s. 40, s. 41, s. 44 and s. 48, 20 HALSBURY'S

STATUTES (2nd Edn.) 234, 237, 243, 249; and for the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 2, s. 15, see 35 HALSBURY'S STATUTES (2nd Edn.) 381, 406, 425.] A

Cases referred to:

Broken Hill Proprietary Co. v. *Broken Hill Municipal Council*, [1925] All E.R. Rep. 672; [1926] A.C. 94; 95 L.J.P.C. 33; 134 L.T. 335; Digest Supp. B

Hoystead v. *Taxation Comr.*, [1925] All E.R. Rep. 56; [1926] A.C. 155; 95 L.J.P.C. 79; 134 L.T. 354; Digest Supp.

Inland Revenue Comrs. v. *Brooks*, [1915] A.C. 478; 84 L.J.K.B. 404; 112 L.T. 523; sub nom. *Brooks* v. *Inland Revenue Comrs.*, 7 Tax Cas. 236; 28 Digest (Repl.) 331, *1463*.

Inland Revenue Comrs. v. *Sneath*, [1932] All E.R. Rep. 739; [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434; Digest Supp. C

Kingston's (Duchess) Case, (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C. 12th Edn. 754; 21 Digest 159, *213*.

Leith Harbour & Docks Comrs. v. *Inspector of the Poor*, (1866), L.R. 1 Sc. & Div. 17; 38 Digest 480, *390*.

Maritime Electric Co., Ltd. v. *General Dairies, Ltd.*, [1937] 1 All E.R. 748; [1937] A.C. 610; 106 L.J.P.C. 81; 156 L.T. 444; Digest Supp. D

New Brunswick Ry. Co. v. *British & French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.

North Eastern Ry. Co. v. *Dalton Overseers*, [1898] 2 Q.B. 66; 67 L.J.Q.B. 715; 78 L.T. 524; 62 J.P. 484; *revsd.* C.A., [1899] 1 Q.B. 1026; *affd.* H.L. sub nom. *Dalton Overseers* v. *North Eastern Ry. Co.*, [1900] A.C. 345; 21 Digest 174, *275*. E

Patuck v. *Lloyd*, (1944), 171 L.T. 340; 26 Tax Cas. 284; 2nd Digest Supp.

R. v. *Hutchings*, (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 21 Digest 232, *631*.

Scott v. *Lowe*, (1902), 86 L.T. 421; 66 J.P. 520; 21 Digest 233, *632*.

Wakefield Corpn. v. *Cooke*, [1904] A.C. 31; 73 L.J.K.B. 88; 89 L.T. 707; 68 J.P. 225; 21 Digest 154, *163*. F

Appeal.

Appeal by the ratepayer society from an order of the Court of Appeal (MORRIS and SELLERS, L.JJ., and WYNN-PARRY, J.), dated Feb. 9, 1959, and reported [1959] 1 All E.R. 509, dismissing the society's appeal against a decision of the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C.), given on Apr. 14, 1958, whereby the society's contention by way of a preliminary point that the respondent valuation officer could not be heard to say that the society was not entitled to exemption from rating in respect of a hereditament which it occupied under the Scientific Societies Act, 1843, s. 1, was dismissed. The facts are set out in the opinion of LORD RADCLIFFE, see p. 319, post. G H

Dimitry Tolstoy, Q.C., and *Herbert Hart* for the appellants.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the respondent.

Their Lordships took time for consideration.

Jan. 21. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I have had the privilege of reading the opinion which my noble and learned friend, LORD RADCLIFFE, is about to deliver. I agree so fully, both in his reasoning and conclusions, that I do not think it necessary to add anything further. I shall content myself with moving in due course that the appeal be dismissed. I

LORD RADCLIFFE: My Lords, the only question raised by this appeal concerns the application of the principle of estoppel per rem judicatam to the making of a new valuation list for the St. Pancras, London, rating area in accordance with the provisions of the Local Government Act, 1948. The appellants occupy a hereditament at Tavistock House, Tavistock Square, situated in that area, and their objection is to the entry of their hereditament in the new valuation list which came into force on Apr. 1, 1956, at a gross value of £300 and a rateable value of £247. Their objection, which takes the form of a proposal to alter the list, calls for the exclusion of the hereditament on the ground of " exemption from payment of rates under the Scientific Societies Act, 1843 ". They may, indeed, be entitled to such exemption if they bring themselves within the conditions required by s. 1 of that Act; but hitherto they have been maintaining in their successive appeals to the local valuation court, the Lands Tribunal, the Court of Appeal and now to this House that they are entitled to this exemption as a conclusion of law founded on the facts (i) that in 1951 they obtained a decision from the then local valuation court that the preceding valuation list, now expired, should be altered so as to give effect to their exemption from rating by virtue of the Scientific Societies Act, and (ii) that neither their circumstances nor their purposes have altered since that date. This particular plea was argued as a preliminary point when the appeal was before the Lands Tribunal, and so it remains. It became possible to deal with it in this way and thus to postpone any inquiry into the actual current situation of the appellants because the respondent had formally intimated to the local valuation court before they decided on the appellants' proposal that he did not contend that any alteration had been made in the constitution of the society since the earlier decision of the local valuation court in 1951, and did not suggest that the society now carried on activities which it did not then carry on. What he wished to rely on were the present constitution of the society and its present activities. The setting up of a preliminary point in this way seems a somewhat elaborate procedure; but the result is that, if the plea of estoppel does not commend itself to your Lordships' House, as it has not to the Lands Tribunal or to the majority of the Court of Appeal, the case will have to go back to the Lands Tribunal for adjudication on its merits, whatever they may be.

It is necessary now to state a few matters of fact to show the context in which this alleged estoppel arises. The Scientific Societies Act, 1843, as is well known, gives exemption from rates in respect of any hereditament, if (i) it belongs to a society instituted for purposes of science, literature or the fine arts exclusively, (ii) it is occupied by the society for (a) transacting its business, and (b) carrying into effect its purposes, and if the society (iii) is supported, at any rate in part, by voluntary contributions, and (iv) does not make distributions of money among its members, and (v) obtains a certificate, as prescribed (1). Exemption, therefore, depends on the combination of a set of facts, most of which are capable of variation from year to year and the absence of any one of which destroys the privilege of immunity from rates. I note this because the foundation of the appellants' argument for an estoppel lay in the proposition that the decision of the local valuation court in 1951 was a decision as to the society's " status ". To my mind, that would be an inappropriate description of the nature of such a decision, and it would not become any the more appropriate because on a particular subsequent occasion the valuation officer agreed or did not oppose a claim that the relevant purposes and circumstances had not altered.

In 1951 the valuation list in force in the St. Pancras rating area was the last valuation list made under the Valuation (Metropolis) Act, 1869. The procedure followed when the appellants made their proposal to delete their hereditament from the list was that laid down by the Local Government Act, 1948. The valuation officer objected to their proposal, and the resulting appeal came before a local valuation court for North East London, whose function is (s. 44 (1)) the " hearing and determining appeals . . . against objections to proposals for the alteration of valuation lists ". The valuation officer appeared as a party on the hearing of the appeal, as he was entitled to do (s. 48 (3)), and the court, after hearing the parties, then gave its decision in favour of the exemption claimed. In doing so, it acted under the authority conferred on it by s. 48 (4), which runs as follows (2):

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(1) The certificate is now obtained from the central office of the registry of friendly societies or, in Scotland, from the assistant registrar of friendly societies for Scotland: see Friendly Societies Act, 1896, s. 2 (1) (c), s. 4 (1) (c).

> " After hearing the persons mentioned in the last preceding subsection, or such of them as desire to be heard, the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded, and the valuation officer shall cause the list to be altered accordingly."

No appeal against the decision was made by the valuation officer.

Now does that decision create an estoppel per rem judicatam when the valuation list that was the subject of the decision has come to the end of its statutory life and a new quinquennial valuation list has to be brought into existence to fulfil the requirements of the relevant Act of Parliament? Obviously not, both parties agree, if there has been any material change of circumstances in the meantime; but " Yes ", the appellants say, if it is shown or agreed that there has been no change of circumstance. The principles of law governing estoppel per rem judicatam inter partes are generally repeated in the form derived from the words of De Grey, C.J., in the *Duchess of Kingston's Case* (3) and quoted by Lord Selborne, L.C., in *R.* v. *Hutchings* (4):

> " The judgment of a court of concurrent [or of exclusive] jurisdiction, directly upon the point, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment."

Other authorities have added the requirement that there must be a lis inter partes for the judgment to proceed on, and that the court must be a court " of competent jurisdiction that has seisin of the case for the purpose of reaching a final decision inter partes " (see *Inland Revenue Comrs* v. *Sneath* (5)).

My Lords, the words themselves may be plain, but they involve several distinctions that are far from clear. What is direct? and what collateral or incidental? By what test is the matter the same or different? When are the parties the same and what are the determining marks of a party or a lis for this purpose? To take only the instance of the present case. Certainly the local valuation court is a court of competent jurisdiction able to give a final decision of some sort between those who appear before it; but then the question arises, for what decisions is it a court of competent jurisdiction and do they or can they extend beyond the range of the form and contents of the current valuation list? Again, the valuation officer is no doubt a party to a controversy between himself and the complainant; but, having regard to his statutory function and duties, including that of preparing the new valuation list, and to the interests of the whole body of ratepayers from time to time in the contents of the list, is this controversy a lis or is he a party for the purpose of the principles of estoppel per rem judicatam?

I do not think that it is possible to discuss the point raised by the present appeal simply in terms of these general phrases or without giving full weight to the fact that what is in question is the conclusiveness for liability to one rate of a decision given with regard to another. The system of rating involves certain considerations that are special to itself. Its nearest analogy is with the system of annual personal taxation. With regard to both one has to begin by recognising that there is high and frequent authority for the proposition that it is not in the nature of a decision given on one rate or tax that it should settle anything more than the bare issue of that one liability and that, consequently, it cannot constitute an estoppel when a new issue of liability to a succeeding year's rate or tax comes up for adjudication. The question of this liability is a " new question ". It is not " eadem questio ". The " cause of action is different ".

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(2) As amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 15 and Sch. 7, Part 1.

(3) (1776), 1 East, P.C. 468.

(4) (1881), 6 Q.B.D. 300 at p. 304.

(5) [1932] All E.R. Rep. 739 at p. 745; [1932] 2 K.B. 362 at p. 380.

> "... the subject-matter is a different year's tax and a different year's assessment and is not the same as the subject-matter of the previous ruling."

All these things have been said with reference to rates or taxes, and the list of decisions that recognise or enforce the principle is a long one: see *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (6); *North Eastern Ry. Co.* v. *Dalton Overseers*, per WILLS, J. (7); *Scott* v. *Lowe* (8); *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (9); *Inland Revenue Comrs.* v. *Sneath* (10); and *Patuck* v. *Lloyd*, per LORD GREENE, M.R. (11).

It would not be at all easy for us to depart from this long line of authoritative opinion, even if we wanted to. Personally, I do not want to, because I think that, on the whole, it is more in the public interest that tax and rate assessments should not be artificially encumbered with estoppels (I am not speaking, of course, of the effect of legal decisions establishing the law, which is quite a different matter), even though in the result some expectations may be frustrated and some time wasted. To say that the issue of liability to one year's rate is not the same subject-matter as the issue of liability to another year's, or that the one cause of action is different from the other is, perhaps, rather an arbitrary way of disposing of the appellants' case. There are legal contexts, in trespass or recurring claims for rent, for example, in which much the same might be said and yet it is not impossible for an estoppel to arise. The reason why, when you are dealing with rates and taxes, the difference of subject-matter is treated as being so important seems to lie in two considerations which, as I read the authorities, are peculiar to their particular field.

One consideration is that the jurisdiction of the tribunal to which the decision belongs by the administrative scheme is a limited one. It is limited in the sense that its function begins and ends with that of deciding what is to be the assessment or liability of a person for a defined and terminable period. " The assessment seems inherently to be of a passing nature ". For the purpose of arriving at its decision, the tribunal may well have to take account of, and form its own opinion on, questions of general law, it may even have necessarily to consider one or more of such questions; but in either case the view adopted with regard to them is incidental to its only direct function, that of fixing the assessment. For that limited purpose it is a court with a jurisdiction competent to produce a final decision between the parties before it; but it is not a court of competent jurisdiction to decide general questions of law with that finality which is needed to set up the estoppel per rem judicatam that arises in certain contexts from legal judgments. It seems to me to be entirely congruous with this conception of the functions of a local valuation court and their inherent limitation that the Local Government Act, 1948, should express its power to make decisions in the words that I have already quoted from s. 48 (4):

> "... the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the

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(6) (1866). L.R. 1 Sc. & Div. 17. (7) [1898] 2 Q.B. 66 at pp. 73, 74.
(8) (1902), 86 L.T. 421. (9) [1925] All E.R. Rep. 672; [1926] A.C. 94.
(10) [1932] All E.R. Rep. 739; [1932] 2 K.B. 362.
(11) (1944), 171 L.T. 340 at p. 341.

> valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded . . ."

I take it that the point of view which I have been expressing forms the real significance of the judgment of LORD SELBORNE, L.C., in *R.* v. *Hutchings* (12), to which reference is so often made. In that case, a local board under the Public Health Act, 1875, had applied to justices in petty sessions for an order against a frontager for payment of a share of the expenses of sewering a street. The application was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. Some years later another application was made by the same board for an order for payment of a share of paving expenses. It was decided by the Court of Appeal that the frontager could not rely on a plea of estoppel against the board, precluding it from asserting that the street was not repairable by the inhabitants at large.

LORD SELBORNE, L.C., said (13):

> " I am of opinion that there was in law no estoppel; . . . I think so, because of the nature of the liability in question, and the nature and limits of the summary jurisdiction which the justices exercised . . ."

Then, later on, he says (14):

> " . . . The justices, before whom the complaint of the urban authority came . . . had no jurisdiction to adjudicate directly or immediately between these parties (or between any parties whatever) on the question whether Mill Street was or was not a highway repairable by the inhabitants of Bradford at large. That was, at the most, a matter ' incidentally cognisable ' by them. No conclusion which they might form upon it could establish (in the one case) or disprove (in the other) any such liability, as against or in favour of the inhabitants. Their only jurisdiction was to make or refuse the order for payment of a certain sum of money, then claimed as the defendant's statutable quota of certain expenses, at that time incurred by the urban authority."

When the respondent in this appeal advances the reason

> " Because the local valuation court which decided in 1951 how the said hereditament was to be treated in the valuation list then in force had no jurisdiction to decide how it should be treated in the new valuation list ",

this is, of course, a truism. But then I do not think that anyone is contending that it had just that jurisdiction. What is said is that in 1951 it had sufficient jurisdiction to be able to settle, permanently, questions of law as between the parties themselves: and that jurisdiction, in my opinion, it did not possess.

The other main consideration which has influenced the courts in their treatment of these questions is the special position of the valuation officer, surveyor or equivalent official or committee. This reflects on the propriety of using the words " party " or " lis inter partes " in this connexion. It will be shorter to limit attention to the case of rating, though a study of the judgments of the Court of Appeal in *Sneath's* case (15) will show how closely parallel are the arguments that develop with regard to a surveyor or inspector of taxes. However that may be, the position of the valuation officer in rating is that he is a neutral official charged with the statutory and recurring duty of bringing into existence a valuation list and maintaining its contents in correct and legal form. He has, of course, no personal interest when he appears before the local valuation court; nor would it be correct to say that he represents the rest of the ratepayers other than the complainants. It is in the nature of the rating scheme that all those other

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(12) (1881), 6 Q.B.D. 300.
(13) (1881), 6 Q.B.D. at p. 303.
(14) (1881), 6 Q.B.D. at p. 305.
(15) [1932] All E.R. Rep. 739; [1932] 2 K.B. 362.

A ratepayers, a body of persons varying from year to year, are interested in the valuation or exemption allotted to any single hereditament on the list. Indeed, we were reminded by counsel that, at the time of the 1951 decision, there was no bar to any ratepayer, as a person aggrieved, raising an objection to the alteration of the list consequent on that decision and asking for his objection to be heard. Some statutory limitation has since been placed on this right of objection, the B details of which I have not checked, because its existence is only significant as illustrating how inappropriate are the general circumstances of rating procedure to the importation of the legal doctrine of estoppel per rem judicatam into its ordinary administration. It is no reflection on the responsible work carried out by the local valuation courts if I say that they are not the natural repositories of the right to decide for good such legal issues as the interpretation of statutes C or general legal questions affecting ratepayers; and to hold that, subject to appeal, such decisions are to be treated as conclusive for all time would be, in my opinion, to impose a needlessly heavy burden on the administration of rating.

There is only one further point. In the course of their argument, the appellants relied on the decision of the Judicial Committee of the Privy Council in *Hoystead* v. *Taxation Comr.* (16). They pointed out, as is quite true, that that was a case in D which estoppel per rem judicatam was successfully asserted against the taxing authority in respect of an assessment for the year 1920-21 because of a judgment on a Case Stated for the High Court in Australia relating to the assessment for the year 1918-19. The estoppel related to a question as to the nature of legal rights in property and the interpretation of the taxing statute with regard to them. But *Hoystead's* case (16) is useless to illuminate the only point which is E now before this House, the effect on a succeeding valuation list of a decision given with regard to an earlier. At no stage of the proceedings, so far as appears, was the argument put forward on behalf of the Commissioner of Taxation that the assessment for 1920-21 was a new subject-matter in relation to the assessment for 1918-19; nor is the point noticed in the opinion of the Judicial Committee delivered by LORD SHAW. That opinion is devoted to considering with weight F and learning and ultimately to rejecting the proposition advanced by counsel on behalf of the commissioner that there could be no estoppel because the legal point which had been the subject of the High Court's decision had been conceded by admission and did not, therefore, embody the court's own direct judgment. The case stands as an authoritative contribution to the rule that, in matters of estoppel, what might have been said may be as important as what was actually G said and that, as between the parties themselves, law may indeed be formed sub silentio. To apply the same conception to the elucidation of the law itself and to suppose that decisions can be persuasive on propositions that were never considered, for good reasons or bad, would be an altogether unconvincing way of arriving at a judgment.

We do not know for what reason the point of "new subject-matter" was H not raised in *Hoystead's* case (16). It is to be noted, however, that the decision that was set up as an estoppel was a decision of the highest legal tribunal in Australia, the High Court, arrived at by the Full Court on a Special Case for their opinion by a single judge of the High Court to whom there lay an appeal from the decision of the Commissioner of Taxation. Any objection, therefore, which was based on difference of subject-matter between the taxes for the respective years I would have to meet the puzzling question whether, for the purposes of estoppel, the jurisdiction of the High Court in adjudicating on points of law arising in tax proceedings is not wider and more comprehensive than the jurisdiction of the original assessing tribunal. It is true that that aspect does not seem to have had any weight attached to it in the other decision of the Judicial Committee of the same year, the *Broken Hill* case (17). But there the point did not call for, or receive, any full attention. I say nothing more about this. It is not the point before us and, if it ever arises, it will need separate consideration.

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(16) [1925] All E.R. Rep. 56; [1926] A.C. 155.
(17) [1925] All E.R. Rep. 672; [1926] A.C. 94.

I would dismiss the appeal.

LORD COHEN: My Lords, I concur.

LORD KEITH OF AVONHOLM: My Lords, I do not repeat the facts of this case which have already been fully set out by my noble and learned friend, Lord Radcliffe. The proposition submitted by counsel for the appellants was that, where a question has been decided by a court of competent jurisdiction in a lis inter partes, these parties are estopped from reopening the same question in a subsequent suit between themselves. This submission necessarily proceeded on the assumption which has not been challenged by the respondent that the facts and circumstances relevant to the appellants' exemption from rating under s. 1 of the Scientific Societies Act, 1843, remained unchanged from what they were when the local valuation court, on Oct. 24, 1951, decided that the appellants' hereditament was exempted from rating under the Act of 1843. Otherwise it would not be the same question that comes up for reconsideration.

The proposition advanced, which is impeccable in circumstances in which it is permitted to operate, is, in my opinion, inapplicable to the circumstances of this case. I find it difficult to equate the procedure followed out under the statute with a proper lis inter partes, though that, of itself, might not be conclusive. Nor do I find it easy to distinguish the functions performed by assessment committees before the coming into operation of the Local Government Act, 1948, from those now performed by a local valuation court, or to think, because the new body is differently constituted and called a court, that a greater importance and effect should be attached to its decisions. The introduction of a court into the proceedings instead of a committee played some importance, if I understood aright, in the submission for the appellants.

What we are faced with here is an administrative act of a public official, the valuation officer, against which the party affected has a right of appeal to the local valuation court, with further appeals to higher courts. The valuation officer has a public duty to perform by making periodically every five years a valuation list of all hereditaments, with certain exceptions, in his rating area. He must necessarily reconsider and revise the previous valuation list. He has no personal interest in any appeals taken against his valuation, and has a duty to hold the scales as fairly as he can among the ratepayers affected, the occupiers of the various hereditaments. The general body of ratepayers is constantly changing. With each quinquennium, the revaluations will affect a new body of ratepayers. I doubt if the valuation officer, owing such a duty to an ever-changing body of ratepayers, can be regarded as always the same party in the sense in which that expression is used for the application of the rule of res judicata. What if the appellant society changes its habitat and moves into another rating area with a different valuation officer? I emphasise these aspects of the functions of a valuation officer under the statute, for they lead to what I regard as the true answer to the submission for the appellants, which is that a public officer in the position of the respondent cannot be estopped from carrying out his duties under the statute. The case is, I think, a fortiori of the judgment of a Board of the Privy Council in *Maritime Electric Co., Ltd.* v. *General Dairies, Ltd.* (18), where it was held, in the circumstances of that case, that a public utility company could not be estopped from carrying out its duty under a statute. It has been said on other occasions that there is no estoppel against a statute. Lord Parker of Waddington applied this ratio in *Inland Revenue Comrs.* v. *Brooks* (19), with reference to an assessment to income tax which was claimed to be final against the Commissioners for the Special Purposes of Income Tax in an assessment for super tax. He said (20):

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(18) [1937] 1 All E.R. 748; [1937] A.C. 610.

(19) [1915] A.C. 478.

(20) [1915] A.C. at p. 491.

> "I do not dispute those general principles [of law governing estoppels], but it seems to me that where there is a statutory provision requiring an estimate to be made for a statutory purpose and by a statutory authority, the principle of estoppel cannot be invoked to render the provision nugatory in cases where such principle might otherwise have applied."

If an entry in the valuation list has become final that is a procedural matter and may be conclusive for the period for which the list endures. I say *may* be conclusive, for I observe that the Act (s. 40) provides with reference to current valuation lists that a person aggrieved or a valuation officer may make a proposal for alteration of the list at any time. Whatever the effect of this may be I have reached the conclusion, for the reasons which I have given, that, when a new list is in preparation, the valuation officer is not estopped by anything that he has done, or omitted to do, or by any decision given against him, in the past. He may, in my opinion, seek to rectify the result of mistakes in fact or errors of law. A previous judgment will have only the weight that falls to be attributed to it, according to the authority of the court that gave it, on the doctrine of stare decisis.

Much reliance was placed by counsel for the appellants on the judgment of the Privy Council in *Hoystead* v. *Taxation Comr.* (21). That authority is not binding on this House, and the point was never taken in the case that a decision on liability to assessment to tax for one year is not conclusive of liability to assessment in a later year. The judgment would seem to conflict with what was said a month earlier in *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (22), by a Board differently constituted, rejecting a plea of res judicata. It was said (23):

> "The decision of the High Court related to a valuation and a liability to tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, viz., the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply."

In my opinion, that is the position here, and I do not find it necessary to examine *Hoystead's* case (21) further, beyond observing that some of the things that were said in that case are not, I think, entirely consistent with what was said in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (24), or with what I regard as essential to a successful plea of res judicata, a common medium concludendi in the two actions.

It was suggested by appellants' counsel that the previous decision of the local valuation court was a judgment in rem fixing the status of the appellant society. But I cannot accept that the local valuation court has jurisdiction to pronounce judgments in rem. It is concerned with the entry of hereditaments in the valuation list, and under s. 48 (4)

> ". . . shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded . . ."

That is a general power with reference to the treatment of hereditaments in a particular valuation list and cannot, in my opinion, be taken to confer a power to make a declaration on the status of the occupier which would have all the binding effect of a judgment in rem. So to hold would, indeed, I think, be against the provisions of the statute if only because it would stultify the right given to a person aggrieved to make a proposal for alteration of the current list under s. 40. The general considerations to which I have earlier referred are, in my opinion, equally strong reasons for rejecting this submission for the appellants. Reliance was placed on *Wakefield Corpn.* v. *Cooke* (25). The judgment there held to be a judgment in rem had reference to the status of a street as a public street. This was quite a different category of case decided under a statutory code which was held to give justices a power to determine once and for all the character of a street for the purposes of a local Act and cannot, in my opinion, be applied to the circumstances of this case.

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(21) [1925] All E.R. Rep. 56; [1926] A.C. 155.
(22) [1925] All E.R. Rep. 672; [1926] A.C. 94.
(23) [1925] All E.R. Rep. at p. 675; [1926] A.C. at p. 100.
(24) [1938] 4 All E.R. 747 at pp. 766, 769; [1939] A.C. 1 at pp. 37, 41, 42.

Reference was made in the course of the argument to certain Scottish land valuation decisions thought to be unfavourable to the appellants' contentions. These may be put aside. At best they provide but illustrations of the practice in the matter of valuation under a co-ordinate jurisdiction which operates independently of and without appeal to the courts exercising civil jurisdiction in Scotland. The Lands Valuation Appeal Court in Scotland is, within limits, master of its own system of practice and procedure and a final court of law within its own sphere. The question, moreover, which arises on this appeal could not come before the Lands Valuation Appeal Court. It would be a question between the rating authority and the occupier which, in the event of dispute, would be matter of ordinary litigation in the civil courts. Such was the case in *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (26), the speeches in which in this House, especially that of LORD CHELMSFORD, contain dicta on the rule of res judicata which are not helpful to the appellants. There were specialties, however, in that case which may make the dicta obiter, rather than the ratio of the decision. I do not, therefore, treat these observations as determinative of the point raised by this appeal. For the reasons, however, which I have already given I think the appeal must fail.

LORD JENKINS: My Lords, I agree.

Appeal dismissed.

Solicitors: *Hillearys* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

R. *v.* McKENNA. R. *v.* McKENNA. R. *v.* BUSBY.

[COURT OF CRIMINAL APPEAL (Cassels, Donovan and Ashworth, JJ.), January 12, 15, 1960.]

Criminal Law—Jury—Intimidation or threat—Jury recalled by judge and told that they would be kept for the night if they did not reach a verdict in ten minutes—Freedom of jury to take time—Convictions quashed.

It is a cardinal principle of English criminal law that a jury in considering their verdict shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat: they still stand between the Crown and the subject, and they are still one of the main defences of personal liberty (see p. 329, letter G, post).

At the beginning of a criminal trial of three accused on a Monday the judge told the jury that the court could not sit after 1 p.m. on the following Wednesday. The trial proceeded and the court sat until 5 p.m. on Monday and until 6.30 p.m. on Tuesday. The jury retired at 12.20 p.m. on Wednesday. At 2.38 p.m. the judge recalled the jury and told them that if they had not reached a conclusion in ten minutes they would be kept all night and the case would be resumed on the next day. The jury retired and returned six minutes later with verdicts of guilty against all accused. They appealed against conviction. It was submitted for the prosecution that the evidence had been so cogent that there had been no miscarriage of justice and that, if the convictions could not stand by virtue of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, a venire de novo should be ordered.

Held: the convictions would be quashed.

Appeals allowed.

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(25) [1904] A.C. 31.

(26) (1866), L.R. 1 Sc. & Div. 17.

[As to the retirement of juries to consider their verdicts, see 10 HALSBURY'S LAWS (3rd Edn.) 431, para. 795, and as to the delivery of a jury's verdict, see ibid., p. 427, para. 789; and for cases on the retirement of juries, see 14 DIGEST (Repl.) 367, *3557-3563.*

For the power to dismiss an appeal where there has been no miscarriage of justice, see 10 HALSBURY'S LAWS (3rd Edn.) 535, para. 985, and as to venire de novo, see ibid., pp. 540, 541, para. 992.]

Appeals.

The appellants, Charles Alexander McKenna, William James McKenna and Arthur William Busby, were convicted at Nottingham Assizes before STABLE, J., on Nov. 25, 1959. Busby was convicted of stealing television sets and other electrical equipment from a motor van and taking and driving away the van without the owner's consent, and the other two appellants were convicted of being accessories after the fact.

All three applicants appealed against conviction on the ground that a substantial miscarriage of justice had occurred at the trial in that the judge had set the jury a time limit in which to reach their verdict and threatened that otherwise they would not be separated until the resumption of the hearing of the case the next day. William McKenna also appealed on the ground that the jury were wrongly directed that a person who assisted an accessory after the fact could be an accessory after the fact to the principal felon.

The facts relevant to the main appeals are set out in the judgment of the court*.

J. J. Deave for the appellants, Charles and William McKenna.

P. G. Hughes for the appellant, Busby.

T. R. Fitzwalter Butler and *D. M. Cowley* for the Crown.

Cur. adv. vult.

Jan. 15. **CASSELS, J.**, read the following judgment of the court: These three appellants were convicted at Nottinghamshire Assizes on Nov. 25, 1959, before STABLE, J., of the following offences: Busby of stealing 162 television sets, 120 pocket radio sets, six automatic record players, and other valuable electrical equipment from a Dennis motor van in the county of Nottingham in May, 1959; and also of taking and driving away the same van without the owner's consent. Charles and William McKenna of being accessories after the fact in respect of the same theft.

Busby, a man with a criminal record, was sentenced to three years' imprisonment for the theft, and to six months for taking and driving away the van, these sentences to run concurrently. Charles McKenna, who had a previous conviction in October, 1959, of being an accessory after the fact in respect of the theft of certain other television sets, for which he received a term of eighteen months' imprisonment, was now sentenced to two years' imprisonment, the sentences to run as from commission day of the assizes. William McKenna, who had only one minor previous conviction, was put on probation for three years.

All three prisoners now appeal to this court, Busby and Charles McKenna by leave of the court, and William McKenna with the certificate of the learned judge on a point of law peculiar to his case alone. This was whether a person who, knowing of the felony, assisted not the principal felon, but an accessory after the fact, could thereby be guilty of himself being an accessory after the fact in respect of the same felony. The learned judge ruled that he could, and we agree. Indeed, as a proposition of law this ruling was not seriously disputed before us. The argument addressed to us was that since William McKenna was charged in terms with assisting the principal felon, it would not be enough to justify a conviction that he should be found guilty of assisting an accessory only. The jury by their verdict found William McKenna guilty of assisting the principal felon. He could do this indirectly by assisting an accessory after the fact to the same felony, and there was cogent evidence that he did so. If, therefore, there were no other ground of appeal in William McKenna's case, there would be no reason for interfering with the verdict.

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* The court was referred to the following authorities in argument: *R.* v. *Bushell,* (1670), 6 State Tr. 999; *R.* v. *Hartleigh,* (1908), 1 Cr. App. Rep. 17; *Crane* v. *Public Prosecutor,* [1921] 2 A.C. 299; *R.* v. *Neal,* [1949] 2 All E.R. 438; [1949] 2 K.B. 590; *R.* v. *Camborne JJ., Ex p. Pearce,* [1954] 2 All E.R. 850; [1955] 1 Q.B. 41.

There is, however, a further ground of appeal common to all three appellants. In the case of Busby and Charles McKenna it is their only ground. It is this: that the learned judge, after the jury had been considering their verdict for over two hours, called them back into court and threatened to keep them together all night and until 11.45 a.m. the next day unless they arrived at a conclusion within the next ten minutes.

The learned judge's actual words, according to the transcript of the proceedings, were these:

> " I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if, by that time, you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at 11.45 a.m. tomorrow. I do not know, and I am not entitled to ask—and I shall not ask—why in a case which does not involve any study of figures or documents you should require all this time to talk about the matter. May I suggest to you that you go back to your room, that you use your common sense, and do not worry yourself with legal quibbles. That is what you are brought here for: to use your common sense, bring a bit in from outside. There it is, members of the jury."

The jury thereupon retired again and came back into court six minutes later with verdicts of guilty on the charges above set out. It is now said on behalf of all three appellants that the ultimatum delivered by the learned judge was so improper that the convictions should be quashed.

In fairness to the learned judge the following facts should be mentioned. The trial began on Monday, Nov. 23, 1959, and at the outset the jury were informed that the court could not sit on the Wednesday afternoon [i.e., Nov. 25, 1959], but would rise at 1 p.m. The court sat until 5 p.m. on the Monday, and until 6.30 p.m. on the Tuesday. On Wednesday morning the learned judge commenced his summing-up, and at 12 noon he addressed the jury as follows:

> " Under the rules that govern our procedure once a summing-up is finished and the jury retire they cannot separate until the verdict has been arrived at. If in the middle of a summing-up a break is requested, the jury can go before the conclusion, and come back and hear the conclusion of the summing-up the next day or after the adjournment. The position is this, that I am very much afraid that I have this engagement and I cannot escape it. I have to get up to London by the 1.35 train, which means I shall have to leave here about ten minutes past one o'clock. If you feel you cannot arrive at a verdict in this case before then I can break off my summing-up at this stage. There won't be very much to add, I can assure you, and you can come back here tomorrow morning at 11.45 a.m., by which time I shall have returned from London, and then I can conclude the summing-up and you can retire and arrive at your verdict. What I want to guard against is one o'clock coming and you saying, ' we still have not arrived at our verdict ', in which case I would have to throw this engagement over and it would be very inconvenient and would keep you all locked up overnight."

(The foreman of the jury): " May we discuss that, my Lord? "

(STABLE, J.): " I won't finish my summing-up; we will have a little break."

A The court thereupon adjourned for ten minutes, and on the resumption at 12.15 p.m. the foreman of the jury informed the learned judge that the jury would require more than three-quarters of an hour to reach a verdict. This, of course, would mean that if the learned judge went on to conclude his summing-up, the court would not rise at 1 p.m. as had been arranged. Instead of accepting this position, and concluding his summing-up the next morning, the judge said:
B "I will catch the later train and I will now run through the indictment again". Having done this, and finished his summing-up, the judge asked the jury to consider their verdict at 12.20 p.m. They, thereupon, retired and were out for two hours. At 2.20 p.m. they returned, asking for guidance on two questions, and this the learned judge gave. One question was whether by wittingly helping an accessory after the fact William McKenna could himself be an accessory
C after the fact, and the judge, as we have already stated, said: "Yes". The other was a question which seemed to indicate that the jury might be convinced that Busby took and drove away the Dennis van in Cambridgeshire but not in Nottinghamshire, as the count in the indictment alleged. They wanted to know if in the circumstances the indictment could be altered. If we may respectfully say so, the learned judge did not seem fully to grasp the point the jury were
D making. Otherwise he could have told them that they could say, if they so found, that Busby was guilty of taking and driving the van away in Cambridgeshire. Nothing, however, now turns on this particular point and the answer which the learned judge in fact gave, except that the prosecution, very naturally, stresses the fact that the jury's question showed that they thought that Busby was guilty of this offence at any rate in the county of Cambridge.

E Having received answers to their two questions the jury retired again at 2.23 p.m. Fifteen minutes later they were apparently brought back into court by order of the judge and he then delivered to them what has been called the ultimatum to reach a conclusion within the next ten minutes or be kept together all night. We think we ought to state that a jury is, in any event, never locked up in the jury room all night, but if necessary accommodated in a hotel. This
F jury may, very understandably, not have known this. After the threat (and we regret we can call it nothing else) that failing a conclusion in ten minutes they would be kept together till 11.45 the next morning, the jury arrived at a conclusion adverse to the appellants in six minutes.

It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in com-
G plete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty. To say to such a tribunal in the course of its deliberations that it must reach a conclusion within ten minutes or else undergo hours of personal inconvenience and discomfort, is a disservice to the cause of justice. In this case the ultimatum no doubt fell with added force on the jury
H since two of them were women. It may well be that having regard to the steps he had taken from the outset to ensure that the case should finish by mid-day on the third day, steps which included working beyond the normal hours on the Monday and the Tuesday, the learned judge was understandably irritated by the inconvenient slowness of the jury in reaching a verdict in what he thought was a plain straightforward case. But juries do at times take
I much longer than a judge may think necessary to arrive at a verdict; there are, after all, twelve of them who have to be unanimous and the proper exercise of the judicial office requires that irritation on these occasions must be suppressed or at any rate kept severely in check. To experience it is understandable; to express it in the form of such a threat to the jury as was uttered here is insupportable.

What then, in these circumstances, should this court do? The prosecution asked originally that a distinction should be drawn between the cases of Busby and Charles McKenna on the one hand, and William McKenna on the other; and that if the learned judge's ultimatum to the jury were a grievous irregularity, William McKenna's conviction should be quashed, but the other convictions should stand. This was because, in the prosecution's view, the case against Busby and Charles McKenna was overwhelming, but not nearly so strong against William McKenna. Pressed by the court with the strength of the evidence against William McKenna the prosecution finally submitted that his conviction, too, ought in any event to be sustained. In other words, in the case of all three appellants the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, should be applied (1).

We subscribe to the view that the evidence against all three appellants was cogent to a degree. We also agree that it is possible that the jury had little doubt about the guilt, at any rate, of Busby and Charles McKenna. The difficulty, however, is that the opposite view cannot, with complete confidence, be excluded. They had put forward defences which though they may appear to a lawyer to be fanciful, at any rate had the effect that after two hours the jury still had not arrived at a unanimous verdict. At no stage did they say, as they could have done, that they were agreed in the case of some of the prisoners but still not agreed as regards another. And when they were told to reach a conclusion as regards all three prisoners within the next ten minutes or in default to remain together all night it is, at the very least, a reasonable inference that what their minds concentrated on in these last ten minutes was not so much the evidence they had to consider, but the inconvenience and discomfort with which they had been threatened. This being so, the court does not think it right to resort to the proviso to s. 4 (1). The prosecution also submits, as an alternative that a venire de novo should be ordered, but this trial was not in the true sense of the word a nullity.

With regret, therefore, the court feels bound to quash these convictions. Although any jury would have been amply justified in finding all these appellants guilty of what was, by whomsoever committed, an extremely serious, well-planned crime, it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement. Plain though many juries might have thought this case, the principle at stake is more important than the case itself.

The appeals are accordingly allowed and the convictions quashed. In the case of Charles McKenna this will not mean his discharge. He is still serving his sentence of eighteen months' imprisonment on another case. In the case of Busby it does mean that he is discharged.

Appeals allowed. Convictions quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for all three appellants); *R. A. Young & Pearce*, Nottingham (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(1) The proviso reads: " Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

R. *v.* WILLIS.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Hilbery and Salmon, JJ.), November 23, 1959.]

Criminal Law—Evidence—Admissibility—Hearsay—Evidence of statement made to accused by person not called as a witness—Statement relevant in considering subsequent conduct of accused.

On Jan. 19, 1959, while the appellant, a scrap dealer, was visiting a customer in the course of business, his foreman, N., who was responsible for loading his lorries, stole from the customer a valuable drum of metal cable by hiding it on one of the lorries. On the following day the drum was unloaded in the appellant's yard and on the morning of Jan. 21, N. took the drum to S., another customer of the appellant, who immediately spoke to the appellant on the telephone telling him that the drum had arrived. The appellant was not present when the drum was put on his lorry, or when it was unloaded in his yard, or when it was put on another lorry to be taken to S., and, according to the statements which he made later to the police, he did not know that the drum to which S. referred in that conversation was one which had been stolen. After being questioned by the police during the afternoon of Jan. 21, the appellant had another conversation with S., who told him that the drum was a valuable one and described its contents. According to the appellant's own admission, he then suspected that the drum was stolen. On the evening of Jan. 21, the appellant saw N., who had been taken into custody in connexion with the theft, and a conversation took place between them. Later, N. confessed to having stolen the drum, and the appellant also was charged with larceny on the ground that he had acted in concert with N. At the appellant's trial, counsel for the defence raised the question whether the appellant could give evidence of what N. had said to him on the evening of Jan. 21 (the evidence being to the effect that N. had said that he was not guilty of any offence and had not taken the drum to S.), in order to explain the appellant's subsequent conduct and answers to the police, but the deputy chairman of the quarter sessions ruled that this evidence was inadmissible. In his summing-up, the deputy chairman referred to the fact that, even after seeing N. on the evening of Jan. 21, the appellant told the police that he knew nothing about the stolen drum. The appellant was convicted of the offence. On appeal,

Held: (i) the deputy chairman's ruling was wrong, because evidence of what N. had said to the appellant was relevant to explain his answers to the police and his conduct when charged, and, therefore, was admissible.

Dictum of MR. L. M. D. DE SILVA in *Subramaniam* v. *Public Prosecutor* ([1956] 1 W.L.R. at p. 970) applied.

(ii) even if, however, that evidence had been admitted, any jury, properly directed, would have found the appellant guilty of the offence, and the appeal would therefore be dismissed under the proviso* to s. 4 (1) of the Criminal Appeal Act, 1907.

Appeal dismissed.

[**Editorial Note.** It has long been settled law in England that the so-called hearsay rule relates only to evidence that is tendered to prove the truth of the facts stated. A statement can be "hearsay" if it is tendered to prove the truth of the facts that were heard to be stated; but if its relevance is that it was in fact made, evidence of its having been made is original evidence. Thus, the fact that a statement was made may explain the hearer's state of mind and be admissible for that purpose; similarly, as the present case shows, the fact that a statement was made may be admissible to explain the hearer's subsequent conduct when questioned by the police.

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* By the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, the Court of Criminal Appeal "may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

As to the rule against hearsay, see 15 HALSBURY'S LAWS (3rd Edn.) 294, para. 533; and for cases on the subject, see 14 DIGEST (Repl.) 507, 508, *4909-4924*.

For the Criminal Appeal Act, 1907, s. 4 (1), proviso, see 5 HALSBURY'S STATUTES (2nd Edn.) 929.]

Case referred to:

Subramaniam v. *Public Prosecutor*, [1956] 1 W.L.R. 965; 3rd Digest Supp.

Appeal.

The appellant, George Arthur Willis, was convicted at the Berkshire Quarter Sessions, before the deputy chairman and a jury, of the larceny of a drum of metal cable and was sentenced to eighteen months' imprisonment. He appealed against conviction.

E. Clarke for the appellant.

K. Jones for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at the Berkshire Quarter Sessions, before the deputy chairman, of larceny and was sentenced to eighteen months' imprisonment. He now appeals by leave of the court against his conviction. It is necessary, in order to understand the position, to state the facts in a little detail. The appellant is in business at Southend as a dealer in scrap metal. He has a number of lorries and he employs a number of lorry drivers, and, in particular, he employed a man called Boulton as a lorry driver and a man called Napper, who was what was called the outside foreman. His business had a contract with the Atomic Energy Authority to remove scrap weekly from Aldermaston, and it was his practice to go down there in his car, accompanying such lorries as were necessary, once a week to collect the scrap. His evidence was that he left the actual collection of the scrap and of loading-up to the foreman, Napper, and that he himself was only concerned with seeing the officials of the Atomic Energy Authority and inspecting any property which from time to time they were prepared to sell.

On Jan. 19, 1959, two lorries, three drivers, Napper and the appellant all went down to Aldermaston. His evidence was that, while he was seeing various people about the place, Napper was responsible for the loading, and there is no doubt that Napper instructed Boulton, who was incidentally convicted also, to load a large and valuable drum of cable. That was put on one of these lorries. It was packed round with scrap metal and a tarpaulin was put over it. Towards the end of the day, the two lorries went over the weighbridge. The appellant followed in his car and the procession went to an inn known as the Hare and Hounds, where it was the practice for the party to spend the night. The lorries were parked outside the inn. The drivers, Napper, and the appellant stayed there, and the next morning the appellant and Napper, who had business of their own elsewhere, went their separate ways. The lorry with the drum of cable was driven back to the yard at Southend. The evidence is that there it was unloaded. That was on the afternoon of Jan. 20. After dark that evening the appellant got back to his yard at Southend. The next morning, according to him, before he arrived at the office a lorry had left with this particular drum of cable going to Watford to a company known as the Brookside Metal Co., of which Mr. Stock was the manager.

Napper confessed to having stolen that drum of cable, and the whole question in the trial which followed of Boulton and the appellant was whether they, in their respective capacities, had been acting in concert with Napper. The appellant maintained—and it was not contradicted—that he had nothing to do with the actual loading. He said that, although he had gone with the lorries to the Hare and Hounds, he never realised that there was this valuable drum of cable on one of the lorries. He said that he never saw it in the yard; that it was dark when he got back to Southend in the evening; and that the cable had gone by the time he got down there the next morning.

The prosecution's case against the appellant, on the other hand, was, first, based on the argument that, if Napper was acting on his own and not on the instructions of or in concert with a fraudulent employer, he was taking a quite fantastic risk because he was doing everything right under the eyes of his employer who, if an honest man, would have handed him over to the police at once. Added to that, Napper took a drum said to be worth £550—it contained forty per cent. copper—to an old customer of his employer, the Brookside Metal Co., where, if payment was to be made, it would be payment made to his employer, and therefore he, Napper, stood to get nothing out of it.

The second part of the prosecution case was based on the appellant's failure to give candid answers to the police. The position with regard to that was that on Jan. 21 Mr. Stock rang up as soon as the drum had arrived and said that it had arrived. The appellant said that he had no idea that it was a drum of cable which had come from Aldermaston but thought that Mr. Stock referred to some cable which had been inspected some few days before. That same afternoon the police arrived. Sergeant Rickwood questioned the appellant. He denied having taken the drum from Aldermaston. The yard was searched. The drum was not there, and the appellant said that it was quite impossible for it to be there without his knowing it. Then followed another conversation with Mr. Stock, and it is perfectly clear that Mr. Stock then told the appellant that he had seen the cable; that it was a very valuable one and contained forty per cent. copper; and that the appellant was forced to admit that, as soon as that occurred, he suspected that it was a stolen drum. Still on Jan. 21, at about 10 p.m., he saw Napper, who was in custody, and a conversation took place, and it is as a result of a ruling given with regard to that conversation that this appeal comes before the court. Counsel for the defence raised the question whether he was allowed to ask and the appellant was allowed to answer what Napper had told him in that conversation. It was said that evidence of that conversation was material in considering the appellant's subsequent conduct and the answers that he gave to the police, which were to the effect that he knew nothing about the stolen drum of cable. The matter was argued in the absence of the jury, and in the end the deputy chairman ruled that the evidence was inadmissible.

This court is of opinion that that ruling was wrong. It is quite clear that evidence of what has been said by somebody else, who is not called as a witness, may be perfectly good evidence of the state of mind in which the prisoner was. In a recent case in the Privy Council, *Subramaniam* v. *Public Prosecutor* (1), it was held that the state of mind of a man charged with possessing ammunition, contrary to certain regulations, could be proved by what had been told him in that case by certain terrorists into whose hands he had come. MR. DE SILVA, giving the advice of the Board, said this (2):

> "In ruling out peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from

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(1) [1956] 1 W.L.R. 965.

(2) [1956] 1 W.L.R. at p. 970.

> its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

In the opinion of this court, that statement of the law is applicable to the position in the present case. It is true that the Board were there considering the state of mind and conduct of the prisoner at the time of the commission of the offence, but, provided that the evidence as to his state of mind and conduct is relevant, it matters not whether it was in regard to the conduct at the time of the commission of the offence or, as here, at a subsequent time to explain his answers to the police and his conduct when charged. Accordingly, it seems to this court that that evidence in the present case was wrongly excluded.

In those circumstances, counsel for the appellant points to the fact that a great deal of the prosecution case was based on the answers which the appellant gave to the police, and counsel has drawn attention to a number of passages in which the deputy chairman in his summing-up stressed the matter. It is perhaps sufficient to refer only to one of the passages, occurring at the end of the summing-up. It is in these terms:

> " But it does not end there. [The appellant] told you the reason why he did not do it was because he wanted to see Napper first. He saw Napper that evening, and saw Sergeant Rickwood immediately after he had seen Napper. You may ask yourselves, members of the jury, if he had decided not to tell the police until he had seen Napper, why, after he had seen Napper, did he not then tell Rickwood, whom he saw that evening, about the drum. You will have to consider that very carefully, members of the jury, and ask yourselves what light that throws on [the appellant's] mentality."

It appears that the evidence which the appellant sought to give was that Napper had said that he, Napper, was not guilty of any offence and had not taken any drum of cable to the Brookside Metal Co. It is said that, if that evidence had been given, a comment such as that to which I have just referred—and there are several others—would not have been made. It seems to this court, however, that, although the comment would not have taken exactly the same form, a similar comment was inevitable, namely: Was the absence of a true statement to the police consistent with the appellant's innocence?

This court is sparing in its application of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907 (3), but in the present case it seems to the court that the evidence here is really overwhelming and that, even if evidence as to the conversation with Napper had been admitted, any jury, properly directed, were bound to come to the same conclusion as that to which this jury came. In the first place, it is almost inconceivable that an honest employer, even though told by his employee that nothing had been stolen and that nothing had been taken to Mr. Stock's yard, should not at once have told the police what he had been told by Mr. Stock, namely, that a drum of cable which appeared to have been stolen had come from the appellant's yard. It is almost inconceivable that, on the next day when he was seen by Inspector Moyle, he should have said, as I think he did, " My lorries have not been used to take any drums of cable out; I know different to that ". Finally, as I said at the beginning, there was the overwhelming case against the appellant on the basis that Napper, with an honest employer, was taking the most fantastic risk and appeared at the end not to be in a position to obtain any advantage from it. It seems to this court that any jury properly directed would have been bound to return the same verdict even if this evidence had been admitted, and, accordingly, this appeal must be dismissed.

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(3) See footnote at p. 331, ante.

Appeal dismissed.

Solicitors: *Nelson Mitchell & Williams*, Southend-on-Sea (for the appellant); *Solicitor to Berkshire County Council* (for the Crown).

[*Reported by* Kevin Winstain, Esq., *Barrister-at-Law.*]

R. *v.* BENNETT, *Ex parte* R.

[Queen's Bench Division (Lord Parker, C.J., Hilbery and Pearson, JJ.), December 11, 1959.]

Magistrates—Procedure—Summary trial for indictable offence—Consent of accused to summary trial—Case adjourned for a week after evidence of first prosecution witness—Whether accused entitled to withdraw consent at adjourned hearing—Whether summary trial begun—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 55), *s.* 19 (5), *s.* 24.

The applicant appeared before a metropolitan magistrate on an information charging her with attempted suicide, which was an indictable offence triable summarily under s. 19 of the Magistrates' Courts Act, 1952. The provisions of the section having been complied with, the applicant elected to be tried summarily and pleaded not guilty. A woman police officer was then called and said that she had seen the applicant that morning in a hospital and had told her that she would be taken to a police station and charged with attempted suicide, and that, when the applicant was charged and cautioned, she had said " It was not an attempt to commit suicide." The woman police officer was the only witness for the prosecution ready to give evidence and the applicant, at the request of the prosecution, was remanded for a week. At the adjourned hearing the applicant, through counsel, asked for leave to withdraw her consent to be tried summarily so that she could be tried by a jury. The magistrate held that, as he had begun to try the case summarily, he could not allow the applicant to change her election. On an application for an order prohibiting the magistrate from continuing with the summary trial, it was contended for the applicant that the evidence of the woman police officer was merely formal evidence in connexion with remand and not evidence in the case.

Held: the evidence of the woman police officer was evidence in the case, and, therefore, the magistrate had begun " to try an information . . . summarily " within the meaning of s. 24* of the Magistrates' Courts Act, 1952, and could not allow the applicant to change her election, as he was precluded by s. 24 from inquiring into the information as an examining justice.

R. v. *Craske, Ex p. Metropolis Police Commissioner* ([1957] 2 All E.R. 772) distinguished.

[As to consent by adults for summary trial of indictable offences, see 25 Halsbury's Laws (3rd Edn.) 177, para. 326, and 205, para. 372.

For the Magistrates' Courts Act, 1952, s. 19 and s. 24, see 32 Halsbury's Statutes (2nd Edn.) 438, 443.]

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* The terms of the section are printed at p. 336, letter I, post.

Cases referred to:

R. v. *Craske, Ex p. Metropolis Police Commissioner*, [1957] 2 All E.R. 772; [1957] 2 Q.B. 591; 121 J.P. 502; [1957] 3 W.L.R. 308; 3rd Digest Supp.

R. v. *Ibrahim*, (1957), 122 J.P. 119; 42 Cr. App. Rep. 38; 3rd Digest Supp.

Motions for prohibition and mandamus.

The applicant moved the court for (i) an order of prohibition, directed to PAUL BENNETT, ESQ., V. C, the metropolitan magistrate sitting at the Marlborough Street Magistrates' Court, prohibiting him from proceeding with the summary trial of the applicant on a charge of attempted suicide; and (ii) an order of mandamus requiring him to inquire into the case as an examining justice.

The facts are stated in the judgment of LORD PARKER, C.J.

P. Sheridan for the applicant.

Paul Wrightson for the respondent, the prosecutor.

LORD PARKER, C.J.: On Nov. 16, 1959, the applicant appeared before the learned magistrate charged with attempted suicide (1). It appeared to be a matter with which the magistrate could properly deal summarily, and accordingly the provisions of s. 19 of the Magistrates' Courts Act, 1952, were invoked. I entirely accept the learned magistrate's affidavit that that section was fully complied with; in other words, the court ordered the charge to be written down and read to the accused, who was told that she was at liberty to be tried summarily instead of being tried by a jury, and so on. She elected to be tried summarily, and thereupon she was asked to plead, and she pleaded not guilty. Thereafter, a woman police constable was called, who said this:

> "At 11.45 today at St. George's Hospital I saw the [applicant]. I told her I should take her to Gerald Row Police Station where she would be charged with attempted suicide. When charged and cautioned she said 'It was not an attempt to commit suicide'."

Thereafter, the applicant was remanded for seven days, and the magistrate directed that there should be a medical report. At the adjourned hearing on Nov. 23, she was represented by counsel, who asked the magistrate for leave to change her election so that she should go for trial by a jury. The magistrate decided that he had no power to allow her to change her election. In those circumstances this court was moved to prohibit him from continuing with the trial in a summary way.

The whole matter depends on s. 19 and s. 24 of the Magistrates' Courts Act, 1952. By s. 19 (5) it is provided:

> "After informing the accused as provided by the last two preceding subsections the court shall ask him whether he wishes to be tried by a jury or consents to be tried summarily, and, if he consents, shall proceed to the summary trial of the information."

Pausing there, there is nothing in the statute which deals in any way with the possibility of a change in the election, but s. 24 provides:

> "Except as provided in sub-s. (5) of s. 18 of this Act [which has no relevance in this case], a magistrates' court, having begun to try an information for any indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices."

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(1) Attempted suicide is one of the indictable offences specified in Sch. 1 to the Magistrates' Courts Act, 1952, which, under s. 19 of the Act, may be dealt with summarily, subject to the provisions of the section, if the accused has attained the age of seventeen.

Accordingly, the short question here is whether, on the facts, the magistrate had begun to try an information summarily within the meaning of that section.

There have been two authorities at least on this matter. In *R.* v. *Craske, Ex p. Metropolis Police Commissioner* (2), it was held by this court that a magistrate who has merely taken the plea has not begun to try an information summarily and that he does not so begin until he begins to take evidence. Again, in *R.* v. *Ibrahim* (3), it was held by the Court of Criminal Appeal that a magistrate has not begun to try an information summarily within s. 24 by hearing the opening by the prosecution. Again, it is said that he does not so begin until he begins to hear evidence.

In the present case, a policewoman gave the evidence to which I have referred. Counsel for the applicant, however, says that that evidence was merely formal evidence, the sort of evidence which would have been given in connexion with bail. He says that this was formal evidence in connexion with remand and was not, as he puts it, evidence in the case. He seeks to support that by reference to *R.* v. *Craske* (2), where he maintains that similar evidence of arrest and charge had been given, albeit in the form of depositions. For my part, I am satisfied that no help can be obtained from *R.* v. *Craske* (2). It is true that there is a reference (4) to evidence being taken in deposition form of the arrest and charge of one Rees, but, if one looks at the passage closely, it is quite clear that that evidence in deposition form was taken after the magistrate had decided in that case to allow the prisoner to change his election and had begun to take evidence as an examining justice. For my part, without deciding whether there can be what is called formal evidence as opposed to evidence in the case, I am quite clear, accepting the learned magistrate's affidavit as I do, that the evidence of this police officer was evidence in the case. In his affidavit the learned magistrate says:

> "The witness concerned was a witness in the trial and fully gave her evidence, though I believe the police officer in charge of the case had first intimated to me that he had only one witness ready to give evidence and would ask for a remand after she had so given evidence. The police officer in charge did so ask for a remand thereafter."

The court has been supplied with a transcript of a shorthand note which was taken and from which it appears that, after the plea, Police Inspector Francis Woods said: "I will ask for a remand, Your Worship", and then the evidence was given. That largely supports the learned magistrate's affidavit. Accepting that evidence as I do, it seems to me that the woman police officer was the only witness for the prosecution who was present and was the first witness in the case, and that she gave her evidence in the trial, and that the applicant was thereafter remanded. Accordingly, I think that these applications fail and should be dismissed.

HILBERY, J.: I agree.

PEARSON, J.: I also agree.

Motions dismissed.

Solicitors: *Barry Ziff* (for the applicant); *Solicitor, Metropolitan Police* (for the prosecutor).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(2) [1957] 2 All E.R. 772; [1957] 2 Q.B. 591. (3) (1957), 122 J.P. 119.

(4) [1957] 2 All E.R. at p. 773; [1957] 2 Q.B. at p. 594.

WEXLER *v.* PLAYLE (VALUATION OFFICER) AND OTHERS.

[Court of Appeal (Morris, Willmer and Harman, L.JJ.), December 8, 9, 1959.]

Rates—Valuation—Dwelling-house—Disrepair—Landlord's liability to repair—Dwelling-house in poor state of repair—Disrepair disregarded in arriving at value—Valuation for Rating Act, 1953 (1 *&* 2 *Eliz.* 2 *c.* 42), *s.* 2 (2), (3) (*a*).

A flat was in poor decorative repair and had cracks in the ceiling and walls, window frames requiring re-setting, damp in the kitchen ceiling and wall, a defective hot-water tank and the stove out of order. It was agreed that all these defects were readily repairable. They were disregarded by the Lands Tribunal in arriving at the gross value of the flat under s. 2 (2) of the Valuation for Rating Act, 1953, on the ground that the hypothetical tenant taking the flat would have required the hypothetical landlord to put the flat in a reasonable state of repair under his covenant to repair in accordance with everyday practice.

Held: there was no error of law in the decision of the tribunal since the landlord's obligation to repair included the obligation to put the flat into repair and the defects being remediable were such that the hypothetical tenant would require him to put them right (see p. 343, letter H, and p. 346, letters F and I, post).

Quaere: (i) whether the " state " in which a dwelling-house must be assumed to have been on June 30, 1939, for valuation purposes under s. 2 (3) (a) of the Valuation for Rating Act, 1953, includes its state of repair (see p. 342, letter B, p. 345, letter H, and p. 347, letter A, post).

(ii) whether the words " necessary to maintain the hereditament in a state to command that rent " in s. 2 (2) of the Valuation for Rating Act, 1953, govern only the words " the other expenses, if any " that immediately precede them or govern also the prior words " the cost of the repairs and insurance " in that subsection (see p. 342, letter I, p. 345, letter I, to p. 346, letter C, and p. 347, letter A, post).

Rates—Lands Tribunal—Evidence—Evidence after decision reserved—Discretion of tribunal to refuse to hear evidence that might have been adduced at hearing.

At the hearing of a rating appeal relating to a second floor flat, a schedule of rents of other flats was put in, including one particular flat, comparable in size, of which the figures and circumstances were set out. The Lands Tribunal reserved its decision. It subsequently received an application from the ratepayer for leave to adduce further evidence concerning " the comparative amounts of natural light reaching " the two flats and its effect on comparability and the value of the appeal flat. The nature of the evidence was such that it could have been given at the hearing. The tribunal rejected the application and gave its decision. On appeal,

Held: though there might be cases in which further evidence should be admitted after a hearing and before decision, yet the tribunal had properly exercised its discretion in refusing to admit the fresh evidence in this case, since the evidence was on a matter which had been part of the inquiry before the tribunal and could have been given at the hearing.

Bigsby v. *Dickinson* ((1876), 4 Ch.D. 24) distinguished.

Appeal dismissed.

[**Editorial Note.** This case related to a dwelling-house, the method of ascertaining the gross value of which during the currency of present valuation lists (in force until Apr. 1, 1963, under present legislation) is defined by s. 2 (2) and (3) of the Valuation for Rating Act, 1953. It would seem, however, A that the decision would apply to the ascertainment of the value of other hereditaments for which a gross value is required to be ascertained, the definition in s. 2 (2) being based on and closely following that in s. 68 (1) of the Rating and Valuation Act, 1925 (cf. s. 4 of the Valuation (Metropolis) Act, 1869) save that the definition in the Act of 1953 is related to values in June, 1939.

For s. 2 (2) and (3) of the Valuation for Rating Act, 1953, see 33 HALSBURY'S B STATUTES (2nd Edn.) 584.]

Case referred to:

Bigsby v. *Dickinson*, (1876), 4 Ch.D. 24; 46 L.J.Ch. 280; 35 L.T. 679; 22 Digest (Repl.) 180, *1634*.

Case Stated.

The appellant ratepayer was the occupier of a flat, 13, Park Mansions, Prince C of Wales Drive, Battersea. He appealed by way of Case Stated against a decision of the Lands Tribunal (H. P. HOBBS, ESQ.) given on Dec. 12, 1958, reducing the assessment of the flat from £69 gross value, £51 rateable value, to £65 gross value, £48 rateable value (4 R.R.C. 161).

The facts appear in the judgment of MORRIS, L.J., at letter F, infra, and p. 340, letter H, post.

D *W. J. Glover* for the ratepayer.

J. R. Phillips for the valuation officer.

J. P. Harris for the rating authority.

MORRIS, L.J.: This matter concerns the rating of a flat on the second floor of a block of flats called Park Mansions in Prince of Wales Drive, Batter- E sea. The matter went to the local valuation court, which gave its decision on Oct. 9, 1957. Thereafter the tenant, who is the appellant ratepayer in this court, gave a notice of appeal to the Lands Tribunal. That was on Oct. 28, 1957. The Lands Tribunal heard the appeal and gave its decision on Dec. 12, 1958. Thereafter by a notice dated Jan. 21, 1959, the tenant gave a notice requiring the Lands Tribunal to state a Case. Accordingly points of law are F now raised for our consideration.

The flat is situated in a road which runs along the south side of Battersea Park between Albert Bridge Road and Queenstown Road. The block of flats is at the junction of Albert Bridge Road and Prince of Wales Drive. The building is a substantial one and was erected about sixty years ago. There are no lifts in the building. The particular flat, which, as I have said, is on the G second floor and is No. 13, contains a lounge, three bedrooms, a kitchen, dining room, bathroom and separate water closet, the lounge and one bedroom overlooking the park. In 1934 the flat was let at a yearly rent of £110, the landlord being responsible for rates, repairs, insurance and services. Thereafter for a period the flat was vacant. That was between March, 1935 and 1944. There was evidence which showed that the flat was vacant in June, 1939. It was later H occupied, however, and the ratepayer became tenant on Oct. 24, 1948. Under his tenancy the landlord was responsible for rates, services, insurance and external repairs and the ratepayer was responsible for internal repairs.

Now the rateable value has to be arrived at by following the provisions of the Valuation for Rating Act, 1953. Section 2 (1) of that Act provides as follows:

> I "For the purpose of making or altering the first valuation lists made after the passing of this Act, the gross value for rating purposes of a hereditament which is either a dwelling-house or a private garage or private storage premises (as hereinafter defined respectively) shall not be ascertained by reference to the definition of gross value in s. 68 of the Rating and Valuation Act, 1925 (hereinafter in this Act referred to as 'the Act of 1925') or in s. 4 of the Valuation (Metropolis) Act, 1869 (hereinafter in this Act referred to as 'the Act of 1869'), but shall be an amount equal to the rent specified in the next following subsection."

There follows a proviso which is not material for present purposes. Subsection (2) is in these terms:

> " The said rent is that at which the hereditament in question might reasonably have been expected on or about June 30, 1939, to let from year to year if the tenant had undertaken to pay all usual tenant's rates and taxes and if the landlord had undertaken to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

Then sub-s. (3) is in these terms:

> " For the purposes of the last preceding subsection it shall be assumed —(a) that the hereditament was subsisting on and about the said June 30 in the state in which it actually subsists at the time of valuation."

It is agreed that for present purposes the time of valuation was Mar. 30, 1957. Then sub-s. 3 (b) reads:

> " that the locality in which the hereditament is situated was on and about the said day in the same state, as respects the other premises situated in that locality and (subject to the next following subsection) as respects the occupation and use of those premises, as respects the transport services and other facilities available to persons living or working in the locality, and as respects other matters affecting the amenities of the locality, as it is at the time of valuation ",

which again, as I have said, means in this case Mar. 30, 1957.

Questions arose as to the way in which to value having regard to the provisions of those sub-ss. (2) and (3). Under sub-s. (3) a point was taken by the ratepayer that there now exists in the park near his flat a fun fair which is open in the summer months and which attracts a number of people to the locality. It was contended by the ratepayer that, if the conditions now obtaining were related to June, 1939, the effect should be to diminish the gross and rateable values. The respondent valuation officer was of the opinion that the assessment should be £77 gross value, £58 rateable value. When the matter went to the local valuation court, the determination there was that it should be £69 gross value, £51 rateable value. On appeal to the Lands Tribunal, the decision was that it should be reduced to £65 gross value, £48 rateable value. A reduction was made by the Lands Tribunal because the view was taken that there were considerations arising out of the coming of the fun fair to Battersea Park which would diminish the amenity of the flat and should result in a reduction. Accordingly, the Lands Tribunal so decided, and it awarded costs of a stated amount to the ratepayer to be paid by each one of the two respondents, the valuation officer and the rating authority, Battersea Metropolitan Borough Council. We are not concerned with that issue and no point of law arises.

The decision of the tribunal shows that evidence was given as to the state of the premises, the particular flat, in October, 1957. It is recited that a witness, Mr. Arsclott, giving evidence for the ratepayer, put in a schedule of condition which had been compiled after an inspection of the flat made on Oct. 8, 1957, and which showed that the flat was in poor decorative repair. He said that there were sundry cracks in the ceilings and in some of the walls, that the window frames required re-setting owing to war damage, that there were patches of dampness in the kitchen ceiling, presumably due to leakage from the flat above, and that there was dampness in the kitchen wall, the hot-water tank being defective and the stove apparently out of order. That witness, Mr. Arsclott, agreed that all those defects were repairable. The decision also recites that the ratepayer himself gave evidence that in 1957 the water system was such that a sanitary notice had been served in respect of

> " wet, defective and perished condition of walls and ceiling in kitchen; leaky condition of water tank ",

and he had said that in 1956 and 1957 there was considerable inconsistency in the electricity supply. The decision further records that the valuation officer had agreed that, with regard to the flat itself, decorating was needed, that the hot-water tank required replacing, that there were defects in the window frames and that there were superficial cracks in the ceilings and walls; but he considered that all those matters permitted of repair by the landlord. The decision of the Lands Tribunal I think proceeded on the basis that on Mar. 30, 1957, i.e., the time of valuation, there were conditions of disrepair in the premises of the nature to which I have referred.

The Lands Tribunal arrived at its conclusion by looking at the 1934 rent of the flat and by looking at the rents of other second floor flats. It came to the conclusion that the starting figure should be £120. There was no doubt that certain adjustments then had to be made concerning services and interior repairs and, those adjustments having been made, the figure would become one of £115 inclusive of rates. That was the decision of the Lands Tribunal. If the deduction for rates was made, then the gross value would be £75. As I have indicated, the Lands Tribunal reduced that £75 to £65 because of the view taken concerning the change in amenities arising out of the coming of the Battersea fun fair. So that the Lands Tribunal, therefore, fixed the assessment as £65 gross value, £48 rateable value.

Two main points of law have been argued by counsel for the ratepayer and they were taken, so far as they could be taken, before the Lands Tribunal. The notice of appeal summarises the points under four heads, but the third of the four has not been argued before us. The first and second, which counsel for the ratepayer agrees can really be taken as one main point, read as follows:

> " (i) that s. 2 of the Valuation for Rating Act, 1953, requires the hereditament to be valued in the state of repair in which it was at the time of valuation. (ii) that the landlord's covenant under the said s. 2 is only to maintain the hereditament in the state of repair in which it was at the time of valuation."

Counsel's argument runs as follows. He says that, if reference is made to s. 2 (3) (a), then there has to be the assumption that on or about June 30, 1939, the hereditament was subsisting in the state in which it actually subsists at the time of valuation. The time of valuation was Mar. 30, 1957, and counsel for the ratepayer says that the evidence was sufficient to establish that there were certain defects in the premises, of the kind to which I have referred, and that they existed on or about Mar. 30, 1957. He therefore says that the valuation under s. 2 (2) must be made on the assumption that in June, 1939, the hereditament was subsisting in the state in which it actually subsisted on or about Mar. 30, 1957. He then says that in its application to the facts of this case sub-s. (2) contemplates an arrangement being made between a hypothetical landlord and a hypothetical tenant on the basis of the premises being in a state of disrepair, the landlord merely agreeing to do such repairs as would be necessary to prevent the premises becoming any worse.

To that submission learned counsel for the two respondents make several replies. They submit that that is a wholly unreal and artificial approach. They further submit certain contentions in regard to the construction of the words of sub-s. (2) and sub-s. (3). In regard to the words in sub-s. (3) (a):

> " that the hereditament was subsisting on and about the said June 30 in the state in which it actually subsists at the time of valuation ",

it is submitted, particularly by counsel for the rating authority, that the word " state " as there used refers to the structural condition of the premises but does not include the state of repair or state of decoration. In furtherance of his submission, he referred to a point, first raised I think by HARMAN, L.J., that the word " state " is also used in sub-para. (b) of sub-s. (3) in the clause

> " that the locality in which the hereditament is situated was on and about the said day in the same state, as respects the other premises situated in that locality ",

and so on. It was submitted that the basis of the argument of counsel for the ratepayer fails, because " state " does not include state of repair. Counsel for the ratepayer says that he does not contend that " state " primarily means state of repair but that the word is wide enough to include state of repair. I do not think that it is necessary to express a final opinion on this point, for I propose to reach my conclusion on the assumption that the words of sub-s. (3) (a) are sufficiently wide to include the state of repair or decoration of the premises.

Another point of construction that has been raised concerns the words at the end of sub-s. (2):

> " if the landlord had undertaken to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

Are we to read the concluding words as governing " cost of the repairs and insurance " or are we to read them as governing " the other expenses, if any, necessary to maintain the hereditament in a state to command that rent." The words used in the subsection have substantially been in existence for a very long time. They are substantially the words which form the definition of " gross value " in s. 68 (1) of the Rating and Valuation Act, 1925:

> " ' Gross value ' means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes . . . and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

So in the Act that applied to the metropolis, the Valuation (Metropolis) Act, 1869, in s. 4 we find a definition of " gross value " which is substantially in the same terms. If, however, we go back to the Parochial Assessments Act, 1836, we find these words:

> " The rent at which the [hereditaments] might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent."

Those words and that punctuation would more accord with the construction for which counsel for the ratepayer contends and it has been pointed out that in the change after the Act of 1836 there was no comma between the word " repairs " and the word " insurance " but instead of a comma the word " and " was inserted. That seems to lend some support to the view that the concluding words of sub-s. (2) are words that relate to " the other expenses, if any, necessary to maintain the hereditament in a state to command that rent ". The words of the subsection refer to the cost of the repairs and insurance. The cost of insurance would not seem normally to be effectively described by the words " expenses . . . necessary to maintain the hereditament in a state to command that rent."

This point of construction does not appear ever to have been decided, but counsel for the valuation officer very frankly told us that his instructions were that in practice valuers had rather proceeded on the assumption that the concluding words did govern all the words that went before. Again for my part I do not find it necessary to decide this point, for it seems to me that, even on the basis for which counsel for the ratepayer contended, he still does not succeed. Counsel's contention was summarised in the decision in this way:

> "[Counsel for the ratepayer] argued that under s. 2 (3) (a) of the Act of 1953 the flat must be valued exactly as it existed at the date of the proposal, submitting that, if a hereditament was out of repair at the particular date, then the rent should be the rent of the premises out of repair and conversely, if in repair, then the rent should be that of the premises in repair."

The Lands Tribunal did not accede to those submissions. The first reason stated by the Lands Tribunal for disagreeing was expressed as follows:

> "I think that it is contrary to what happens in everyday life, for in practice I am sure that a tenant viewing a house or flat with the decorations dirty and worn, some cracks in the walls and ceilings, and generally in a poor state of repair, so long as his tenancy provided that the landlord was to bear the cost of repairs, would not only require the landlord to keep the premises in a good state of repair but also to put the premises in a good and reasonable state of repair and decoration before he entered into possession and I do not think that this is a matter where the hypotheses of rating require departure from everyday practice."

It seems to me that there is no error of law in that approach.

If, therefore, I make the assumption for which counsel for the ratepayer contends, viz., that on or about June 30, 1939, the flat was in the state in which it actually was on Mar. 30, 1957, and if I assume in his favour that the word "state" is wide enough to cover state of repair and state of decoration, it seems to me that counsel's submission becomes really a most unrealistic one. He submits that what has to be ascertained if premises are in temporary disrepair is what rent would be paid on the basis that the landlord only undertook to do such repairs as would prevent the premises from becoming in a worse state of disrepair. I cannot think that that is right. It runs contrary, as it seems to me, to all reason and does not accord with what could reasonably be contemplated as likely to be the bargain between a landlord and a tenant. I think we must bear in mind the opening words of sub-s. (2) "The said rent is that at which the hereditament in question might reasonably have been expected . . . to let." There is therefore introduced what might be expected and what might reasonably be expected. When the words of this subsection are first read, it might seem as though a somewhat illusory test is laid down for the fixing of the rent. If a high rent was fixed, then that could command onerous repair obligations and if a very low rent was fixed, that might result from a refusal to undertake any substantial repairs. That rather illusory test will not apply if the construction of sub-s. (2) is the construction contended for particularly by counsel for the rating authority. It seems to me that the section is contemplating that the landlord will do repairs, and it must be remembered that, if a landlord is to maintain premises in repair or to keep premises in repair, he has the obligation to put premises in repair. So, if one postulates that a hypothetical landlord and a hypothetical tenant went into a flat which had the defects to which I have referred, such as bad window frames, cracks in the walls and ceilings and dampness and so on, and if we are considering what might reasonably have been expected by way of rent, I would say that it would be such rent as would be payable on the basis that the landlord would then do the necessary repairs to make the flat reasonably habitable and would do such later repairs as would be reasonable in all the circumstances (1). I think that one must assume that ordinary sensible people are dealing with the situation. I think also that consideration must be given to the class of property with which they are dealing.

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(1) Compare the passage in the decision of the Lands Tribunal (4 R.R.C. at p. 167), citing *Chritchlow* v. *Almond* (*V.O.*) ((1957), 2 R.R.C. 3) and *Fowler* v. *Lloyd* (*V.O.*) ((1958), 3 R.R.C. 65), which show that the tribunal had been following the principle that it should be assumed, when determining gross value, that the landlord would carry out his responsibilities and that the premises were in a reasonable state of repair.

Counsel for the ratepayer points out that in the Case Stated, para. 6 (b), it is stated as follows:

> "It was admitted by both respondents that if it was correct in law to value the said hereditament in the state of repair that it was in at the date of the said proposal a deduction for the state should be made in the valuations submitted on behalf of the respondents. On behalf of the respondents [the rating authority] it was admitted that the said deduction should be the sum of £10 per annum from the inclusive rental of £120 per annum. It was admitted by the respondent [valuation officer] that the said deduction from his inclusive rental should be £5 per annum."

There is a difference, it will be seen, between those two figures. But for the reasons that I have given, it seems to me that the Lands Tribunal did not in any way err in law in their approach. The state of disrepair was something that was easily remediable, as the Case finds. In those circumstances it seems to me that what would reasonably be expected would be that the tenant would require the landlord to put right those remediable defects. Accordingly, I consider that the basis on which the Lands Tribunal proceeded is not shown to be erroneous in law.

Now the other remaining point, which is quite a separate point, arises in this way. The hearing before the Lands Tribunal was on Oct. 29 and 30. During the hearing, for the purpose of arriving at the starting figure of rent for the flat in question, a schedule or list of tenancies was put in showing the rents of second floor flats in the block of flats as at June, 1939. A flat which compared in size with No. 13 was No. 18, and the figures and circumstances with regard to that flat were set out, being part of the evidence for the tribunal to consider. After the hearing was concluded the tribunal decided to reserve its decision so as to put the decision into writing. On Nov. 10 an application was made by the ratepayer for what was called a stay of proceedings to enable him to consider with counsel the making of an application for admission of further evidence. The other parties were not demurring to the suggestion, and on Dec. 8 a formal application was made by the ratepayer for the hearing of further evidence arising out of the evidence given on the last day of the hearing by the expert witness for the rating authority. The decision recites that:

> "The evidence was to concern the comparative amounts of natural light reaching Nos. 18 and 13 Park Mansions and the effect of this on comparability and on the value of No. 13."

It will be apparent, therefore, that the nature of the additional evidence was such that the evidence could have been given at the time of the hearing. The Case recites that the Lands Tribunal decided to refuse the application. I read from the decision:

> "I decided that these applications should be refused because I am strongly of opinion that once a hearing has been concluded that part of the proceedings is definitely finished and the fact that a decision thereon is often reserved to enable the tribunal to comply with the requirement that the decision shall be given in writing together with a brief statement of the tribunal's reasons for its decision, should not afford an opportunity for any of the parties concerned to adduce fresh evidence."

In the Case Stated the tribunal says:

> "I refused this application and read my decision, a signed copy of which together with a document setting out the details of the second floor flats is annexed hereto and forms part of this Case."

Now counsel for the ratepayer submits that the Lands Tribunal had power to admit the further evidence sought to be tendered but wrongfully refused to exercise such power. He submitted that there was power to admit the evidence

A and a discretion in the tribunal, but he says that the tribunal either failed to exercise the discretion judicially or failed to exercise it at all. We were referred to the Lands Tribunal Rules, 1956. I do not propose to mention them in detail. It does not seem to me that there is any substance in this complaint. The Lands Tribunal does not say that in no circumstances ever would it hear further evidence after the evidence had been concluded. There are many circumstances B in which a court might feel it appropriate to accede to an application to hear further evidence before judgment was given in a case where the hearing had been concluded and judgment reserved. This is not the occasion to seek to describe the situations where that might be appropriate. We were referred to *Bigsby* v. *Dickinson* (2). That was a situation in which the Court of Appeal thought that it was clearly right that an opportunity should have been given C to hear further evidence. It might easily be that, after the conclusion of the evidence in a case and while judgment was reserved, it might be found that there had been some inadvertent error in a figure or in some evidence and that it would be proper to make an application to a judge to hear further evidence in order to correct an error and a judge would be very likely in an appropriate case to accede to such an application. But the present situation D was quite different. A comparison between No. 13 and No. 18 was something which was a part of the inquiry before the Lands Tribunal and, if parties, after a hearing is concluded, have some good ideas and feel that they would like to add a little to what they have already put forward, they might well make the end of litigation quite uncertain. It seems to me that the Lands Tribunal had a discretion here over this matter. I do not think that there was any wrongful E exercise or non-judicial exercise of this discretion. It was perfectly within its powers to decide as it did.

I therefore am of the opinion that that submission so clearly made by counsel for the ratepayer also fails. I think, therefore, that the points to be decided in this case must be decided against the ratepayer.

F **WILLMER, L.J.**: I have come to the same conclusion, and there is but little that I desire to add to what my Lord has said. The right of appeal from the Lands Tribunal to this court is on a question of law only, and I am not persuaded in this case that the decision of the tribunal discloses any error of law. The principal argument advanced on behalf of the ratepayer amounts to this, that the combined effect of sub-s. (2) and sub-s. (3) (a) of s. 2 of the Valuation G for Rating Act, 1953, is that the gross value of the premises in question is to be fixed by reference to the rent that such premises would have been expected to command at the material date in 1939, if they were in the same state of repair in which they actually were in 1957, and on the assumption that the landlord will do such repairs as are necessary to maintain the premises in a state of repair to command that rent. It seems to me that two assumptions are fundamental H to that argument, and for myself I am doubtful as to the validity of either of them. One assumption is that the word " state ", where it occurs in sub-s. (3) (a), includes state of repair so as to cover the kind of defective condition of repair that we have in this case. My Lord has already read the defects alleged here and it is unnecessary to repeat them. For myself I think it is extremely doubtful whether the word " state " is to be read in the sense of including state I of repair. As my Lord has pointed out, where the same word occurs in the following para. (b) it clearly has no reference to state of repair, and I am not persuaded, therefore, that the first assumption is correct.

The argument also assumes that the concluding words of sub-s. (2), viz., the words " necessary to maintain the hereditament in a state to command that rent ", are to be construed as governing not only the words " the other expenses, if any ", which immediately precede them, but also the earlier words, namely,

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(2) (1876), 4 Ch.D. 24.

" the cost of the repairs and insurance ". For it is basic to the ratepayer's argument that the landlord's undertaking is to be construed as an undertaking only to execute such repairs as are necessary to maintain the hereditament in the same state of repair as at the date of the proposal. My Lord has already suggested some difficulties in the way of adopting that construction. I venture to suggest another difficulty. The words actually run:

> " the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

On the ratepayer's argument we should have to construe those words as though they read " the cost of the repairs and insurance, and the cost of the other expenses ". That seems to me to be a very strange way of reading the subsection, and I should have thought that the more natural construction to put on it is that the concluding words, which I have already read, are to be taken as governing only " the other expenses " which immediately precede them. Speaking for myself, therefore, I am disposed to doubt the validity of both the assumptions that underlie the appellant's argument.

However, as my Lord has pointed out, it is not necessary for us in this case to reach any concluded view about that, because the Lands Tribunal has in fact taken another route to the solution of the case, and, as I have already said, I can see no error of law in the reasons given for the decision. Even making those two basic assumptions in favour of the ratepayer, it remains true to say that the argument involves something which, in the words of the tribunal, is contrary to what happens in everyday life. For my part I should have thought it is clear that sub-s. (2) is to be construed on the basis of what normally does happen in everyday life. I infer that from the incorporation of the word " reasonably " at the beginning of sub-s. (2). The subsection speaks of the rent which might " reasonably " have been expected. That imports the notion of a reasonable landlord and a reasonable tenant, behaving reasonably and making a reasonable arrangement. If that is the right approach, then I entirely agree with what my Lord has said, namely, that one would expect a reasonable landlord and a reasonable tenant, when contracting for a tenancy, if it appeared that there were readily remediable defects such as those we have in this case, to proceed on the basis that the landlord's covenant to repair would include an obligation not only to keep the premises in repair but to put the premises in repair. That seems to me the common-sense application of the subsection. That is the way in which the tribunal applied the subsection, and I am quite unable to say that the decision was wrong. On that main point, therefore, I do not find myself able to accede to the ratepayer's argument.

With regard to the second point, viz., that the tribunal was in error in refusing to grant leave to call further evidence after the hearing was concluded, I find myself in agreement with what my Lord has said, and I desire to add nothing further. In those circumstances I agree that this appeal should be dismissed.

HARMAN, L.J.: I am of the same opinion. It seems to me the decision of the Lands Tribunal was no less good law than it was clearly good sense. It would produce chaos if the ratepayer's contentions were upheld. It seems to me that, where there is a landlord under a repairing covenant and a tenant about to take a house on a year's tenancy, the tenant must naturally be supposed to have a landlord whom he can oblige to observe his repairing covenant, and therefore the fact that there are, at the moment when the bargain is made, repairable and temporary defects in the property ought not to be taken into account in arriving at the hypothetical rent which is the basis of the rateable value. If it were otherwise, it would be difficult in any case, and quite impossible in a case like the present, to arrive at a conclusion dependent on a state of repair existing so long ago as 1939. I am glad to think, therefore, that the tribunal was able to come to what seems to me to be a sensible conclusion

A and one in accordance with the law without the necessity of deciding rather nice questions of construction raised by the two subsections which my Lords have discussed. On those I desire to reserve my opinion, expressing as at present advised a preference for the views to which WILLMER, L.J., has given expression. I need say no more on the other point except that I agree with MORRIS, L.J.

B *Appeal dismissed. Leave to appeal to the House of Lords refused.*

Solicitors: *Mortimer, Wexler & Co.* (for the ratepayer); *Solicitor of Inland Revenue* (for the valuation officer); *Sharpe, Pritchard & Co.* (for the rating authority).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

C

D

PRACTICE DIRECTION.

E

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Costs—Taxation—Bill of costs—Item numbers to be shown—Rules of the Supreme Court (*No. 3*), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *Appendix* 2.

F *Probate—Costs—Taxation—Bill of costs—Item numbers to be shown—Rules of the Supreme Court* (*No. 3*), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *Appendix* 2.

Bills drawn for taxation under Appendix 2 to the Supreme Court Costs Rules* should show the item number in the appendix under which each item of the bill is charged.

B. LONG,

G Jan. 22, 1960. Senior Registrar.

[Note: This Direction will be included in the Compendium.]

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* Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

ISAAC *v.* HOTEL DE PARIS, LTD.

[PRIVY COUNCIL (Lord Denning, Lord Birkett and Mr. L. M. D. de Silva), November 16, 17, 18, December 16, 1959.]

Licence—Licence to occupy premises—Exclusive possession—Payment and acceptance of amount of rent due to landlord of licensor—Intention of parties—Whether licence or lease.

Privy Council—West Indies—Trinidad—Licence—Licence to occupy premises—Exclusive possession—Payment and acceptance of amount of rent due to landlord of licensor—Whether intention of parties to create relationship of landlord and tenant or of licensor and licensee.

The respondent company, owners of a hotel called the Hotel de Paris in Trinidad, were the lessees of another building called the P. Hotel. J., who owned all the shares of the respondent company (sixty-four in number) had agreed to sell fifteen to the appellant. In December, 1955, at the appellant's suggestion, the respondent company let him into occupation of the first floor of the P. Hotel, it being agreed that a night bar should be established there and should be managed by the appellant on behalf of the respondent company. The appellant got a licence in his own name to use the first floor of the P. Hotel as a night bar, and he put in a stock of liquor at his own expense. In February, 1956, relations between J. and the appellant became strained, but at a meeting to try to settle their differences they agreed on terms which were to be embodied in a written contract. No concluded contract was reached but some of the proposed terms were acted on, viz.—(i) the appellant was to remain in occupation of the first floor of the P. Hotel; (ii) he agreed to pay all expenses incurred in connexion with the running of the P. Hotel, including the monthly rent which the respondent company paid to their landlord; (iii) he would retain for himself all profits he made from the business carried on at the P. Hotel, in lieu of the dividends on his shares if he acquired them. Another term, which was not implemented, was that the appellant would pay the balance due for the purchase of the fifteen shares. The appellant remained in occupation at the P. Hotel, ran the night bar, paid all expenses, took all the profits and paid the monthly rent to the respondent company which was accepted by them. No contract having been executed and the balance due on the shares not having been paid, J., in May, 1956, gave notice to the appellant that the deposits made under the agreement to purchase the shares were forfeited, and required the appellant to remove and take away his stock and other materials from the P. Hotel within seven days. The appellant did not do so, but the respondent company took no steps to have them removed. In October, 1956, the respondent company issued a writ asking for a declaration that they were entitled to possession of the P. Hotel and an order for possession. The appellant claimed he was a tenant at a monthly rent. After the issue of the writ, everything went on as before; the appellant paid the monthly rent as "rent for the P. Hotel", and the respondent company accepted the amount but gave no receipt. In December, 1957, the court made an order for possession which was later confirmed, but the appellant stayed on.

Held: the respondent company were entitled to an order for possession of the P. Hotel, because—

(i) after February, 1956, the relationship between the parties was not that of landlord and tenant but of licensor and licensee, even though there was exclusive possession by the appellant and acceptance of the amount of the rent by the respondent company, the circumstances and conduct of the parties showing that all that was intended was that the appellant should have a personal privilege of running a night bar at the P. Hotel with no interest in the land at all, and this privilege came to an end with the notice of May, 1956.

(ii) after the notice of May, 1956, the appellant remained in occupation at sufferance, and, in the circumstances, the acceptance of rent by the respondent company did not waive their right to immediate possession.

Appeal dismissed.

[As to principles for determining whether an agreement creates a lease or a licence, see 23 HALSBURY'S LAWS (3rd Edn.) 427, para. 1022; and for cases on the subject, see 30 DIGEST (Repl.) 527-529, *1649-1670.*]

Cases referred to:

Booker v. *Palmer*, [1942] 2 All E.R. 674; 30 Digest (Repl.) 539, *1737.*

Clarke v. *Grant*, [1949] 1 All E.R. 768; [1950] 1 K.B. 104; [1949] L.J.R. 1450; 31 Digest (Repl.) 507, *6322.*

Cobb v. *Lane*, [1952] 1 All E.R. 1199; 3rd Digest Supp.

Errington v. *Errington & Woods*, [1952] 1 All E.R. 149; [1952] 1 K.B. 290; 3rd Digest Supp.

Marcroft Wagons, Ltd. v. *Smith*, [1951] 2 All E.R. 271; [1951] 2 K.B. 496; 2nd Digest Supp.

Minister of Health v. *Bellotti*, [1944] 1 All E.R. 238; [1944] K.B. 298; 113 L.J.K.B. 436; 170 L.T. 146; 30 Digest (Repl.) 540, *1747.*

Murray, Bull & Co., Ltd. v. *Murray*, [1952] 2 All E.R. 1079; [1953] 1 Q.B. 211; 3rd Digest Supp.

Appeal.

Appeal by Wilfrid Isaac from an order of the Federal Supreme Court for the West Indies (HALLINAN, C.J., RENNIE and ARCHER, JJ.), on transfer from the West Indian Court of Appeal, dated May 27, 1958, dismissing the appellant's appeal from an order of the Supreme Court of Trinidad and Tobago (CLEMENT-PHILLIPS, J.), dated Dec. 6, 1957, whereby he granted a declaration that the respondent company, Hotel de Paris, Ltd., was entitled to possession of the first and second floors of No. 10 Abercrombie Street, Port of Spain (known as the Parisian Hotel), and an order for possession of the premises. The facts are set out in the judgment of the Board, p. 350, post.

Dingle Foot, Q.C., and *R. Millner* for the appellant.

B. B. Gillis, Q.C., and *J. Lloyd-Eley* for the respondent company.

LORD DENNING: In the City of the Port of Spain in the Island of Trinidad there is a hotel called the Hotel de Paris. It is situate at No. 7 Abercrombie Street and it is owned by the respondent company, Hotel de Paris, Ltd. On the other side of the street at No. 10 Abercrombie Street there is a building which is owned by Mr. Manoel Fernandez. He let the ground floor of it to a bank, and he let the two floors above it on a lease to the respondent company at a rent of $250 a month. The respondent company used these two floors for sometime as bedrooms in connexion with their hotel. They called it the Parisian Hotel. In or about December, 1955, the respondent company let the appellant Isaac into occupation of the Parisian Hotel, or part of it, and they now seek to get him out. The Supreme Court of Trinidad and Tobago (CLEMENT-PHILLIPS, J.) made an order for possession against the appellant. The Federal Supreme Court (HALLINAN, C.J., RENNIE, J. and ARCHER, J.) affirmed the decision. The appellant now appeals to Her Majesty in Council. The contest before their Lordships turned mainly on what was the correct legal relationship between the respondent company and the appellant. Was the appellant a tenant? or was he in the premises merely under a licence to be there? Had his interest, whatever it was, been validly determined? And if it had been determined by a proper notice, had it been revived by subsequent acceptance of rent?

All these issues will not become clear until their Lordships have stated the facts. The respondent company has an issued capital of sixty-four shares. In September, 1955, a Mr. Attie Saffie Joseph bought all these sixty-four shares and thus gained control of the company. He was acquainted with the appellant Isaac and agreed to sell him fifteen of these shares (roughly a quarter interest in the company) for $4,687.50. The agreement was put into writing dated Oct. 1, 1955. Under it, the appellant was to pay a deposit of $1,000 down and the balance by six monthly instalments of $614.59 each. It contained a provision that, if the appellant made default, he was to forfeit his deposit of $1,000 together with any further instalments not exceeding $2,000 in all. The appellant duly paid the $1,000 and he also paid near enough the first two monthly instalments due on Nov. 1 and Dec. 1, 1955. So it looked at this time as if he would acquire a fair stake in the respondent company. He had had some experience in the hotel trade, and he helped with the running of the Hotel de Paris. Then he suggested that repairs should be done to the Parisian Hotel on the other side of the road, that a night bar should be established in the Parisian Hotel and that he should be put in charge of it on behalf of the respondent company. Mr. Joseph agreed. Accordingly, about December, 1955, the respondent company let the appellant into occupation of the first floor of the Parisian Hotel. The appellant got a licence to use it as a night bar. He took the licence in his own name and put in a stock of liquor at his own expense. He put up a signboard with the words " Wilfrid Isaac and Hotel de Paris Annexe—Night Bar ". This looked as if the appellant was proposing to operate it on his own account. Mr. Joseph remonstrated. The appellant thereupon promised to account to the respondent company for his expenditure and receipts from the night bar: and he did so account. The position at this time, as the trial judge found, was that the appellant was installed at the Parisian Hotel for the purpose of managing a night bar on the respondent company's behalf.

In February, 1956, the relations between Mr. Joseph and the appellant Isaac became strained; and on Feb. 17, 1956, the two men with their lawyers met to try to settle their differences. At this meeting, the parties agreed on terms which were afterwards to be embodied in a written contract between them. Their Lordships are of opinion that no concluded contract was reached at the meeting. Everything was subject to a contract later being signed. A draft contract was prepared by Mr. Joseph's lawyer but it was not approved by the appellant's lawyer. So the contract never materialised. Nevertheless, although no concluded contract was reached, some of the terms of the proposed contract were acted on; and their Lordships must draw attention to them. They accept for this purpose the findings of the trial judge. The first term was an important term which was never implemented:

> " (a) The [appellant] was to pay the balance due for the purchase of the shares."

But the next three terms were acted on. They were these:

> " (b) The [appellant] was to remain in occupation of the first floor of the Parisian Hotel, where the night bar was being operated.
>
> " (c) The [appellant] agreed to pay all expenses incurred in connexion with the running of the Parisian Hotel, *including the monthly rent of* $250 *which the* [*respondent*] *company paid its landlord, Mr. Manoel Fernandez.* [These words were under-lined by the trial judge.]
>
> " (d) The appellant would retain for himself all profits he made from the business carried on at the Parisian Hotel, in lieu of the dividends on his shares if he acquired them."

It was, no doubt, anticipated by both parties that a contract would be drawn up and that the appellant would then pay the balance due on the shares. Meanwhile the appellant remained in occupation and acted just as if a contract had been concluded. He ran the night bar. He paid all expenses. He took all the profits. And he paid $250 a month to the respondent company. It was expressly paid as " rent ". For instance, on Apr. 3, 1956, the appellant sent " the sum of $250.00 being the rent to Apr. 1, 1956, for Parisian Hotel ". No receipt or acknowledgment was ever given, but it was undoubtedly accepted by the respondent company. Towards the end of April, 1956, however, seeing that no contract had been executed and the balance due on the shares had not been paid, Mr. Joseph gave notice to the appellant that he intended to forfeit the sums of money already paid for the shares. And by a letter dated May 7 or 8, 1956, he wrote to the appellant:

> " Re: Agreement for purchase of shares in the Hotel de Paris, Ltd.
>
> " I have to refer to previous correspondence passing between us on the above-mentioned subject and to inform you that your deposits made under the above agreement have been forfeited. You are required to remove and take away such stock and other materials as you have at the Parisian Hotel within seven days of the date hereof, and I am to warn you that if you fail to do so I shall be obliged to take such steps as may be necessary to have them removed therefrom."

(A question was raised before their Lordships whether this letter was ever properly proved. Mr. Joseph said he served it on the appellant. He kept a copy of it. The original should have been in the possession of the appellant. But no notice to produce had been given. This might have raised a nice point, but for the fact that the copy formed one of a bundle of agreed documents which were tendered and admitted into evidence without objection. That is enough to overcome the want of notice to produce.) Notwithstanding that notice, the appellant did not remove his stock or other materials. But the respondent company took no steps to have them removed. Everything went on as before. The appellant remained in occupation, paying the expenses and taking the profits. And he paid $250 a month to the respondent company. These were expressly paid as " rent due at Parisian Hotel ". The respondent company accepted the payments but gave no receipts.

On Oct. 19, 1956, the respondent company issued a writ asking for a declaration that they were entitled to possession of the Parisian Hotel and an order for possession. The appellant in his defence claimed that he was a tenant at a monthly rent of $250.00. Even after the issue of the writ, everything went on as before. The appellant remained in occupation and paid $250 a month to the respondent company. These were expressly paid as " rent for the Parisian Hotel ", but no receipts were given. On Dec. 6, 1957, the Supreme Court of Trinidad and Tobago made an order for possession, but still the appellant stayed on. On May 27, 1957, the Federal Supreme Court affirmed the order, but still he stayed on. The order has not yet been executed. Their Lordships were told that the appellant is still there awaiting the outcome of this appeal.

At the trial, the appellant alleged that in December, 1955, there was an oral agreement whereby Mr. Joseph, on behalf of the respondent company, sub-let both floors of the Parisian Hotel to the appellant at a rent of $250.00. The judge rejected the evidence of the appellant and his witness on this point. He held that, originally, the appellant was put into occupation of the first floor for the purpose of establishing and managing a night bar on behalf of the respondent company. In other words, as a servant or agent on behalf of the company, with no right or interest of his own. The Federal Supreme Court upheld this finding, and their Lordships think it clearly right. But what was the position after Feb. 17, 1956? It was submitted by counsel for the appellant that there were all the indicia of a monthly tenancy. There was not only exclusive possession but there was also the payment and acceptance of rent. (Furthermore, the appellant paid the disbursements, and so forth.) Counsel admitted that these would not be decisive to establish the tenancy in the case

A of premises within the Rent Restriction Acts such as *Marcroft Wagons, Ltd.* v. *Smith* (1) and *Murray, Bull & Co., Ltd.* v. *Murray* (2), but it was altogether different, he said, in the present case where the premises were not subject to rent restriction legislation. The only proper inference here was a monthly tenancy. Their Lordships cannot accept this view. There are many cases in the books where exclusive possession has been given of premises outside the Rent Restriction Acts and yet there has been held to be no tenancy. Instances B are *Errington* v. *Errington & Woods* (3) and *Cobb* v. *Lane* (4), which were referred to during the argument. It is true that in those two cases there was no payment or acceptance of rent, but even payment and acceptance of rent—though of great weight—is not decisive of a tenancy where it can be otherwise explained: see *Clarke* v. *Grant* (5). As LORD GREENE, M.R., said in *Booker* v. *Palmer* (6):

> C "There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind."

It appears to their Lordships that the law on this matter was correctly interpreted and applied by ARCHER, J., in the Federal Supreme Court when he said: D

> "It is clear from the authorities that the intention of the parties is the paramount consideration and while the fact of exclusive possession together with the payment of rent is of the first importance, the circumstances in which exclusive possession has been given and the character in which money paid as rent has been received are also matters to be considered. E The circumstances in which [the appellant] was allowed to occupy the Parisian Hotel show that Joseph never intended to accept him as a tenant and that he was fully aware of it. The payments he made were only part of the disbursements for which he made himself responsible and the so-called rent was in the nature of a reimbursement of the rent payable by the [respondent company]."

F Their Lordships are, therefore, of opinion that the relationship between the parties after Feb. 17, 1956, was not that of landlord and tenant, but that of licensor and licensee. The circumstances and conduct of the parties show that all that was intended was that the appellant should have a personal privilege of running a night bar on the premises, with no interest in the land at all. It was at first only a privilege to be there pending the execution of a formal contract. G Later, when the contract fell through, and notice was given to him to remove his belongings, even that privilege came to an end. The notice of May 7 or 8, 1956, would not, of course, have been sufficient to end a tenancy, but it was quite sufficient to end a licence: see *Minister of Health* v. *Bellotti* (7).

But what about the position after May 15, 1956, when the notice expired? The appellant remained in possession carrying on as before. He was still permitted to be there both before and after the issue of the writ. H He was in a sense still a licensee. But he was not, in the opinion of their Lordships, in such a privileged position that he could demand or expect yet another notice before being turned out. He was there at sufferance liable to be turned out whenever the respondent company thought fit to execute its right to do so; just as, in the old days, a tenant by sufferance was. And during this period it should I not be taken against the respondent company that it accepted his monthly payments of so-called rent. Better to have something in hand than lose all in the long-drawn course of court proceedings. True it is that, a year after the issue of the writ, on Oct. 23, 1957, when giving evidence on an application by the appellant for a licence, Mr. Joseph said: "Hotel de Paris are sub-letting to [the appellant]. [The appellant] pays $250 a month rent. He is not in default ". But it must be remembered that a layman may in cases of this kind easily put the wrong label on to a legal relationship. Mr. Joseph put it better later in his evidence on that occasion when he said: "I do not know how long the case will last so I must cash his cheques ". The acceptance of the payments did not, in these circumstances, evince any intention to waive the company's right to immediate possession.

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(1) [1951] 2 All E.R. 271; [1951] 2 K.B. 496.
(2) [1952] 2 All E.R. 1079; [1953] 1 Q.B. 211.
(3) [1952] 1 All E.R. 149; [1952] 1 K.B. 290.
(4) [1952] 1 All E.R. 1199.
(5) [1949] 1 All E.R. 768; [1950] 1 K.B. 104.
(6) [1942] 2 All E.R. 674 at p. 677.
(7) [1944] 1 All E.R. 238; [1944] K.B. 298.

Their Lordships find themselves in full agreement with the Supreme Court of Trinidad and Tobago and the Federal Supreme Court. They will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.* (for the appellant); *Malcolm Slowe & Co.* (for the respondent company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

NOTE.

Re VISCOUNT HAMBLEDEN'S WILL TRUSTS.

[CHANCERY DIVISION (Wynn-Parry, J.), December 15, 1959.]

Trust and Trustee—Variation of trusts by the court—Practice—Order—Direction that variation should be carried into effect not to be included in order—Alteration of trusts affected by court's approving arrangement—Variation of Trusts Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 53), *s.* 1.

[For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.

For the Law of Property Act, 1925, s. 53 (1) (c), see 20 HALSBURY'S STATUTES (2nd Edn.) 551.]

Cases referred to:

Grey v. *Inland Revenue Comrs.*, [1959] 3 All E.R. 603; [1959] 3 W.L.R. 759.

Joseph's Will Trusts, Re, [1959] 3 All E.R. 474; [1959] 1 W.L.R. 1019.

Adjourned Summons.

This originating summons, dated July 10, 1959, was issued on the application of the Right Honourable William Herbert Viscount Hambleden (referred to hereinafter as " the applicant "), who was one of the trustees of and a beneficiary under the will of his father, the Right Honourable William Henry Viscount Hambleden.

By his will dated June 6, 1946, the testator directed that one share of his residuary estate should be held on trusts under which, in the events which had happened, the income thereof was to be held on protective trusts for the applicant during his life, and after his death, and subject to any appointment which he should make for the benefit of any wife who might survive him for her life, in trust for his children or remoter issue as he should by deed or will appoint and in default of appointment in trust for all or any of his children or child who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares. It was further provided that, if the trusts declared concerning the applicant's share should fail, the share should be held on trust for other members of the testator's family.

On his marriage in 1955, the applicant, in exercise of the power conferred on him by the will, appointed an annuity to his wife, to be paid out of his settled share, during any period of her life after his death during which any child of A the marriage should be living or after a child of the marriage being dead should have attained a vested interest in the funds subject to the trusts of the marriage settlement. At the date of the summons the applicant had three infant children.

By the summons, the applicant applied to the court for an order under s. 1 of the Variation of Trusts Act, 1958, approving an arrangement, intended to be exhibited to an affidavit to be filed in the proceedings on behalf of the applicant, B on behalf of (a) the infant respondents, (b) all persons unborn who might thereafter become entitled (otherwise than under the protective trusts thereinafter mentioned) to a beneficial interest in the applicant's share, and (c) any person who was or might thereafter become entitled to any discretionary interest under the protective trust on which the life interest of the applicant in the share was held. C

Under the scheme of arrangement the trusts of the applicant's settled share would be varied (a) by releasing a part of the share from the applicant's protected life interest, in order to form an annuity fund (in which the applicant's wife would have an immediate life interest) and a children's fund (the income of which would be accumulated for the benefit of the applicant's children during their minority); and (b) by releasing the whole of the applicant's share from the D annuity appointed to his wife and from the power to appoint an annuity to any surviving wife. The details of the proposed scheme are not material to this report, which is confined to the question of the form of the order. The draft minutes of order, after reciting that the adult respondents had consented to the order, stated that the court approved the arrangement on behalf of infant respondents and unborn persons and persons entitled under protective trusts E (as applied for in the summons), and went on to say: " And doth authorise and direct the trustees of the said will to carry the said arrangement into effect."

Geoffrey Cross, Q.C., and *D. H. McMullen* for the applicant, the present Lord Hambleden, a trustee of the testator's will and beneficially entitled thereunder.

D. H. Mervyn Davies for the Dowager Lady Hambleden, a trustee of the will.

F. E. Skone James for the other trustees. F

W. T. Elverston for the infant children of the applicant.

V. G. H. Hallett for other infants interested under the trusts of the will.

E. G. Wright for adults interested under the trusts of the will.

WYNN-PARRY, J., considered and approved the scheme in principle with minor amendments, and, having been informed that no instrument had G been executed by any of the consenting adult parties and that it was not intended that this should be done, heard argument on the form of the order, viz., whether it should contain a direction to the trustees to carry the arrangement into effect.

Geoffrey Cross, Q.C., and *D. H. McMullen* for the applicant: The question has been raised whether, when the court makes an order under the Variation of Trusts Act, 1958, the trusts are ipso facto varied or some document is necessary. H Apart from the Act, the court would have no power to vary the trusts in a case such as this, where no question of any compromise arises. Although the Act is not perhaps very happily worded, its scheme seems to be that all the beneficiaries in existence must be before the court. All persons of full age consent to the proposed variation in the trusts, which the court then approves, if it sees its way to doing so, on behalf of the infants and unborn persons beneficially interested, I thereby ipso facto varying the trusts. Having regard, however, to the decision of VAISEY, J., in *Re Joseph's Will Trusts* (1), the words " and doth authorise and direct the trustees of the said will to carry the said arrangement into effect " have been inserted in the draft minutes of order.

WYNN-PARRY, J.: I do not agree with that decision. I take the view that I have no jurisdiction to make an order including words directing the trustees to carry the arrangement into effect, and those words should be deleted from the draft minutes. Nothing is required except the approval of the court to the arrangement. If that approval is given, the trusts are ipso facto altered, and the trustees are bound thereafter to give effect to the arrangement. I would, however, like to hear counsel for the infants.

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(1) [1959] 3 All E.R. 474. See also the form of the order in *Re Chapman's Settlement Trusts (No. 2)*, [1959] 2 All E.R. at p. 50.

W. T. Elverston for the infant children of the applicant: It is apprehended that those who have raised this point have in mind the decision of the House of Lords in *Grey* v. *Inland Revenue Comrs.* (2), where it was held that a verbal direction to trustees to hold property on certain trusts was not enforceable, since s. 53 (1) (c) of the Law of Property Act, 1925, requires a disposition of an equitable interest to be in writing. It is, of course, essential from the point of view of the infants in the present case that there should be a valid determination of the applicant's protected life interest in the annuity fund and the children's fund. It is agreed that nothing further is needed than that the court should approve the arrangement, thereby ipso facto varying the trusts, but perhaps it might be so stated.

WYNN-PARRY, J.: I will so state, subject to anything counsel for the parties may say. If I approve an arrangement, I alter the trusts. Res ipsa loquitur.

W. T. Elverston: The only enforceable trust will then be the trusts of the will as varied. If, after the order of the court, anybody should at any time apply to the court for an order for the execution of the trusts, it is submitted that the trusts ordered to be executed would be the trusts as varied by the arrangement and not the original trusts.

WYNN-PARRY, J.: Yes. The trusts will take effect according to the arrangement.

F. E. Skone James for the trustees other than the applicant and Lady Hambleden: The court is not asked to decide the matter otherwise than in accordance with the view just expressed, but, having regard to *Grey* v. *Inland Revenue Comrs.* (3), it seemed to those who took this point that the effect of s. 53 (1) (c) of the Law of Property Act, 1925, might be that an agreement was required, which the adult parties would execute, and the court would be asked to approve on behalf of infants and unborn persons to give effect to the proposed variation of the trusts.

WYNN-PARRY, J.: I do not think that that Act has any application to this case. If I approve an arrangement, I vary the trusts.

E. G. Wright for other adult persons interested under the trusts of the share: This point was taken for the reasons just indicated, but, if the court has formed the view that no document is necessary, and will so state, that will dispose of any doubts.

WYNN-PARRY, J.: Very well. I hold that the effect of my approval is effective for all purposes to vary the trusts. Thereafter, the trusts are the trusts as varied. I approve the minutes of order, with the slight alterations which have been referred to, and the arrangement in the schedule.

Order accordingly.

Solicitors: *Bircham & Co.* (for all parties).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(2) [1959] 3 All E.R. 603.
(3) [1959] 3 All E.R. 603, see, perhaps, particularly per LORD RADCLIFFE at p. 608.

Re FEDERATION OF BRITISH CARPET MANUFACTURERS' AGREEMENT.

Re FEDERATION OF BRITISH CARPET MANUFACTURERS' AND OTHERS' COMMON FORM AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Upjohn, J., Sir Stanford Cooper and Mr. W. L. Heywood), November 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, December 1, 2, 3, 4, 17, 1959.]

Restrictive Trade Practices—Reference—Carpet manufacturers—Price cum quality restriction—Wholesale dealings restrictions—Overseas trading restrictions—No sales to be made direct to consumer buyers other than buying agencies—Whether removal of restrictions would deny public substantial benefit—Whether removal of restrictions would be likely to cause substantial reduction in volume of earnings of carpet trade export business in relation to whole business of carpet trade—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 c. 68), *s.* 21 (1) (*b*), (*f*).

Restrictive Trade Practices—Reference—Alteration after date of reference—Overseas trading restrictions severed from home trading restrictions and embodied in new document—Discretion of court to deal with overseas trading restrictions—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 c. 68), *s.* 8 (8), *s.* 20.

Restrictive Trade Practices—Reference—Continuance of terms of trading—Resolution after date of reference for continuance by individual arrangements—Resolution a recommendation within Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 c. 68), *s.* 6 (7).

The Federation of British Carpet Manufacturers was established after the war of 1939-1945 to promote the interests of the carpet industry as a whole. At that time prices and qualities were controlled by the Board of Trade, who established standards, among which standards A.1 and W.1 (for Axminster and Wilton woven carpets) became well known. The control ended in 1952. Manufacturers who joined the Federation undertook to abide by the Federation's Standards of Trading and decisions of its executive committee, save that, under cl. 22 of the Federation's Constitution and Rules, any member had the right to contract out of particular terms. There were some fifty-eight members of the Federation and about fourteen manufacturers outside the Federation; members of the Federation made about seventy-five per cent. of the total United Kingdom production of traditional carpets. The Standards of Trading were contained in a document which was divided into clauses, of which cl. 1 related both to the "Federation's standard qualities" for Axminster and Wilton woven carpets and to prices, limiting non-standard quality carpets to a price that must not be within 12½ per cent. of the minimum selling price of a standard quality carpet. Clause 2 of the Standards related to terms of trading and required the Federation's members to allow wholesale discount only to those firms whose names appeared on a list maintained by the Federation, admission to which was by the decision of the appropriate committee of the Federation, the decisions of which were found by the court in practice to be arbitrary decisions. There were 193 wholesalers on the list, and during the period June 1, 1955, to Jan. 1, 1959, fourteen applicants had been admitted, 134 had been rejected and nine had been deferred. A member of the Federation was, however, entitled both to contract out of this provision (under cl. 22 of the rules) or to put a particular wholesaler on a supplemental list, if the wholesaler would enter into the common form agreement as to discounts and terms of re-sale to retailers. If a wholesaler were so placed on the supplemental list, the member so placing him, but no other member, might then deal with him. Clause 3 related to overseas markets and its cardinal provision was that carpets should not be sold in overseas markets for less than in the home market. In December, 1957, Europe was excluded from the scope of cl. 3, and subsequently Central and South America and parts of Africa were excluded. Exports of carpets to the Commonwealth were principally of high quality carpets, but were declining despite the existence of the A.1 and W.1 price/quality standards. By resolution of Aug. 26, 1959, after the notices of reference had been given, the Standards of Trading were amended so as to eliminate cl. 3 and to embody the standards for overseas markets in a separate document. In October, 1959, the court refused to make an order excluding the overseas restrictions from further consideration in proceedings on the reference then existing.

A wholesaler whose name was admitted to the Federation's list of wholesalers agreed, at the time of admission, to abide by the Federation's Standards of Trading and gave an undertaking. This undertaking included agreement to carry stock, to accept the manufacturer's price as the minimum price to retailers and, in effect, to sell to retailers for re-sale and not to consumer-buyers subject to certain exceptions. These wholesalers were bound to accept the discount allowed, which was at a low rate, and had the benefit of trading with manufacturers within the Federation on the standard terms. Fourteen manufacturers had contracted out of this restriction, whose original purpose had been to keep out the " brass plater ", viz., a trader who held himself out as a wholesaler but had only a small office and carried no stock.

Thus no limit on prices was provided by the Standards of Trading, save the provision of the 12½ per cent. margin. The executive committee of the Federation periodically reviewed current minimum carpet prices and fixed changes in price. The prices were prices to retailers, not to the public, and were for certain standard qualities; but when selling non-standard ranges of carpets manufacturers customarily did not quote prices below the listed prices, though the Standards did not preclude them from so doing. The court found that the public as purchasers were unaware of the Federation's standard qualities, for advertising in recent years had been mainly directed to publicising the manufacturer's name or brand. The industry as a whole was a buoyant and prosperous one.

Restrictions arising out of the two arrangements were referred pursuant to s. 20 (2) (a) of the Restrictive Trade Practices Act, 1956*, by notices of reference dated July 18, 1957. On Oct. 20, 1959, the executive committee of the Federation resolved to recommend draft letters being sent out by members individually with a view to their continuing to trade with wholesalers under rules then embodied in the Standards of Trading whatever might be the outcome of the references.

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* Section 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing subsection may be made—(a) in any case, by the registrar . . .

" (3) Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and . . . the court may . . . make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement . . . (a) from giving effect to . . . the agreement in respect of those restrictions; . . ."

Held: (i) the following restrictions contained in the Standards of Trading were, for the following reasons, deemed by s. 21 (1) of the Restrictive Trade Practices Act, 1956*, to be, and would be declared to be, contrary to the public interest and void—

(a) the main price standards contained in cl. 1 (a) of the Standards of Trading because the Federation had not established that the public would be denied substantial benefits by the removal of the restrictions (see p. 373, letter A, post) which accordingly were not brought within s. 21 (1) (b), since, (i) though the prices fixed by the Federation's executive committee for standard quality carpet might not be unreasonable, they were in fact arbitrarily fixed, and the public had no guarantee that the prices would be reasonable (see p. 369, letter D, post); (ii) though removal of the quality standards might deprive retailers of standards of comparison, yet retailers should re-learn skills of comparing standards of carpets that they had possessed before the war (see p. 372, letter C, post); (iii) stability of prices in the case of a buoyant industry conferred no public benefit (see p. 373, letter B, post), and (iv) removal of the price/quality restrictions was unlikely to lead to debasement of the product, and competition would lower prices and the public would be offered a large range of carpets at competitive prices (see p. 372, letter H, post).

(b) the restriction confining wholesale discount to wholesalers on the Federation's list (cl. 2 (a) of the Standards of Trading) because it was contrary to the public interest, as it prevented enterprising wholesalers from having an opportunity to purchase a proper range of carpets, and as it relaxed the competition which would otherwise be a spur to those whose names were on the list (see p. 373, letters C and D, post).

(c) the restriction on wholesalers selling to consumer-buyers because it offended s. 21 (1) (b) of the Act of 1956 (see p. 374, letter F, post).

(d) the restrictions formerly contained in cl. 3 of the Standards of Trading, being the restrictions concerning overseas markets, since the Federation had not proved that their removal would cause a substantial reduction in the volume or earnings of the carpet export trade, and, accordingly, these restrictions were not within s. 21 (1) (f) of the Act of 1956 (see p. 375, letter A, post); moreover, a declaration should, in the circumstances, be made with regard to these restrictions down to Aug. 26, 1959, though the question whether the new document embodying them, adopted on that date, was a new agreement to which the Act of 1956 did not apply (by virtue of s. 8 (8)*) and was justiciable only by the High Court (see p. 376, letters I and D, post).

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* Section 21 (1), so far as relevant, provides: "For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . .

"(b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . .

"(f) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to cause a reduction in the volume or earnings of the export business which is substantial either in relation to the whole export business of the United Kingdom or in relation to the whole business (including export business) of the said trade or industry; . . .

and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods) resulting or likely to result from the operation of the restriction."

(ii) the resolution of Oct. 20, 1959, was a recommendation to which s. 6 (7)† of the Act of 1956 was applicable (see p. 377, letter F, post).

[For the Restrictive Trade Practices Act, 1956, s. 6, s. 8, s. 20, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 937, 940, 952, 954.]

Cases referred to:

Blanket Manufacturers' Association's Agreement, Re, [1959] 2 All E.R. 1; L.R. 1 R.P. 208; [1959] 1 W.L.R. 442; *affd.* C.A., [1959] 2 All E.R. 630; L.R. 1 R.P. 271; [1959] 1 W.L.R. 1148.

Yarn Spinners' Agreement, Re, [1959] 1 All E.R. 299; L.R. 1 R.P. 118; [1959] 1 W.L.R. 154.

Consolidated References.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court, by two notices of reference dated July 18, 1957, two agreements, viz., (i) an agreement between the members of the Federation of British Carpet Manufacturers and consisting of the Constitution and Rules of the Federation, a document entitled Standards of Trading, a list of houses to whom the current rate of wholesale discount might be allowed and a supplementary list of such houses, the undertakings signed by the members of the said Federation and all resolutions and minutes of the committees of the Federation which were as such binding on the members as if contained in the said agreement; and (ii) a common form agreement made between the members of the Federation of British Carpet Manufacturers and numerous carpet wholesalers whose names appeared on the list of houses to whom the current rate of wholesale discount might be allowed. The second of these two agreements consisted of a letter from the secretary of the Federation to each of the carpet wholesalers, a document signed by each of the carpet wholesalers, a document containing particulars of the Standards of Trading together with all resolutions and minutes of committees of the Federation as aforesaid. The Standards of Trading at the date of the references provided that a manufacturer should, on application for membership of the Federation, or as soon after his election as might be possible, give an undertaking to abide by "the following Standards of Trading" so long as he should be a member of the Federation, unless specific notice to contract out were given to the Federation through the secretary in accordance with cl. 22 of the Constitution and Rules concerning any particular clause, or unless the Federation decided that the Standards should be varied for all members. The undertakings were in fact given by letter and included an undertaking to abide by all decisions of the Federation or its Executive Committee except as permitted by cl. 22 of the Constitution and Rules. The Standards of Trading in the documents of that name consisted of clauses each denoted by a central heading. The first three of these read " 1. PRICES—HOME MARKET. 2. TERMS OF TRADING—HOME MARKET. 3. PRICES—OVERSEAS MARKETS (excluding U.S.A. . . .)." Each clause was subdivided into paragraphs lettered (a)-(h), (a)-(f), and (a)-(e), respectively, the paragraphs subsequent to the first paragraph of cl. 1 being mainly directed to charging and discounts. The initial paragraphs of the clauses are set out in the judgment at p. 365, letters B to E, and p. 366, letters G to I, or are referred to at p. 376, letters B and C, post. Clause 22 of the Constitution and Rules of the Federation provided, so far as is relevant:

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* Section 8 (8) provides: "This Part of this Act does not apply to an agreement in the case of which all such restrictions as are described in sub-s. (1) of s. 6 of this Act relate exclusively—(a) to the supply of goods by export from the United Kingdom; (b) to the production of goods, or the application of any process of manufacture to goods, outside the United Kingdom; (c) to the acquisition of goods to be delivered outside the United Kingdom and not imported into the United Kingdom for entry for home use; or (d) to the supply of goods to be delivered outside the United Kingdom otherwise than by export from the United Kingdom; and sub-s. (7) of s. 6 of this Act shall not apply in relation to recommendations relating exclusively to such matters as aforesaid."

† Section 6 (7) provides: "Where specific recommendations (whether express or implied) are made by or on behalf of a trade association to its members or to any class of its members, as to the action to be taken or not taken by them in relation to any particular class of goods or process of manufacture in respect of any matter described in the said sub-s. (1) [of s. 6], this Part of this Act shall apply in relation to the agreement for the constitution of the association notwithstanding any provision to the contrary therein, as if it contained a term by which each such member, and any person represented on the association by any such member, agreed to comply with those recommendations and any subsequent recommendations made to them by or on behalf of the association as to the action to be taken by them in relation to the same class of goods or process of manufacture and in respect of the same matter."

> " Any member shall have the right to contract out of any decision of the Executive Committee not included in the objects of cl. 2 (b) to (g) without terminating his membership of the Federation, provided that thirty days' notice in writing is given to the Secretary . . ."

By cl. 2 of the Constitution and Rules of the Federation, the objects for which the Federation was established were: (a) to promote and advance the interests of the carpet industry as a whole; (b) to carry into effect, where practicable, the recommendations of the Working Party Report for the Carpet Industry, 1947; (c) to assist, advise, negotiate and deal with government departments and others on behalf of its members, and to promote, support or oppose legislative or other measures affecting the carpet industry; (d) to assist in the procurement of raw and processed materials when necessary and in their equitable distribution to the carpet industry; (e) to promote research, development, and the design of study and colour, and, to assist in these objects, to contribute to outside bodies dealing with these bodies; to collect and distribute information and statistics which might be of interest to the carpet industry; (f) to arrange for representation on the national joint committee and district joint councils for the carpet industry and other bodies and to contribute to the costs; (g) to collaborate with the appropriate trade unions by supporting the joint advisory council for the carpet industry as a channel through which matters of interest to the well-being of the carpet industry were discussed, wages and working conditions being specifically excepted. By cl. 7, the business of the Federation, so far as not transacted by the Federation itself, was to be conducted by an executive committee.

By resolution of the executive committee of the Federation on Aug. 26, 1959, separate Standards of Trading were adopted for overseas markets with effect from Sept. 1, 1959. The Standards of Trading were amended contemporaneously by eliminating cl. 3 and defining them as standards for the home market; cl. 1 was further amended so as to have the effect of establishing a standard price for each of the two Federation standard qualities.

The Federation's Standards of Trading included in cl. 2, Terms of Trading, a paragraph providing that wholesale discount should be granted only to firms appearing on the Federation's List of Houses to whom the current rate of wholesale discount might be allowed. On admission to this list by the executive committee of the Federation the wholesaler gave an undertaking by letter by which he agreed, among other matters, to accept the manufacturer's price as the minimum price to the retailer, to offer the goods openly and freely on the market to any and all retail buyers who purchased for re-sale, and not to sell direct to consumer-buyers, i.e., public bodies (other than H.M. Government), householders, hotels, restaurants or cinemas; this last provision did not apply, however, to buying agencies who were the recognised channel through which purchases for certain large consumers or groups of consumers were made and who conducted their operations in recognised business premises. The wholesaler also confirmed by letter that he would comply with the Federation's Standards of Trading.

A *J. G. Foster, Q.C.*, *R. O. Wilberforce, Q.C.*, and *A. R. Barrowclough* for the Federation of British Carpet Manufacturers and individual carpet wholesalers.

A. A. Mocatta, Q.C., and *Arthur Bagnall* for the Registrar.

Cur. adv. vult.

Dec. 17. **UPJOHN, J.**, read the following judgment of the court: This consolidated reference is concerned with certain trading restrictions which B members of the Federation of British Carpet Manufacturers (which we shall call "the Federation") have, by a series of agreements, bound themselves to observe, and also with certain common form agreements which members require wholesalers with whom they deal to enter into. The restrictions fall broadly into two classes: first, a price cum quality control of certain qualities of carpet, and, secondly, restrictions on trading by placing some limitation on wholesalers C with whom manufacturers may deal, by fixing rates of discount and defining the terms on which sales may be made to retailers.

Woven carpets are made of yarns of many differing materials. They may be made of all wool or worsted, man-made fibres, cotton, or mixtures of these yarns. The backing may be of cotton, jute, linen, hemp, paper or Terylene. Furthermore, carpets may be woven in a variety of different weaves and on a D number of different types of loom. The price cum quality restrictions of the Federation affect only all wool or worsted carpets, and then only certain qualities known as W.1, a Wilton weave, and A.1, an Axminster weave. Carpets have been woven in Axminster and in Wilton for well over two centuries. Carpet manufacture is still carried on in those towns, and "Axminster" carpets have been made in Axminster since 1755, but the main centres of the carpet-making E industry are, and for many years have been, in Kidderminster, in Scotland and in the North of England. The particular weaves, Wilton and Axminster, with which we are concerned, however, originated in the United States of America, where the weaving of carpets by power loom was first invented many years ago, but carpets made on these looms were described as Wilton or Axminster no doubt for good commercial reasons. Power looms were introduced in this F country under patent licences and one well-known firm—it is best that we should preserve a complete anonymity of names from start to finish of this judgment—introduced a particular quality named "Imperial Axminster" which achieved great success. Other firms began to copy this until "Imperial Axminster" became the description of a particular quality rather than the production of a particular firm. It acquired world-wide renown as a medium G to good quality carpet suitable for domestic use anywhere in a house.

Before the war there were a number of associations of carpet manufacturers who were concerned to protect their mutual interests, but none of them attained the position of power and influence now held by the Federation. The most important seems to have been the Carpet Manufacturers Association (C.M.A.) formed many years ago, although it was small in numbers compared to the H whole industry, but it had a powerful rival in the Allied British Carpetmakers formed in 1937. The C.M.A. was a staunch supporter of the Imperial Axminster standard, and its members agreed a specification for the standard comprising total yarn weight and surface yarn weight. During the pre-war years, this specification was upgraded for the reason that individual members of the C.M.A. had been seeking to obtain some advantage over one another by giving a better I quality than their competitors within the C.M.A. The members of the C.M.A. agreed among themselves the price at which they would sell Imperial Axminster, and this price tended to set the general price for Imperial Axminster throughout the trade. During this time, too, the C.M.A. devised similar standards and prices for "Super Wilton". This is a more expensive quality than Imperial Axminster and, though used to some extent domestically, is more normally found where harder wear is to be expected, for example in hotels. Apart from this price leadership by C.M.A. in these two qualities, there was no price control in the trade so far as we know.

During the 1930's the carpet industry experienced trouble from the type of trader known as a " brass plater ". As the possibility of re-entry of this type of trader into the carpet trade plays an important part in the Federation's case, we shall at once explain this phrase. In the carpet industry, the wholesaler plays an important part in the distribution and sale of its products. Some manufacturers will deal only direct with retailers; they have to maintain an elaborate sales organisation of their own. Other manufacturers refuse to deal with retailers at all, but deal exclusively with wholesalers; they need only maintain a minimum sales organisation. Most manufacturers, however, deal both with wholesalers and retailers, and they regard the wholesaler as part of their selling organisation. Speaking in very general terms, the pattern of sales of this last class of manufacturers seems to be that they deal direct with the big retailers in the populous areas, leaving the less populous or more remote areas to be covered by the wholesalers' systems of travellers. The wholesaler may be a specialist in floor coverings or he may be a general wholesaler with a carpet department. The wholesaler is expected to provide a service for the retailer; that is to say, he is expected to have adequate showrooms where the retailer can see and compare wide varieties of carpets. He is expected to carry reasonable holdings of stock so that the retailer can obtain quick delivery. Finally, the larger wholesaler is expected to provide what is called a " customer's customer " service. This means that a small retailer holding only a small stock can send a member of the general public requiring a carpet to the wholesaler to inspect his range of carpets. The customer chooses a carpet, notes its number and then orders it through the retailer. For these services, the wholesaler of course obtains a wholesale discount on the manufacturer's list price to the retailer. In the 1930's the " brass plater " was a trader who held himself out as a wholesaler, but who had no more than a small office from which he conducted business—hence the name. He held no stock, had no showroom and was no more than a commission agent. If he obtained an order from a retailer, he merely passed it on to the manufacturer but, representing himself to be a wholesaler, claimed the wholesale discount though performing no service to the retailer or general public. Frequently the brass plater would deal direct with the general public and, having low overheads, would be prepared to split the wholesale discount either with the retailer or the public. This enabled him to quote lower prices to the retailer than the manufacturer was prepared to do. Very often he was only in the trade for a comparatively short time. No doubt he was a thorn in the flesh of the manufacturer, though we are satisfied that some of the evidence as to the gravity of this problem before the war was greatly exaggerated. There was, in fact, a marked expansion in the industry in the 1930's.

To return to our brief historical survey, on the outbreak of war the overall export trade of the United Kingdom became of vital importance and a Carpet Export Group was set up to encourage the export of carpets, but by 1941 this of course had become impossible. The carpet trade was regarded as a non-essential industry, looms were dismantled and the industry turned itself to the manufacture of a large range of war products. In 1943 a Carpet Manufacturers Executive Committee was formed to represent the interests of all United Kingdom manufacturers of woollen and worsted carpets. In June, 1944, a sub-committee of this executive committee was formed under the title " The Post-War Trade Terms Sub-Committee ", and it formulated a number of recommendations (subsequently adopted by the executive committee) as to post-war trading. An important part of the recommendations dealt with transactions with wholesalers; broadly speaking, they foreshadowed the terms of trading we shall have to review in detail. Towards the end of 1944, raw materials, including wool, became sufficiently available to enable allocations to be made for civilian industrial purposes, and the Carpet Trade Rationing Committee originally constituted on the outbreak of war resumed its activities. The carpet trade began to resume its activities under a system of licensing from the Board of

Trade, and a strict system of control on maximum prices at all stages—manufacturing, wholesaling and retailing—was imposed. The Board of Trade established certain quality standards by reference to the weight of surface yarn and designated each quality by reference to a symbol; maximum prices were established in each weave for each quality. Thus, in the Axminster weave four qualities were defined, numbered from A.0 to A.3. The A.1 quality was the old Imperial Axminster. In the Chenille weave there were six qualities from C.0 to C.4. In the Wilton weave there were thirteen qualities from W.0.A. to W.7. The W.1 quality was the old Super Wilton. In each case the top quality was 0 and the qualities descended progressively.

The establishment of rigid price control which depended on the cost from time to time of raw materials and labour, together with the great shortage of raw materials, particularly jute, necessitated continual discussion between the Board of Trade and the Carpet Manufacturers Executive Committee and a body representing the wholesalers known as the Wholesale Floorcovering Distributors' Association (W.F.D.A.). Terms of trading were also reviewed, among other matters. A wholesale list containing the names of wholesalers with whom members might deal was drawn up, and names were subsequently added to or deleted therefrom. A wholesale rate of discount was established at ten per cent. with the approval of the Board of Trade. In 1946 a working party was set up by the Board of Trade to examine the carpet industry, and it reported in 1947. Among many other recommendations, it recommended

> "That the Carpet Manufacturers Executive Committee should be reconstituted with wider functions to assist in promoting the efficiency of the industry to act as a channel of communication between the government and the industry and to satisfy the government that proper progress is maintained and the interests of the community served"

(see Working Party Report on Carpets, p. 41). Arising out of that recommendation, the Federation was founded in September, 1948. Control of qualities and prices by the Board of Trade came to an end in April, 1952.

We think that, during this period of control, the symbols A.1, W.1, C.1 and so on were greatly used and became well known in all sections of the trade—manufacturing, wholesaling and retailing. There is no doubt that, rightly or wrongly, these symbols were regarded in the trade as denoting standards of quality, and this was particularly true of the A.1 and W.1 qualities. If a wholesaler or retailer was offered an A.1 or W.1 quality, he accepted it as such without question. We are not satisfied that these symbols A.1 and W.1 became well known as standards of quality in the minds of the general public. Some, no doubt, did regard them as denoting a general standard of quality, but we believe that many did not and relied entirely on the sales talk of their retailer. Many purchasers were governed entirely either by price considerations or by general appearance, design or colour. Whatever may have been the position when Board of Trade controls applied, we are satisfied that, since then, so far as the general public is concerned, the use of the symbols A.1 and W.1 in the United Kingdom has virtually come to an end. Manufacturers increasingly sell under their own trade names and not under A.1 and W.1. No doubt, as one of the more important witnesses for the Federation stated in his proof, those in the trade would know that the X (trade name) carpet is the Y firm's A.1 product, but to the general public the symbol A.1 or W.1, if (as we doubt) it ever carried the assurance of a particular quality, has long since ceased to have any precise meaning.

The Federation consists at present of some fifty-eight members. Membership has fluctuated, and since the end of 1949 there have been eight additions and eighteen resignations. There are about fourteen manufacturers outside the Federation. Members of the Federation make about seventy-five per cent. of the total United Kingdom production of "traditional" carpets, that is, all wool or worsted, mixtures, hair and rayon. Of the outside manufacturers, A one is very large and makes about ten per cent. of total production, and two others who resigned from the Federation in 1957 together account for another ten per cent., leaving the remaining five per cent. to be split among the remaining twelve outside manufacturers. There is a remarkable diversity in the range of manufacture by the members of the Federation. Some members concentrate largely on A.1 and W.1 qualities and their major production (up to, in one B case, in one year, one hundred per cent.) is in those qualities. At the other end of the scale, some members make no A.1 or W.1 qualities at all. Then, again, the proportion of production by any one firm of the various qualities may differ considerably year by year.

Statistics of production within the industry are not important in this case and have not been easy to obtain, but we think such statistics as have been C put before us, together with the oral evidence, justify the following brief conclusions:—(i) The industry as a whole is, and has been since the war, a prosperous expanding industry. Its condition was described by a Federation witness as " buoyant ". (ii) Over the last three years, the production of A.1 and W.1 by Federation members taken as a whole has been fairly constant, and it is not yet possible to say with any certainty whether there is a trend away from D these qualities and other woollen carpets in favour of newer types such as tufted or mixtures containing man-made fibres. (iii) Foreign imports have greatly increased since 1953, mainly in carpets containing less than fifty per cent. wool. It is fair to say that conditions within the industry are competitive.

The Federation has, in conjunction with the British Carpets Promotion Council, undertaken to advertise British carpets. Over 400,000 copies of a booklet E " How to Choose and Care for British Carpets " and 500,000 copies of a booklet entitled " How to Look After Your British Carpet " have been issued to the public. Copies have been in evidence before us. They do nothing to extol any particular qualities. Indeed, the first-mentioned publication is at pains to explain that Axminster and Wilton are not brand names but two major weaving processes. The second publication merely gives hints on the F care of carpets generally. The object of this advertising campaign, as appears plainly from the Promotion Council's Report for 1957, is to advertise generally the advantages of traditionally woven wool carpets, including Wilton and Axminster, to try to stem the greatly increased sales of new types of tufted carpets. The International Wool Secretariat has published brochures for the use of salesmen, entitled " Selling Carpets " and " The Care of Carpets ". They G are written to promote the sales of British wool carpets in quite general terms. " Selling Carpets " contains some imaginary conversations with an intending customer and are skilfully devised to induce a sale. It is noteworthy from start to finish that there is no mention of particular qualities. The International Wool Secretariat has also organised certain training courses for salesmen to educate them to sell more effectively to the public. In addition, Carpet Fortnights H are organised, when retailers make a special display of their goods and there is an advertising campaign in the National Press. A slogan may be chosen such as " Carpets Make a Home ". The joint advertising campaign by the Promotion Council is contributed to by members of the Federation, but, in addition, there is a grant, which, over the last three or four years, has been £30,000 annually, made by the International Wool Secretariat and British Wool I Marketing Board.

We propose now to summarise the main restrictions which the Federation and its members have adopted, leaving over for later consideration a number of ancillary or subsidiary restrictions. We start with the relevant restrictions as they stand on the Register of Restrictive Trade Practices today, mentioning any previous amendments which may seem material. The restrictions are contained in a document headed " Standards of Trading ", and at the outset the reader's attention is drawn to the fact that members are entitled to contract out of any particular clause in accordance with cl. 22 of the Federation's constitution. Then there is a note that the standards of trading do not apply to jute or cotton pile carpets, or tufted, or to carpets exported. Main cl. 1 deals with prices. It provides as follows:

"(a) Federation Standard Qualities

"(i) The following qualities known as 'Federation Standard Qualities' shall not be sold at prices other than the standard prices fixed for the time being by the Federation:

W.1 Figured Worsted } Five frame
W.1 Figured Woollen } Five frame
A.1 Woollen

"(ii) The finished surface yarn weights of the above mentioned standard qualities shall not be less than the minimum per square yard specified below:

		Minimum per sq. yd.
W.1 Figured Worsted	Five frame	2.35 lb.
W.1 Figured Woollen		2.70 lb.
A.1 Woollen		1.35 lb.

"(iii) No five-frame figured worsted or woollen Wilton and no woollen Axminster carpet containing less than the finished surface yarn weights above-mentioned shall be sold at a price within 12½ per cent. of the price fixed in respect of the standard quality in each type.

"(iv) The above does not prevent any carpet containing more than the finished surface yarn weights above-mentioned from being sold at more than the price fixed in respect of the standard quality.

"(v) The Standard Qualities shall be marked as 'Federation Standard Quality' by label."

There follow a number of ancillary and subsidiary provisions, such as making charges for cut lengths and so on. Sub-clause (iii) has been referred to as the quarantine clause. Originally, a maximum as well as a minimum weight was laid down, but a resolution of the executive committee of the Federation on Dec. 3, 1958, abolished the maximum weight and introduced sub-cl. (iv). Originally, too, the prices fixed were minimum prices, and the 12½ per cent. quarantine operated above as well as below the minimum price, but by a similar resolution on Aug. 26, 1959, a fixed price was substituted and the quarantine only operated on lower qualities. At the same time exported carpets were, for the reason appearing later, excluded from the Standards of Trading. Originally the Chenille Axminster quality C.3 was treated as a Federation Standard Quality, but that was abandoned on Dec. 7, 1955. A number of the labels referred to in sub-cl. (v) have been put in evidence. An examination of them, coupled with the oral evidence we have heard, establishes conclusively that, in recent years, the whole weight of advertising in and by these labels is for the individual manufacturer's brand or trade name. Sometimes the "Federation Standard Quality" is omitted altogether as an act of deliberate policy. In nearly every case where the phrase is still used it is in small unimportant lettering, scarcely calculated to bring to the mind of the purchaser that there is such a thing as an A.1 or W.1 standard or even a British Federation Standard. It strongly supports the view which we have already expressed that the ordinary purchaser is quite ignorant nowadays of any such standard or, more particularly, what is assured by it.

Two things are clear. First, subject only to the 12½ per cent. quarantine, there is no limitation on the prices that may be charged by the manufacturer for carpets outside the standard qualities; this applies whether the carpets in question are above or below the standard. Secondly, the prices fixed for the standard qualities are prices to the retailer. No attempt is made to control the price at which the retailer may sell to the public; he can add whatever "mark up" he thinks commercially wise to the price that he pays the manufacturer or wholesaler. It was also established that, though there is no fixing of prices for other than standard qualities, yet the prices of other qualities of woollen and worsted carpets do, in fact, tend to move in accord—as it was put in evidence—with the price fixed for the standard quality. Finally, when selling their non-standard ordinary range of carpets appearing in their retailers' price lists from time to time, it does seem customary for manufacturers to refuse to quote prices below the listed prices, though we can see nothing in the Standards of Trading to preclude them from doing so. The reason for this will appear later. However, the manufacturer does quote special prices to wholesaler or retailer for special exclusive designs or special non-listed qualities.

We may conveniently deal here with one submission of the Registrar. He submits that a standard defined solely by reference to the weight of surface yarn is no true standard at all. The standard provides no test as to the quality of the wool to be woven or the dye to be used, and there is no definition of the structure of the carpet or the backing. Hence the standard laid down provides but little guide as to durability, as to the fastness of colour and so on. We agree, as, indeed, did many of the Federation's witnesses, that the standard laid down is neither comprehensive nor perfect, but the difficulty is to know what more comprehensive yet workable standard can be laid down. The British Standards Institute have been considering this problem for some time and have not yet solved it. The Board of Trade adopted it for the purposes of their controls and, imperfect though it may be, we think it is probably the most useful single standard that can be devised and is entitled to recognition as such. The real truth of the matter is that the manufacturers, always jealous of their reputations, have made the standards A.1 and W.1 become known within the trade as good and reliable standards because they have, in fact, put good quality materials, wool, dye, backing, into the standard carpets. One reason for this is the existence of the 12½ per cent. quarantine. For example, the standard price of A.1 to retailers is now 26s. 3d., so that no member of the Federation can sell a lower quality all wool Axminster for more than approximately 23s. This prevents what has been called "debasement"; that is, that if all price controls on the quality standards are removed, there will follow (so it is said) a secret and commercially dishonest process of lowering the quality of carpets ostensibly offered as of the standard qualities.

We turn to the second main clause of the Standards of Trading:

> "(a) Wholesale List and Rate of Wholesale Discount.
>
> "(i) Wholesale discount shall be granted only to those firms appearing on the Federation's List of Wholesale Houses.
>
> "(ii) Every member of the Federation who contracts out of cl. 2 (a) (i) of the Standards of Trading shall send to the secretary a full list of those firms, other than those whose names appear in the Federation's Wholesale List, to whom he proposes to grant wholesale discount. He shall also obtain from each such firm and send to the secretary an undertaking identical with that given by firms whose names do appear on the Federation's Wholesale List. He shall keep the secretary informed of any additional firms to whom he decides to grant wholesale discount.
>
> "(iii) The rate of wholesale discount allowed shall be that authorised for the time being by the Executive Committee of the Federation."

These provisions apply to all types of carpets not excluded from the Standards of Trading and not merely to A.1 and W.1. There follows in para. (b) to para. (j) inclusive a number of ancillary or subsidiary provisions dealing with cash discounts, quantity discounts and so on.

Closely bound up with, and an integral part of, these provisions are the

A arrangements which members agree to make with the wholesalers on the wholesale list. This forms the subject-matter of the second consolidated reference before us. The respondents are the wholesalers on the wholesale list and are represented before us by the W.F.D.A. (1). Each wholesaler on the wholesale list is required to sign a letter to the secretary of the Federation whereby, in consideration of receiving the current wholesale trade discount from carpet B manufacturers, he agrees (so far as material to this case): (a) to accept the manufacturer's price as the minimum price to the retailers; (b) to retain the whole of the manufacturer's current wholesale trade discount; (c) not to give any cash discount on payment or extension of time for payment in excess of the corresponding terms received from carpet manufacturers; (d) not to sell to consumer buyers. The distribution scheme of the Federation is thus a clear and C coherent whole. The retailer obtains his carpets whether it be from manufacturer or wholesaler at, but not below, the list price and that, no doubt, is why the manufacturer will not quote special prices for his ordinary listed range of qualities to the retailer; he must not undercut his wholesaler. The wholesaler (if he is on the wholesale list) for the services he performs in carrying stock and having adequate showrooms receives the wholesale rate of discount. This rate was D originally fixed by the Federation at eleven per cent., and it is clear that this is a low rate of discount compared to similar trades. Between 1952 and 1958, there was much pressure to increase this rate of discount and a number of small members of the Federation contracted out of cl. 2 (a) (i) of the Standards of Trading, as they were entitled to do under cl. 22 of the constitution (2). Finally, in 1957, two substantial members (one involving two companies) contracted E out and, in fact, resigned from the Federation. Apparently they now allow 12½ per cent. on all sales. It became evident that the line could no longer be held, and as from Sept. 1, 1958, the Federation fixed a wholesale rate of discount on all carpets below the quality of A.1 and W.1 at 12½ per cent. It remains at eleven per cent. for A.1 and W.1 and higher qualities.

The last restriction in the home market with which we propose to deal is that F in cl. 2 (k) of the Standards of Trading (3). Shortly stated, sales must not be made direct to consumer buyers; that is, public bodies, householders, hotels, restaurants or cinemas. There are excepted from this provision recognised "buying agencies" which are defined in an appendix. Briefly, buying agencies are those who supply more than normally large consumers of carpets; for example, railway and steamship companies, certain government departments, G but not local authorities, hospital boards or nationalised industries except British Railways and British Airways Corporations. This restriction stands very much on its own, and is designed to prevent large consumers from obtaining wholesale terms direct from manufacturers. The argument is that such consumers require a retail service and should, therefore, be compelled to buy through retailers. Thus, for example, the London County Council, whose total require- H ments for carpets for their own offices, hospitals and schools come to about £20,000 per annum, are compelled to purchase through retailers. Of course, retailers will be prepared to give big local authorities and other large purchasers very favourable terms, and one case was proved before us where a retailer was content on one occasion to pass on carpets to the London County Council at the I price which he (the retailer) paid; his only profit was the 2½ per cent. discount he received for cash. These large purchasers naturally argue that they should have the opportunity of striving to get the wholesaler's rate of discount or at any rate some part of it.

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(1) The Wholesale Floorcovering Distributors' Association.

(2) For the relevant terms of cl. 22, see p. 360, letter C, ante.

(3) Viz., the Standards of Trading between members of the Federation. There was a similar provision in the undertaking that a wholesaler was required to give on his name being first entered in the wholesalers' list (see p. 360, letter I, ante).

We shall deal with restrictions on trading in overseas markets at a later stage of this judgment.

We now propose to consider how these restrictions are operated by the Federation in practice. We shall consider first the fixing of prices of the standard qualities by the Federation and then with the method of selection of wholesalers for inclusion on the wholesale list. The Federation do not claim that the price fixed is a low price or a minimum price in the sense of being a " stop loss " price. They claim that it is a proper and reasonable price, a phrase which we shall examine later. In marked contrast to the elaborate costings and calculations which we had to consider in *Re Yarn Spinners' Agreement* (4) and *Re Blanket Manufacturers' Association's Agreement* (5), there is no costings procedure in any accountancy sense whatever. The Registrar's accountant made an investigation into the accounts of fourteen firms who were treated as representative. In only two cases were any standard forms of costing adopted, and it was difficult to extract any completely accurate or truly comparable figures of cost. However, the accountant's evidence established all that it really set out to prove, namely, that there was a substantial range of cost between the high cost producer and the low cost producer and the price fixed by the Federation had no relationship to the costs of individual firms.

As we have stated earlier, the prices were fixed down to the time of decontrol in 1952 by the Board of Trade after negotiations with the old executive committee. When the Board of Trade's accountants were investigating these matters, a figure of 7½ per cent. was taken as a basic margin of profit to be allowed on top of costs. On decontrol, the Federation was then in a position to start from those figures, and the practice has been to consider not basic costs of material and costs of conversion but differences in costs of material or of conversion since the price was last fixed. Prices are first considered by bodies known as Area Costings Committees. These are not truly sub-committees of the Federation but are meetings of manufacturers in each of the three areas. Discussion is very informal, and in the more remote areas sometimes merely by telephone. Apparently some information is exchanged, but the evidence was very vague. These meetings are no more than preparatory discussions for the quarterly meetings of the Costings and Prices Sub-committee of the Federation. This meeting is attended by the members of the sub-committee and their cost accountants, and they have before them reports from the area committees, sometimes verbal, sometimes in the form of an aide-mémoire. As the cost of raw material accounts for about sixty per cent. of the total cost of a carpet, the sub-committee first consider any changes in raw material prices and, after discussion, decide what should be accepted as the current price of the raw material. They then go through the same procedure with the costs of conversion. They then consider whether any change in the prices for the standard qualities is justified, but, in doing this, the committee does not rely on figures only. As the principal witness on this part of the case said in his proof of evidence:

> " We rely at least as much on our collective knowledge and experience of the carpet business as on the figures themselves. Perhaps the best way of explaining the matter is to say that the costings figures produced are relied on as showing trends in costs and are used as a basis for discussion."

The sub-committee then makes a report to the executive committee, indicating whether any change of price is justified. The matter is then discussed by the executive committee, who make the decision as to any change. This committee meets regularly shortly after the sub-committee, and it also takes a very broad view. To quote from the Federation's answer to the Registrar's questionnaire:

> " The executive committee reviews the current minimum prices in the light of the report from the sub-committee but it also takes account of many

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(4) [1959] 1 All E.R. 299; L.R. 1 R.P. 118.
(5) [1959] 2 All E.R. 1; L.R. 1 R.P. 208.

> other factors, such as current and future conditions and trends, the season of the year in relation to sales programmes and other matters not directly related to costs, before it takes a decision as to whether the current minimum prices should be changed."

It may fairly be stated that the executive committee has never decided to make any greater increase of prices than that recommended as justifiable by the sub-committee, and on a number of occasions has either made no increase or a lesser increase than that suggested by the sub-committee. Since this scheme started in April, 1952, there have only been five changes in prices, one in June, 1952 (downwards), and subsequently in September, 1952, December, 1953, September, 1955, and March, 1957, all upwards. We observe that, though the price was last changed in March, 1957, when the price of wool was 108d. per pound and it rose to 110d. for the months of August to October, 1957, it then fell to 106d. in November, 1957, and to 100d. in April, 1958, yet no downward revision has been made. There was no evidence before us that conversion costs have risen during this period to balance the fall in raw material prices. However, looking at the matter generally, it seems to us clear that prices admittedly fixed by the methods which we have stated give no assurance that they will be reasonable in the interests of the public, whose interests indeed do not seem to be considered at all. Changes in carpet prices for the standard qualities seem to be no more than informed guesses taking into account a large number of factors, many of them not related to costs at all. Prices so fixed cannot fairly be described as other than arbitrary.

We turn to the wholesale list. Its avowed object is to keep brass platers out of the trade, and ten criteria have been laid down by the Federation as the principal factors to be taken into account when judging suitability for admission to the list. We propose to summarise the more important of them. The applicant must have adequate storage space and showrooms, adequate finance and coverage by travellers. His standing in the carpet trade is considered. The size of his carpet turnover is considered and, if it drops to less than £10,000 per annum, he is warned that he may be taken off the list. His general reputation, connexion with the retail trade and the general nature of his business are also among the criteria. Before considering the operation of admissions to and removals from this list, we must give a few statistics. There are at present 193 wholesalers on the list. In their replies to the Registrar's questionnaire, the Federation stated that, between June 1, 1955, and January, 1959, fourteen applicants to the wholesale list had been admitted, 134 rejected and nine deferred. The reason given for the rejection of this large number was that the applicant was not a proper firm to be admitted to the list. There seems to be an annual review of those on the list in March of each year. Four were removed and ten warned in March, 1957. As a big manufacturing group resigned in March, 1957, no firm was removed in 1958, but fifteen were warned. Six were removed and seven warned in 1959. Some of those warned had for two or three years turnovers substantially below the critical figure of £10,000, and it is difficult to see why such firms were not removed if the general scheme of the wholesale list was really being operated as it was represented to be. However, it is fair to say that (allowing for re-admissions) between 1952 and 1959, twenty-six have been removed for low turnover and ten for other reasons. The question of admission to and removal from the wholesale list is dealt with by the Federation's Terms Sectional Committee. We have already pointed out that a manufacturer may contract out of this provision (and we have been told fourteen have done so), but he may not want to do so. However, he may want to see a wholesaler on the list but the committee as a whole think otherwise. In that event, the manufacturer is entitled to put that particular wholesaler on a supplemental list and, provided the wholesaler is willing to sign the common form agreement (as to discounts and terms of re-sale to retailers), that particular member, but no other, is entitled to treat that particular wholesaler as being on the list. A number of manufacturers have exercised this privilege.

When a wholesaler applies to be put on the wholesale list, he is sent a questionnaire so framed as to enable the committee to consider which of the criteria he satisfies. The matter is then put before the committee. Any member of the Federation may attend these meetings if he is interested, but usually there are fifteen or sixteen members who attend regularly. Two leading members of the Federation have given evidence before us as to the operations of the committee, and the Registrar has called a number of carpet wholesalers and intending carpet wholesalers who have applied for admission to the wholesale list and have been refused. Now we are prepared to accept that admission to the wholesale list when it was first administered by the committee was intended to be regulated so as to keep out the brass plater. However, we are completely satisfied on the evidence that, for some years now, the committee has ruled on applications for admission in an arbitrary manner entirely for the benefit of the manufacturers, and the ten criteria are seldom, if ever, applied in a bona fide way. Their decisions in practice go far beyond the ostensible object of keeping out the brass plater. They keep out quite arbitrarily a number of genuine wholesalers who would satisfy, and well satisfy, the principal criteria, and we saw in the witness-box some wholesalers who, if the ten criteria had been seriously applied, must have been admitted to the list. We were told that these matters were discussed at great length in the Terms Sectional Committee, yet the secretary never recorded anything more than the decision. He made no attempt to record the sense of the meeting or state the reasons for any decision, and the normal practice is never to give to the applicant any reason for the refusal of his application. That in itself indicates a failure to operate the ten criteria for the purposes of which the applicant has laboriously, but so often uselessly, filled in the questionnaire. The truth of the matter is that there is no plan for an efficient wholesale coverage of the United Kingdom based on density of populations in geographical areas at all. Each member present at the committee consults only his own interest; that is to say, if he is not concerned to have an extra wholesaler in the particular area where the applicant happens to have his place of business, the manufacturer will not support his application. If it so happens that no one is concerned to support the applicant for this reason, the applicant, however qualified and deserving, has no chance of election, and that is why such a large number of applicants have been rejected.

The witnesses for the Federation (who, to be fair to them, gave their evidence with great candour) seem to confuse election to the list with the obligation to supply to those on the list. No manufacturer is bound to supply a wholesaler merely because he is on the list. The Federation's principal witness on this part of the case gave perfectly understandable reasons why he personally would not supply some of the wholesalers called before us by the Registrar. He seemed unable to appreciate the distinction between that and election to the list. Harm has been done to the public by this arbitrary manner of selection to the list. For example, there is no carpet wholesaler in the Channel Islands. Retailers there can, of course, see patterns brought by travellers from the manufacturers or wholesalers, but if a retailer wants to see a display of carpets he must go to the mainland; yet a perfectly genuine wholesaler in Jersey who would have been capable of providing just that service was refused admission to the list. Notwithstanding the post-war introduction of the large pattern trade (that is, where travellers take round a large selection of lithographs and big pattern books), this seems to us a serious drawback to local retailers. The effect of the joint operation of the wholesale list and the wholesale discount is quite obvious. The wholesalers on the list reluctantly accept these low rates of discount primarily because they are on this very select list which diminishes, though it does not destroy, competition, and, secondly, because they hope to make another breach in the rate of discount. The manufacturers have to pay only a low wholesale discount and, if they are dissatisfied with the present structure of their selling and distribution organisation, can either actively sponsor an applicant for admission to the list or can put him on the supplemental list.

The Federation supports its case on the restrictions agreed between members of the Federation under s. 21 (1) (b), (f) and (g) of the Restrictive Trade Practices Act, 1956. It supports its case on the common form agreement with wholesalers under para. (b) and para. (g) only. We shall consider para. (b) first.

We have to decide whether the removal of the restriction would

> " deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom."

The benefits alleged to be enjoyed by virtue of the restrictions as pleaded and argued before us are as follows:—(i) The existence of the A.1 and W.1 standards are in themselves of great benefit to the public and to the trade, for they are confidently regarded by the public and by the trade as being constant and undebased in quality at prices which are regarded by the public and by the trade as being proper and reasonable and as indicating a constant and undebased quality. If the scheme is abolished, the substantial benefits and advantages which would be denied to the public are alleged to be that these standards would cease to exist or would become debased and the public would have no confidence in the quality or price of such carpets and would be deprived of a standard of comparison of qualities. (ii) The fixing of prices for A.1 and W.1 qualities ensures a substantial degree of stability in the price of these and of other qualities which results in a stable distributive trade, creates confidence in stocks on the part of wholesalers and retailers so that they maintain adequate stocks. If the scheme is abolished, the substantial benefits and advantages which would be denied to the public are alleged to be that prices would become unstable, there would be in the distributive trade a lack of confidence and a consequent holding of inadequate stocks for the public, with a resultant lack of choice for them. (iii) The scheme of distribution of carpets ensures that the needs of the public are well served through wholesalers and retailers throughout the country at a low cost. If the scheme is abolished, the substantial benefits and advantages which would be denied to the public are alleged to be that brass platers will enter the trade, discounts to wholesalers would be increased, allowances by way of annual rebates would be introduced, a narrower choice of carpets would be available to the public, the more remote districts would be inadequately served and the cost of distribution would rise. (iv) The scheme ensures the maintenance of " promotional costs "—that is, advertising costs—in connexion with sale of carpets at a low level. If the scheme is abolished, the substantial benefits and advantages which it is alleged would be denied to the public are alleged to be that the joint advertising scheme would be abandoned and greatly increased sums expended by individual firms on advertising, leading to more expensive carpets or a deterioration in quality.

Counsel have quite properly taken each set of restrictions and examined them in turn, and we propose to follow the same course, but in the end we shall review the restrictions as a whole; that is, as a planned system of trading activity. Paragraph (i) and para. (ii) of the foregoing paragraphs are directed to the maintenance of a quality/price standard and para. (iii) to the arrangements with wholesalers, and we (like counsel) shall so deal with them. Paragraph (iv) stands on its own.

As to para. (i), the price cum quality (6) standard, we agree that the maintenance of a standard quality well known to the public is an advantage to it (though whether it would be a specific or substantial advantage is a matter on which we express no opinion) but, for the reasons that we have given, we are not satisfied that, so far as the general public is concerned, the A.1 and W.1 standards signify any standard of quality. Nevertheless, we agree that, within the trade, A.1 and W.1 do indicate a quality standard. They are widely accepted as standards for comparison with other qualities and to that extent make it easier for the retailer to form a judgment. If, therefore, the result of an adverse decision of this court would be to destroy not only the price element but also the quality element (an argument which we shall examine in a moment), would the loss of a standard quality by itself deny substantial and specific advantages to the public? In the circumstances mentioned above, the denial of advantages (if any) to the general public is de minimis. Then, as to the position of the retailer section of the public, if the quality standard disappears it is true he will be deprived of standards of comparison at present available to him; but this is no more than an inconvenience to him. The retailer is in the trade to serve the public, and there was ample evidence that, before the war, experienced retailers were capable of comparing carpets for quality and detecting debasement. If these skills have been forgotten during the post-war control, they must be re-learnt and, until they are re-learnt, retailers who want good quality carpets will have to go to manufacturers or wholesalers of a high reputation. We feel sure that they will not be disappointed. But what if our conclusions are wrong as to the importance of the quality standard to the general public? It was the essence of the Federation's case that the loss of the quality/price standard would be a serious loss. It is said that if, owing to an adverse decision of this court, the price cum quality standard is abolished, the quality standard must necessarily disappear at the same time because, so it was said, quality not coupled to a price and buttressed by a quarantine was a meaningless phrase. It was urged on us that the abolition of the price standard would lead to debasement almost overnight, and the public would suffer accordingly. Evidence was given as to the position before the war, when it was said that lack of price cum quality control led to hopeless debasement of the Axminster qualities in the United States of America; in England it was said that the Brussells weave was debased to virtual extinction. This evidence, we think, was greatly exaggerated. We draw attention to the fact that, before the war, the industry was an expanding industry and, in fact, the Imperial Axminster quality was upgraded. However, pre-war history is not a reliable guide to post-war events. The position today is that this is an expanding, prosperous and buoyant industry. We were told that large sums out of earnings of the industry have been retained in the industry since the war and used to improve premises, plant and machinery. The manufacturers are jealous of their reputations and trade names at home and, as we shall show later, overseas. Little has been heard of Federation standards lately. Furthermore, there was no evidence of debasement by firms outside the Federation to compete with the latter's A.1 and W.1 qualities. If the price cum quality control is abolished, some firms may possibly debase, but we believe that many manufacturers will seize this opportunity to take advantage of the increased standards of living of the public and put on the market, probably under their own trade names, carpets of as high a quality as today, so that there will be readily available to the public a large range of high quality carpets.

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(6) For para. (i), see letters C and D, supra.

Then, as to price, we have already criticised the price fixed by the Federation to retailers as being arbitrary. To suggest, as the pleadings do, that the price is regarded by the public as proper and reasonable, is a meaningless phrase; first, because the public are wholly ignorant of the standard price; secondly, because they have to pay a price arbitrarily imposed on the retailer by a manufacturer and, in addition, whatever mark-up the retailer thinks it is commercially prudent to add. If the pleadings intend to suggest that the retail price charged to the public is regarded by them as reasonable, that was not established by evidence and we do not accept it. We believe that, if the quality/price

A restriction goes, the force of competition will tend to lower prices and that the public will be offered a large range of excellent carpets at competitive prices. We shall deal with discounts when dealing with para. (iii).

We have come to the conclusion that the abolition of the price cum quality standard will deny to the public no benefits whatever.

As to para. (ii) stability of prices (7), some degree of stability of prices may be B sacrificed if the standard quality price is abolished. But, as has been pointed out in earlier cases in this court, that is not necessarily a bad thing. In any event, after an initial shake out, there seems no reason to expect any undue instability of prices and certainly no instability comparable with the incidence of changing purchase tax. Increasing competition in both wholesale and retail trade will compel traders who are determined to stay in business to continue C to hold adequate stocks, giving the public a large variety to choose from. Stability of prices confers no benefit on the public in this case.

Then, as to para. (iii), which in effect supports the wholesale list and wholesale rate of discount (8), the wholesale list is, in our view, the most objectionable feature of the whole scheme. It prevents new and enterprising wholesalers from having an opportunity to purchase a proper range of carpets, for we are D satisfied that, though some manufacturers may refuse to supply some newcomers whom they regard as undesirable wholesalers or as competitors, other manufacturers would do so. The list also prevents many existing and well-established wholesalers who have not been admitted to it from increasing their range of carpets. Those now on the list are not subject to so great a spur of competition as they otherwise would be; in short, their turnover may E to some extent be determined not by their efficiency but by their comparative exclusiveness. The only possible excuse for such a list is to keep out the brass plater. Even if the list was operated bona fide in accordance with the ten criteria (which we have found as a fact it is not), those criteria go much further than can be justified for that limited purpose. Furthermore, though we understand the anxiety of the industry in connexion with the brass F plater, the problem is one which is not peculiar to this industry but is a common one, particularly in the textile trade. The industry faced it before the war and survived. We have already pointed out that no less than fourteen manufacturers have contracted out of the wholesale list clause, and that is a powerful pointer to the fact that it acts as a drag on freedom of trading. The problem of the brass plater must again be faced and dealt with by the industry, and G the remedy lies in the hands of the members. This provision certainly does not fall within s. 21 (1) (b).

Then, as to the wholesale rate of discount, it is possible that the wholesalers will force an increase in the wholesale rates of discount if the list is abolished. Competition may force members to offer bigger discounts for bulk orders, or give to retailers quantity discounts of some kind based on orders over the year. H These are problems common to every industry and, again, this is no case for s. 21 (1) (b); nor is there any ground for believing that these matters will either increase the price of carpets to the general public or decrease the range of carpets available. A number of members have contracted out of this provision and they, together with outside manufacturers, no doubt give higher rates of discount, yet their prices remain fully competitive. As for inadequate service to I remote areas, the evidence, as we have shown, points to exactly the opposite result to that claimed.

As to para. (iv), maintenance of promotional costs (9), two points arise. One of the witnesses said that, without the maintenance of the restrictions, it would be impossible to maintain co-operative advertising. We do not understand why this should be so. We have already pointed out that the whole object of

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(7) For para. (ii), see p. 371, letter E, ante.
(8) For para. (iii), see p. 371, letter F, ante.
(9) For para. (iv), see p. 371, letter G, ante.

this effort is generally to promote the sale of wool or worsted British carpets A
regardless of manufacturer or qualities, and if it be worth while to continue the scheme supported as it is by a substantial annual grant, the Federation will, we believe, do so. Secondly, it was said that much greater expenditure on advertising by individuals would be required if the promotional costs effort goes. Even if the abolition of the scheme does lead to greater expenditure on advertising, it by no means follows that the prices of carpets will rise, and we B
do not think they will. Some outside manufacturers spend very large sums on advertising compared with members, yet their prices at home are no higher. Advertising is undertaken in the expectation that it will be remunerative by increasing turnover in an expanding market or obtaining a larger share of an existing market. This, again, is a feature common to all industries and does not satisfy s. 21 (1) (b). C

Then we must look at the scheme as a whole for the purposes of s. 21 (1) (b). We are prepared to accept the view that the scheme was introduced with the honest intention of giving the public a good service, though plainly the Federation was in nowise neglecting its own interests. As the scheme has been operated, however, the result seems to be as follows: The manufacturers benefit greatly by getting (from their point of view) good prices for their carpets which D
they fix and by paying a low rate for distribution. The wholesaler fortunate enough to be on the wholesale list has some benefit by reduction in competition. It is a convenience (no more) to the retailer not to have to take some trouble in appraising the quality of carpets, but, on the other hand, he has a less good wholesale coverage. To the general public we can see no benefit at all. They are paying prices which are probably too high and the retailer to whom they E
go may not have the range of carpets which he otherwise would have. We think the public will continue to obtain an adequate range of carpets of all qualities if the restrictions are abolished. The claim under s. 21 (1) (b) fails.

Next we must deal with the restriction prohibiting sales to consumers except through retailers. We do not find any justification for this restriction in the pleadings which appear to be directed only to matters which we have earlier F
discussed in this judgment. Nor have we been persuaded in argument that there is any justification for it to be found in s. 21 (1) (b). It was said that without it the retailer would refuse to deal in the goods of the manufacturer. We do not accept that for a moment. This restriction is plainly bad.

We next consider the Federation's case under s. 21 (1) (f). The Federation have to satisfy us that the removal of the restriction in relation to the home G
trade would be likely to cause a substantial reduction in the volume of earnings of the carpet trade export business in relation to the whole business, including export business, of the carpet trade. The other alternative in the sub-paragraph is plainly inapplicable. We must start by quoting some statistics, though both the Registrar and the Federation have found it difficult to put reliable statistics before us. Values of export sales ex factory of the whole carpet industry of wool, worsted H
and mixtures, excluding mohair and tufted carpets, declined steadily from rather over £12,000,000 in 1954 to just under £8,000,000, in 1958. This must be compared to total home and export sales of such carpets which increased from £65,000,000 in 1954 to £71,000,000 in 1958. It follows that the export trade, expressed as a percentage of total sales, declined from 18·5 per cent. in 1954 to eleven per cent. in 1958. The export trade is steadily and rather rapidly declining, despite the I
maintenance of the price/quality standards of W.1 and A.1. During this time, the exports of forty-eight of the Federation's members (who, however, exported ninety-eight per cent. of all Federation exports of woollen and worsted carpets) of A.1 quality fell from nearly £5,000,000 in 1954 to just over £3,000,000 in 1958. Exports of W.1 during this time were apparently much smaller. During this time the percentage of exports of A.1 to total exports of the forty-eight Federation members fell from fifty-six per cent. to forty-five per cent. It is clear that in a rapidly declining export market the proportion of exports of

A.1 is also declining. There seems little ground, therefore, for anticipating that the abolition of the standard quality cum price would be likely per se to cause a substantial reduction in the export trade. The figures suggest that a substantial reduction is likely to occur in any event. This case fails on these figures.

However, we heard some evidence on this matter. Exports to Australasia account for rather more than half of the total exports of United Kingdom carpet manufacturers. It was proved by evidence called by the Federation that the exports of British manufacturers to these Dominions depend on their ability to offer goods of high quality. Since the war, a substantial local carpet manufacturing industry has been built in Australasia. They still use the same symbols as were in earlier days in use in the trade here, such as A.1, 2, 3. Moreover, it is clear from the Australian and New Zealand newspaper advertisements that we have seen that these qualities are brought to the notice of the purchasing public in a way that was never, so far as the evidence goes, done in this country. The evidence was that many of the products of Australasian manufacturers, although advertised in various standard qualities, are in fact of lower quality; in other words, debased. British manufacturers have only been successful in exporting to these Dominions, in the face of difficult quota regulations and import duties, by offering a uniformly high undebased quality and there is no doubt that, for example, a British A.1 quality stands much higher in the estimation of the Australian buying public than an Australian A.1. Furthermore, these newspaper advertisements bring to the notice of the buying public, again in a way which so far as the evidence goes has never been done in this country, the names of the leading British manufacturers as an indication of excellent quality. Exports to Australia and New Zealand have declined from rather under £9,000,000 in 1954 to under £5,000,000 in 1958 and, if this decline is to be arrested, it can only be done by maintaining high and undebased qualities. It is said that this will be impossible, for debasement in the home market will inevitably follow if home restrictions are abolished, and it will then be administratively impracticable to maintain undebased qualities for export. This is contrary to the evidence and to common sense; contrary to the evidence, for it was established, first, that a non-Federation manufacturer who makes little A.1 for the home market, makes a substantial line of A.1 for export, and, secondly, that the general Australasian taste is for a rather different type of design to the popular lines in the United Kingdom, the lines which sell best there being chintz and floral designs. It is contrary to common sense, for British manufacturers who wish to remain in the Australasian market will so organise their factories as to compete on the only possible basis with the local product, by producing better quality and by enhancing their reputations as leading British manufacturers. If any manufacturer decides to go out of the Australasian market, it will not be because of the abolition of the restrictions at home, but because the export market is proving unprofitable to him on any footing.

Finally, though counsel have dealt with this particular matter when arguing another part of the case, we think that it is relevant to refer to the progressive removal of Federation restrictions in relation to the export market. At the date of the reference in July, 1957, there was a general restriction binding on members that in sales overseas, except to the United States of America, carpets were not to be sold at prices below those for the home market. Then, in December, 1957, Europe was excluded from that restriction. A year later, Central and South America, Canada and parts of Africa were excluded. It seems that the Federation has come to believe that freedom of action is the best policy in the export trade. It is a little difficult to see then why freedom of action in the home market should be said to lead to a substantial reduction in exports. This point fails.

It follows that, as the Federation has failed to establish any case under s. 21 (1) (b) or (f), para. (g) has no application. It also follows that it is unnecessary for us to consider the balancing provisions at the end of sub-s. (1), for there is no benefit to be weighed in the balance against the detriment to the public. It is implicit in what we have already said that we regard the detriment to the public flowing from the operation of the Federation scheme as very considerable.

There remain two matters with which we must deal. The first is in regard to the restrictions entered into by members of the Federation in relation to their overseas trade. These restrictions are based on and follow substantially the restrictions relating to the home market. Until Aug. 26, 1959, these restrictions all formed part of the " Standards of Trading " and were contained in main cl. 3 of those standards. The cardinal provision was that carpets were not to be sold in overseas markets at prices below those for the home market. The home wholesalers are not, so far as we are aware, concerned with exports; so there was no wholesalers list, but there was a provision that no wholesale or retail discounts should be allowed other than those authorised by the Federation. By resolution of the executive committee of Aug. 26, 1959, however, the restrictions were removed bodily from the Standards of Trading and reinstated in what was alleged to be a new agreement. This was admittedly done in case the Federation should lose their case before this court. Their case is that, by removing bodily the provisions relating to overseas trading from the Standards of Trading and reinstating them in another document, they have entered into a new agreement to which the Restrictive Trade Practices Act, 1956, does not apply by virtue of s. 8 (8) of that Act. The Registrar contends that the alleged new agreement is only a variation of the old agreement (a variation without a difference) and should be entered on the register maintained by him. That is a question which can only be determined by the High Court.

It has been admitted by the Federation that, having regard to s. 20 of the Act, restrictions on the register in relation to overseas trading down to Aug. 26 last are justiciable by us and that we have a discretion to adjudge on them if we think proper to do so. But the Federation nevertheless submit that, in the exercise of our discretion, we ought not to do so. The question really is whether we ought to decide on the validity of the whole scheme as registered down to Aug. 26, 1959, or only on the provisions relating to the home trade. We think that we should decide on the whole scheme, for two reasons. First, the old overseas scheme was an integral part of, and depended on, the existence of a scheme for the home market. If the price/quality standard is abolished at home, all reason for a scheme abroad based on home prices seems to go. If any manufacturer at home can charge any price he likes for an A.1 carpet, there seems no reason to compel him to charge the same or a higher price for an A.1 carpet overseas. There was no evidence to show that the old scheme could have any useful operation abroad in the absence of controlled prices at home, or that it could be justified under s. 21 (1) (b) of the Act. But there is another reason why we think that we should deal with the whole scheme today. The Federation having, as they put it, severed their overseas trading restrictions from the home trading restrictions by a pair of scissors on Aug. 26, applied to this court for an order that all restrictions relating to the supply of goods by export contained in the registered agreements be excluded from consideration by the court in these proceedings. That application was heard by us on Oct. 14 last and we refused it. The Federation and their advisers, therefore, knew that we might consider the export restrictions and they knew that the Registrar would invite us to do so. They have not in the least been taken by surprise and yet, although the onus is clearly on them, they have elected to call no evidence to justify the continuance of the overseas restrictions; and they must be taken to have decided on that course deliberately. We must declare the restrictions contained in main cl. 3 down to Aug. 26 last contrary to public policy. If the High Court decides that the Registrar's contention is correct and the so-called new severed agreement is in law only a variation which ought to be registered with the Registrar, we see no reason why he should be put to the expense of a fresh reference. In that event, we propose to give him liberty to apply for a declaration of invalidity as to the variation made on Aug. 26 last to

A which, in the absence of any change of circumstances, he will plainly be entitled.

The second matter with which we must deal is an even later last-minute decision to try to avoid the consequences of an adverse finding by this court. On Oct. 20 last, the executive committee of the Federation resolved as follows:

> " The committee considered the draft of an agreement between individual manufacturers and their wholesale customers, which had been prepared by B the secretariat, at the request of the chairman's sub-committee, in the form of two draft letters, together with an appendix and an annexure, as a means by which whatever the outcome of the case members of the Federation, if they wished to do so as individual firms, might be able to continue to trade with their wholesale customers under the rules at present embodied in the Standards of Trading for the home market.
>
> C " After considerable discussion on the details of the drafts, in which the secretary was instructed to include a section to cover the position of wholesalers with retail connexions, the committee agreed that the draft agreements, as amended, should be sent to the Council of the Wholesale Floor-covering Distributors' Association for comment; and that subsequently the drafts should be sent to each member of the Federation with a recommendation D that each member should, without delay, send letters on the lines of the drafts, to each of his wholesale customers, with a view to establishing individual agreements on terms of trading. A copy of the drafts, as finally amended, is at Appendix ' B '."

Members of the Federation have been circularised accordingly. The resolution has been registered with the Registrar. We do not pause to read the drafts at E Appendix " B ", for they do in substance carry out the plain intention of the Federation as expressed in the resolution; that is, on the footing that all the present restrictions are found contrary to public interest by this court, the drafts enable individual manufacturers to continue trading with their wholesale customers under the rules embodied in the Standards of Trading. During the hearing we were told that some twenty-eight out of fifty-eight members have F acted on this resolution. The resolution is a recommendation to which s. 6 (7) of the Act is plainly applicable, so that the constitution of the Federation must be construed as though it contained a term whereby members agree to comply with those recommendations. The members, therefore, are deemed to be bound to send out draft letters on the lines of the drafts circulated. Those drafts, as we have said, contain terms similar in substance, though not in form, to the letters G which wholesalers are bound to sign as a condition of being entered on the wholesale list. We have not yet considered those undertakings in detail and we think that the convenient course will be to consider all those matters together.

Accordingly, today we decide that the following restrictions contained in the Standards of Trading are contrary to public policy:—(i) The main price quality standards contained in main cl. 1 (a). (ii) The restrictions relating to the whole-H sale list and rate of wholesale discount contained in main cl. 2 (a). (iii) The consumer buyer provisions contained in main cl. 2 (k); and, finally, (iv) The main provisions of the overseas market restrictions contained in main cl. 3 down to Aug. 26 last.

[Dec. 21. It was agreed that the subsidiary restrictions must be declared contrary to the public interest. The Federation, however, were still allowed to I prescribe A.1 and W.1 standards, but these must not be related to prices. The Federation stated that the recommendation of Oct. 20, 1959, had been withdrawn since Dec. 17.]

Declaration accordingly.

Solicitors: *Simmons & Simmons* (for the Federation of British Carpet Manufacturers and individual carpet wholesalers); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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HULL *v.* HULL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), December 10, 1959.]

Divorce—Custody—Estoppel—Desertion—Adultery—Wife granted decree in undefended suit on ground of husband's desertion—Discretion statement by her disclosed adultery with two men—Whether husband estopped in B *subsequent custody proceedings from asserting wife had deserted him and from alleging adultery with men other than those referred to in the discretion statement.*

The wife was granted a divorce on the ground of the husband's desertion. There was no prayer in the petition for custody of the three children of the marriage. The suit was undefended, the court found that the husband's desertion was proved and exercised its discretion in her favour. Her discretion C statement disclosed adultery with two men. The husband was represented at the hearing on the question of costs, the matter of custody being adjourned to chambers. The husband took out a summons for custody and sought to include in support of it evidence of facts showing that, contrary to the finding of the trial judge, the husband had not deserted the wife but that she had deserted him, and also evidence of the wife's D adultery with men other than the men to whom her discretion statement referred, the evidence having, however, been known to the husband before trial.

Held: (i) the husband was estopped from putting forward evidence to show that the wife had been in desertion, for the doctrine of res judicata precluded him from raising again in relation to custody issues of fact that E had been determined against him at the hearing of the petition and on which the decree nisi had been founded (p. 384, letter C, and p. 385, letter H, post.)

Corbett v. *Corbett* ([1953] 2 All E.R. 69) distinguished.

(ii) the husband was not estopped from adducing evidence of the wife's adultery before the decree nisi, for those facts were not raised or pronounced F on at the trial and the issue in the custody application (viz., which party was better suited to have custody of the children) was different from an issue whether the adultery barred the petitioner from obtaining relief by decree nisi; moreover the court should not, in custody proceedings, exclude such evidence on the ground of public policy (viz., that it had been known to the husband at the trial and not then raised) since in custody proceedings G the welfare of the children was the factor in issue (see p. 382, letters A, B and E, post).

Dictum on maintenance proceedings in *Duchesne* v. *Duchesne* ([1950] 2 All E.R. at p. 791) distinguished.

[As to estoppel as a bar to relief in matrimonial causes, see 12 HALSBURY'S LAWS (3rd Edn.) 294, para. 581 and SUPPLEMENT; and as to estoppel generally, H see 15 HALSBURY'S LAWS (3rd Edn.) 176, para. 345; and for cases on the subject, see 27 DIGEST (Repl.) 374-378, *3088-3117*.]

Cases referred to:

A.B. (an Infant), Re, [1954] 2 All E.R. 287; [1954] 2 Q.B. 385; 118 J.P. 318; [1954] 3 W.L.R. 1; 28 Digest (Repl.) 726, *2326*. I

Andrews (Infants), Re, [1958] 2 All E.R. 308; [1958] Ch. 665; [1958] 2 W.L.R. 946; 28 Digest (Repl.) 706, *2152*.

Blunt v. *Blunt,* [1943] 2 All E.R. 76; [1943] A.C. 517; 112 L.J.P. 58; 169 L.T. 33; 27 Digest (Repl.) 429, *3589*.

Conradi v. *Conradi, Worrall & Way,* (1868), L.R. 1 P. & D. 514; 37 L.J.P. & M. 55; 18 L.T. 659; 27 Digest (Repl.) 323, *2683*.

Corbett v. *Corbett,* [1953] 2 All E.R. 69; [1953] P. 205; [1953] 2 W.L.R. 1124; 3rd Digest Supp.

Duchesne v. *Duchesne*, [1950] 2 All E.R. 784; [1951] P. 101; 27 Digest (Repl.) 615, *5760*.

Finney v. *Finney*, (1868), L.R. 1 P. & D. 483; 37 L.J.P. & M. 43; 18 L.T. 489; 27 Digest (Repl.) 375, *3092*.

Lindsay v. *Lindsay*, [1934] All E.R. Rep. 149; [1934] P. 162; 103 L.J.P. 100; 151 L.T. 283; 27 Digest (Repl.) 614, *5746*.

Ord v. *Ord*, [1923] 2 K.B. 432; 92 L.J.K.B. 859; 129 L.T. 605; 27 Digest (Repl.) 234, *1882*.

Robinson v. *Robinson*, [1943] 1 All E.R. 251; [1943] P. 43; 112 L.J.P. 47; 168 L.T. 158; 27 Digest (Repl.) 614, *5747*.

Rossage v. *Rossage*, (Jan. 21, 1959), "The Times" Jan. 22, 1959.

Thompson v. *Thompson*, [1957] 1 All E.R. 161; [1957] P. 19; [1957] 2 W.L.R. 138; 3rd Digest Supp.

Winstone v. *Winstone*, [1959] 3 All E.R. 580; [1959] 3 W.L.R. 660.

Summons adjourned into court.

This was an appeal by way of summons by the wife, Sarah Hull, from an order of Mr. Registrar Forbes dated Oct. 13, 1959, refusing her application to strike out certain paragraphs in an affidavit of the husband, Albert Edward Hull, dated Sept. 16, 1959, alleging desertion and undisclosed adultery by her.

The parties had married in 1944 and there were three children of the marriage born in 1945, 1947 and 1950 respectively. On June 30, 1959, Sir Edgar Dale, sitting as a Special Commissioner, granted the wife a decree nisi in an undefended suit on the ground of the husband's desertion, the court exercising its discretion in her favour. The wife put in a discretion statement disclosing adultery with two men, and in evidence stated that she had not committed adultery with any other men. There was no prayer in the petition for custody, but the husband, who had asked in his answer for custody, was represented at the hearing for the purpose of questions of custody and costs. The question of custody was referred to chambers with the husband's consent. On July 20, 1959, the wife swore an affidavit in support of an application by summons for access to the children. On Sept. 3, 1959, the husband took out a summons applying for custody, and on Sept. 16, 1959, he swore an affidavit in support in which he alleged facts which would show that, notwithstanding the finding of desertion against him at the hearing of the wife's petition, she had, in fact, deserted him; further, there were allegations in the affidavit, some of which referred to statements made to the husband by persons other than the wife, tending to show that she had in fact been guilty of adultery with other men than the two mentioned in her discretion statement.

On Oct. 6, 1959, the husband's summons for custody came before Sachs, J., in chambers, and at the same time the wife's application for access was before the court. His Lordship adjourned the case to enable a summons by the wife then pending, by which she asked that the husband's affidavit of Sept. 16, 1959, should be taken off the file, to be heard. This summons came before Mr. Registrar Forbes on Oct. 9, 1959, when it was submitted on behalf of the wife that the husband was estopped from asserting (by facts alleged in paras. 3-7, 9, 10, 12 of his affidavit of Sept. 16, 1959) that the wife had been guilty of adultery with men other than those mentioned in her discretion statement and of desertion. Mr. Registrar Forbes, on Oct. 13, 1959, refused to strike out those paragraphs in the husband's affidavit relating to the wife's desertion and adultery, stating that on the decision of *Corbett* v. *Corbett**, the husband was not estopped from making allegations which might be relevant on the question of the wife's fitness to have access to the children. The registrar acceded to the wife's application to strike out paras. 2, 8, 9, 10, 12 and 13 on the ground that they contained hearsay evidence which was inadmissible, relying on *Gilbert* v. *Endean*† referred to in *Rossage* v. *Rossage**. As a matter of convenience he ordered that the husband's affidavit should be taken off the file, and gave leave for him to file a further affidavit in the form of that of Sept. 16, 1959, omitting paras. 2, 8, 9, 10, 12 and 13. On Oct. 20, 1959, the wife took out a summons appealing against the registrar's decision so far as it permitted the husband to make allegation of desertion and adultery on her part. The husband filed his amended affidavit on Oct. 27, 1959. SACHS, J., reserved judgment on this summons to be delivered in open court.

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* [1953] 2 All E.R. 69; [1953] P. 205.

† (1878), 9 Ch.D. 259.

J. G. St. G. Syms for the wife.
D. J. Turner-Samuels for the husband.

Cur. adv. vult.

Dec. 10. **SACHS, J.**, read the following judgment: This appeal raises in acute form constantly recurring and much disputed questions as to estoppels in custody proceedings initiated under the Matrimonial Causes Acts: they are of wide importance not least because of the anxieties involved in any point which concerns the welfare of children.

In practice the relevant facts as to which dispute arises normally fall into one of four categories:—

(1) facts which are the subject of express or implicit findings by the trial judge on evidence laid before him; which result in the conclusion that a matrimonial offence has or has not been committed or that a recriminatory plea has or has not been established; and which then form the foundation on which a decree is granted or a prayer for a decree rejected.

(2) facts which are the subject of express findings by the trial judge but which have not been used for the above foundation.

(3) facts as to which no evidence has been adduced at trial but which if established could have formed the basis for the grant of a cross-prayer or a recriminatory plea affecting the discretion of the court.

(4) facts which, if established, would not have provided a basis for relief or a recriminatory plea of the type referred to in category (3), but which might have come somewhat close to so doing and which were either not the subject of evidence adduced before the trial judge or were not the subject of findings by him.

The first category covers not merely a finding that the matrimonial offence, for example cruelty, has been committed, but also any specific findings as to conduct which was held to be cruel, such as any blows held to have been struck. Facts in this category fall within that strict definition by which res judicata is stated to relate to a fact " directly in issue in the case " which has " actually been decided by the court, and appearing from the judgment itself to be the ground on which it was based " (see *Ord* v. *Ord* (1)).

The second category, " an example from the run of the chambers work in the court," would include a finding that a respondent wife chastised a child with undue harshness but that this did not affect the petitioner's health and that for this sole reason did not constitute part of the cruelty for which a decree was granted. An allegation of promiscuously lascivious conduct short of adultery could fall into the fourth category, as would the almost limitless allegations that could fall within the ambit of matters proper to be considered in relation to the exercise of the court's discretion as discussed in *Blunt* v. *Blunt* (2).

The present case is a relatively simple one of a not unusual type. The wife on June 30, 1959, obtained a decree on the grounds of her husband's desertion commencing in 1950: the suit came into the undefended list after the husband's answer had on May 1, 1959, been struck out at his own request; and when

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* Jan. 21, 1959 (Court of Appeal, transcript No. 6 of 1959); " The Times " Jan. 22, 1959.

(1) [1923] 2 K.B. 432 at pp. 440, 441, per LUSH, J., citing SIR J. FITZJAMES STEPHEN in his DIGEST OF THE LAW OF EVIDENCE (10th Edn.) p. 53.

(2) [1943] 2 All E.R. 76 at p. 78; [1943] A.C. 517 at p. 525.

A the facts on which the conclusion of desertion were proved in court the husband was represented by counsel in relation to costs and custody. The three children of the marriage have been with the father and his mother since 1950: and between that year and the end of 1956 the wife only saw them on about five occasions, for reasons which she attributes to the husband. Since 1956 she has not seen them at all. In those circumstances the husband on Sept. 3, 1959, issued an B application that he be granted the custody of the children: and in support seeks to put in evidence facts showing that contrary to the finding of the trial judge he was never in desertion and that the relevant separation was really due to the wife's desertion; and secondly that the wife committed before the date of the decree nisi adultery with men other than the man she has now married—the last of such allegations being one which concerned 1957. As C regards each of his allegations he relies on matters within his own knowledge at the date of the decree.

The wife claims that he is estopped from alleging either her desertion or her adultery with the other men. The facts set up by the husband as regards the desertion thus fall into the first of the above four categories: and the way he seeks thus in custody proceedings to go behind the decree is typical of attempts D to which one becomes accustomed in chambers on applications stemming alike from decrees granted in defended and in undefended causes.

The facts set up by the husband as to adultery fall into the third category and are typical of the allegations made by a spouse who has let a decree be obtained in the undefended list. I am thus here solely concerned with the law relating to those two categories in an instance where the facts sought to be set up were E at the date of the trial within the knowledge of the party now alleging them.

On the question of estoppels in custody proceedings under the Matrimonial Causes Acts the industry of counsel has only brought to light one reported case (3); and in view of the arguments raised with regard to its effect it seems best first to consider what conclusion I would reach in the light of other authorities dealing with res judicata and estoppel.

F At the outset it is to be noted that the jurisdiction of this Division to deal with the custody of children is the creature of statute (4) and that it only arises when a lis between a husband and wife commences. The custody application is made in the suit—here divorce proceedings: and whether or not a decree absolute has resulted the title of the proceedings remains unaltered (save, of course, in so far as the parties may change their names). Here the application G was made before decree absolute and has continued after that decree. In law I cannot here see any distinction between the position before and after the final decree—the application is made in the same suit as that in which the decree is granted, and is for what is usually termed ancillary relief. To the extent the application, whether made in the prayer of the petition or by later summons is, albeit in one sense a separate proceeding, yet made in the same suit, the position H is different from that which is the subject-matter of almost all other cases in which estoppels have been considered—and in which the courts have considered in a second set of proceedings what is the effect of what happened in an earlier set of proceedings. It may thus well be that as between the trial of the matrimonial cause and the ancillary custody application an analogy to the trial of separate issues in an action or cause is closer than the analogy to trials of two I successive causes.

I will now turn to the position in a custody application of facts that are in the third category (here the adultery allegations). Whether one looks on the custody application as if it were a second cause successive to the trial at which the decree was granted, or whether one looks on it as being a further proceeding in the same suit as that trial, it seems to me completely clear that the matter in issue in the custody application is different from that at the trial. At trial the issue is whether a matrimonial offence has been committed or a bar to relief for such an offence established: on the application for custody the issue is which party is the better suited to have custody of the child, having regard to that child's welfare.

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(3) *Corbett* v. *Corbett*, [1953] 2 All E.R. 69; [1953] P. 205.

(4) See now s. 26 of the Matrimonial Causes Act, 1950.

It is true that in establishing that a spouse is less suitable to have the custody of a child it may prove relevant to put in evidence facts which may also establish that the spouse has committed a matrimonial offence: but if the facts which establish that offence were not raised and pronounced on at trial I know of no principle of estoppel as applicable to successive suits or actions which can prevent those facts being put in evidence on the matter in issue in the custody application. A fortiori, they can thus be put in evidence if the truer analogy is to the trial of separate issues in the same set of proceedings. I pause only to note that counsel for the wife in arguing the contrary view was constrained to assert that even if the husband's case was that for a period immediately before the decree nisi the wife had been living the life of a common prostitute, the husband's affidavits could not mention that fact and that despite his being obviously able to refer to facts in the fourth category, e.g., lascivious and promiscuous conduct short of adultery.

Once it is clear that the law of estoppel cannot for the above reason apply to these third category facts, counsel for the wife can only succeed in shutting out the relevant evidence of adultery if he can show that there should be applied to custody proceedings those passages relating to maintenance proceedings which state that, even where there is no estoppel, a spouse is " for reasons of public policy prohibited from asserting " matters known at the date of trial which if then raised might well have provided an effective answer to the petition or resulted in cross-decrees (see *Duchesne* v. *Duchesne* (5)). To my mind, however, there arises in custody proceedings an additional factor touching public policy —the welfare of the children. That factor is of such importance that plainly the court, whatever be the position as regards maintenance proceedings, should not in custody proceedings exclude on grounds of public policy evidence which would not be excluded under the established rules relating to estoppel.

I would add that in *Duchesne* v. *Duchesne* (6), PEARCE, J., dealt with no third category facts and only excluded those in the first category: that the facts excluded in *Lindsay* v. *Lindsay* (7), which he cited on the public policy point, were also (as appears from the judgment of SIR BOYD MERRIMAN, P. (8)) first category facts: and that accordingly *Robinson* v. *Robinson* (9)—the second case so cited—seems to be left as the sole direct authority for the application of this new and controversial facet of public policy to evidence of third category facts—and that case concerned a maintenance application.

In my view the attempt in the present case to exclude the evidence as to adultery accordingly fails, because the doctrine of estoppel does not apply and because it is not on any other ground against public policy to exclude that evidence.

That disposes of so much of this appeal as relates to the allegations of adultery. There remain for consideration those passages in the husband's affidavit that seek to show he never was in desertion—and which fall into what I have called the first category. Here much more difficult questions arise. This much, however, is plain: if the correct analogy is that of successive proceedings, then unless the custody application falls into some exceptional class of the type I will later discuss, the doctrine of res judicata applies. Similarly, unless the application falls into some such exceptional class, no one would be disposed to

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(5) [1950] 2 All E.R. 784 at p. 791; [1951] P. 101 at p. 113.
(6) [1950] 2 All E.R. 784; [1951] P. 101.
(7) [1934] All E.R. Rep. 149; [1934] P. 162.
(8) [1934] All E.R. Rep. at p. 152; [1934] P. at p. 168.
(9) [1943] 1 All E.R. 251; [1943] P. 43.

A argue that the doctrine of res judicata does not preclude the same court in one set of proceedings being asked in effect to reverse in a later phase of them a finding of fact reached in an earlier portion.

The point propounded with persuasive force by counsel for the husband is that the same sort of exception applies to an application under s. 26 (1) of the Matrimonial Causes Act, 1950, as applies to issues affecting status tried by B this court under s. 4 of that Act. That exception stems from the phrases in that latter section commencing " On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged " (10) and into certain possible bars to relief. Its effect was discussed by the Court of Appeal in *Thompson* v. *Thompson* (11). My attention was particularly directed to those parts of the judgment of DENNING, L.J., which explains how C " estoppels bind the parties but do not bind the court " (12), and then deals with the manner in which the court can either exercise its discretion to enforce the estoppel or allow parties re-litigation of the relevant facts (13). Such an exception to the long-established rule of res judicata must either derive from statute or exist by reason of some inherent power or duty of the court. Of statutory provisions in relation to custody proceedings the one and only section D which counsel for the husband pressed on me was s. 1 of the Guardianship of Infants Act, 1925. This provides:

> " Where in any proceeding before any court . . . the custody . . . of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the E claim of the father . . . in respect of such custody . . . is superior to that of the mother, or the claim of the mother is superior to that of the father."

That section, however, does not contain words such as those above cited as being part of s. 4 of the Matrimonial Causes Act, 1950. To my mind it deals simply with the weight to be attached to facts once they are proved, and not with the F question of what evidence is admissible to prove them. The word " regard " is, to my mind, used in much the same sense as it is in the phrase " having regard to " in s. 19 (2) of the Act of 1950. Moreover, the provisions of s. 1 of the Act of 1925 apply to all courts—and if construed in accordance with counsel for the husband's submission empower each court to disregard the previous findings of fact not only of its own but of every other court—and, for instance, G enable magistrates and county court judges to decide de novo whether decisions of fact made in this Division (whether or not confirmed on appeal) are in their view right or wrong. It is a bold submission: I doubt if it has previously been made during the thirty-four years since the passing of the Act of 1925: and I do not feel able to accept it. Had the legislature intended so far-reaching a result it would surely have used quite different phraseology—perhaps more H akin to that used in s. 4, or alternatively s. 7 of the Matrimonial Causes Act, 1950. If there is some other statutory provision which here frees this court from the rule of res judicata, it has not been cited. (I pause to note that the Matrimonial Proceedings (Children) Act, 1958, does not apply to the proceedings now before me and has not been considered.)

Next arises the question whether a court of this Division can by virtue of I inherent jurisdiction in relation to children exercise its discretion to go behind what would normally be res judicata. If it were exercising that delegated power of the Crown as parens patriae which is the origin of the relevant Chancery proceedings relating to infants, the argument might be attractive: but the consistent trend of a whole series of decisions (the latest being that of UPJOHN, J., in *Re Andrews* (14) and of WINN, J., in *Winstone* v. *Winstone* (15)) precludes A my taking the view that when exercising statutory jurisdiction under the Matrimonial Causes Act, 1950, this court is in precisely the same position as if it were exercising inherent jurisdiction. (The judgment of LORD GODDARD, C.J., in *Re A.B.* (*an Infant*) (16) illustrates from a different angle how careful a court must be before acceding to an argument that it can exercise inherent powers as parens patriae when dealing in relation to infants with questions that arise B under statutes.) Moreover, the rules as to res judicata in its strict sense and estoppel, in so far as it derives from or includes that of res judicata, are usually said to be rules of evidence: and it is relevant to mention that, save only in regard to welfare officers' reports, this court is on custody proceedings bound by the usual rules of admissibility (compare *Rossage* v. *Rossage* (17)—as to hearsay). It follows that I find myself unable on general principles to find a ground on C which in this custody application the doctrine of res judicata does not apply to facts falling in the first category even if that application is regarded as a successive proceeding rather than a part of one set of proceedings. There remains the question whether authority enables me to say that it does not so apply.

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(10) Viz., s. 4 (1) of the Matrimonial Causes Act, 1950 (see 29 HALSBURY'S STATUTES (2nd Edn.) 394).

(11) [1957] 1 All E.R. 161; [1957] P. 19.

(12) [1957] 1 All E.R. at p. 165; [1957] P. at p. 29.

(13) [1957] 1 All E.R. at pp. 166, 167; [1957] P. at pp. 31-33.

Counsel for the husband naturally pressed *Corbett* v. *Corbett* (18) on me as being D such an authority. Counsel for the wife's first answer was that the relevant parts of the judgment were obiter—but of course even if that were so I would wish to follow them if I could. More serious is the question what precisely were the facts to which the relevant passages in the judgment relate and the circumstances in which they were spoken.

In that case the respondent wife had on her cross-prayer secured a decree nisi E on account of her husband's cruelty, the court exercising its discretion in her favour in relation to adultery with the co-respondent disclosed in the discretion statement and held to have been conduced to by the husband's cruelty. The husband then appealed and on appeal moved for leave to call fresh evidence. The fresh evidence was directed to proving, first, that the wife had committed adultery with men other than the co-respondent (one of the affidavits was that F of a man who swore he had spent the night with her); and secondly, that although the adultery with the co-respondent was properly disclosed in the discretion statement, the wife's association with him was longer than therein stated and had its monetary aspect. The object of trying to introduce this fresh evidence was largely to enable the court to say that the trial judge had come to a wrong conclusion on questions of credibility. But from the point G of view of a judge dealing with a custody issue if the motion failed (as it did) the only evidence that could on that issue be expected to affect his mind, viz., that relating to the adultery with other men, quite clearly fell into the third category: so probably did the evidence concerning her association with the co-respondent.

In that state of affairs counsel for the husband put forward an ab inconveniente H argument that rejection of the motion would affect the custody issue by way of permitting an estoppel to arise. His argument did not apparently reach the stage when authorities are cited. Counsel for the wife does not appear to have been called on to deal with it: it received no mention at all in the leading judgment of SIR RAYMOND EVERSHED, M.R. (19), and nothing relating to it formed part of the ratio decidendi of that judgment—with which both the other I learned lords justices expressly agreed. BIRKETT, L.J., however (20), said:

> " . . . the question of the custody of the child will, of course, be in the

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(14) [1958] 2 All E.R. 308; [1958] Ch. 665. (15) [1959] 3 All E.R. 580.

(16) [1954] 2 All E.R. 287 at p. 290; [1954] 2 Q.B. 385 at p. 396.

(17) Jan. 21, 1959 (Court of Appeal, transcript No. 6 of 1959); "The Times" Jan. 22, 1959.

(18) [1953] 2 All E.R. 69; [1953] P. 205.

(19) [1953] 2 All E.R. at pp. 70-72; [1953] P. at pp. 209-214.

(20) [1953] 2 All E.R. at p. 73; [1953] P. at p. 218.

> complete discretion either of the registrar or of the judge, and he will decide what evidence he will hear and what he thinks relevant to the particular issue which he then has to determine "

—a passage which—contrary to my first impression—does not on reflection seem to me intended to preclude the judge from making decisions on admissibility as well as relevance: and ROMER, L.J., after some observations to which I will later refer, said in conclusion (21):

> " All I am saying is that for my part I take the view that it should not be regarded as matter to be excluded from his consideration altogether merely on the ground that it did not form part of the evidence in the divorce proceedings."

It thus appears that counsel for the wife was right in submitting that the references to the estoppel argument were obiter: indeed they partake rather of the nature of guidance from an appellate court to a first instance tribunal related to the special facts of the case under appeal but even so not intended to be a binding direction. In any event ROMER, L.J.'s views related to third category facts; he had not been asked to address his mind to first category facts—and he obviously had not had the benefit of such full and careful arguments on this point as have been before me. Earlier, however, he had stated (22):

> " Some at least of the evidence contained in these affidavits would, if true, be of some relevance in the custody proceedings, and, in my opinion, it should not be excluded merely because it did not form part of the material on which the issues of divorce were determined. To exclude evidence on a custody application on that ground would result in preventing the court from discharging its paramount duty in matters relating to the care and custody of the children, namely, to ascertain what directions will best serve the interests of the children themselves ",

and it is this passage which counsel for the husband most relied on. It is not unlikely that in using those phrases ROMER, L.J., may have had in mind in reference to third category facts that part of the then relatively recently reported judgment in *Duchesne* v. *Duchesne* (23) which touched on public policy and which I have already considered. In that event he would by those phrases simply have been negativing its application to custody cases in the same way I have mentioned. It would anyway seem to me to be what JENKINS, L.J., has spoken of as an " abuse of authorities " to apply those phrases to first category facts and thus to a case " in which the facts and circumstances are entirely different and which raise questions to which their authors were not directing their minds at all ". Accordingly I do not accept the submission that *Corbett* v. *Corbett* (24) provides even obiter guidance on the way in which the court should here deal with such of the husband's allegations as fall into the first category.

It follows that it is for me to affirm so much of the learned registrar's order as concerns third category facts and hold them to be admissible, and to vary his order in so far as he refused to cause to be expunged allegations of first category facts from the affidavit of the husband.

In case, however, this appeal goes further I must naturally consider what would be the course that should here be taken on the footing that the court has as regards first category facts a discretion of the type discussed by DENNING, L.J., in *Thompson* v. *Thompson* (25).

It seems to me that where an estoppel exists which binds the parties unless the court says otherwise, the wife is normally entitled before answering her husband's affidavit to know whether the statements in it that are prima facie inadmissible are going to be considered by the court. In the present case that question would conveniently be raised by the application under appeal and would properly be dealt with here and now. A procedure by which a court is in the course of a single set of proceedings asked in effect to stand on its head and come to a diametrically opposite finding of fact to that found and acted on by it earlier therein, involves an exercise which is to my mind somewhat unattractive. It might also quite easily result in the ridiculous situation that on the same day and in the same cause it would act on opposite conclusions of fact in a custody and in a maintenance application. The court's discretion in favour of such a course would to my mind only be exercised in truly exceptional cases of quite a different nature to the present one. Moreover, where, as here, the children have been in the care of the husband for eight or nine years, the question of " whose was the desertion " is one which counsel for the husband very properly conceded to be " of a weight that would be marginal or negligible ", and in my view it cannot in practice influence the result of this custody application at all. So that evidence, which is solely directed to the point as to who in 1949 or 1950 was in desertion, is either irrelevant or of such nominal importance as to raise a time-wasting issue. On the footing that I have a discretion to let it be admitted I would refuse so to do.

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(21) [1953] 2 All E.R. at p. 74; [1953] P. at p. 219.
(22) [1953] 2 All E.R. at p. 73; [1953] P. at p. 218.
(23) [1950] 2 All E.R. 784; [1950] P. 101.
(24) [1953] 2 All E.R. 69; [1953] P. 205.
(25) [1957] 1 All E.R. 161; [1957] P. 19.

It only remains to mention that both counsel asked me to draw different and indeed opposite inferences from the existence and wording of Matrimonial Causes Rules, 1957, r. 54 and r. 56, which concern interventions, separate representation, and directions for the initiation of wardship proceedings (26). Suffice it to say that in the present suit no one has intervened and no reason exists why the court should cause those rules to be brought into operation. Here I am dealing with a simple application as between two parties in which one of them has made a commonplace—one might almost say common form—attempt to go behind findings of first-category facts. Until some case arises in which the provisions of those rules are utilised, the question does not arise whether they will provide a safety valve preventing this court in a truly exceptional case from being subjected to undue pressure by the rule as to res judicata.

The result is that I order the parts agreed by counsel for the husband to be solely directed to the question of desertion, in paras. 4, 6, 7, 9, 10, 11 and 12 of the revised affidavit of Oct. 27, 1959, to be deleted. That affidavit (which like its predecessor was not drafted by counsel for the husband) cannot be filed as it stands and should be re-sworn and filed after the appropriate adjustments have been made.

In conclusion I repeat my indebtedness to both counsel for their full and helpful arguments coupled with their references to a number of authorities, starting with *Finney* v. *Finney* (27) and *Conradi* v. *Conradi, Worrall & Way* (28) respectively, in addition to those I have cited.

Order accordingly.

Solicitors: *Wainwright & Co.* (for the wife); *Robert K. George* (for the husband).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(26) See 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 244.

(27) (1868), L.R. 1 P. & D. 483.

(28) (1868), L.R. 1 P. & D. 514.

Re LITTLE (*deceased*). FOSTER *v.* COOPER AND OTHERS.

[Probate, Divorce and Admiralty Division (Sachs, J.), December 16, 17, 1959.]

Will—Execution—Place of signature—Will consisting of several sheets—Nexus between sheets—Signing and attesting below space on last page—Inference concerning testamentary intention—Holograph additions inserted above signature—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 9—*Wills Act Amendment Act,* 1852 (15 *&* 16 *Vict. c.* 24), *s.* 1.

In September, 1956, the deceased gave instructions to his solicitor to prepare a will, saying that he wished his estate on his death to be held in trust for his three grandchildren. The solicitor prepared a typewritten draft will which was sent to the deceased. It consisted of five foolscap sheets of paper fastened together by a brass fastener. The attestation clause was set out at the foot of the fourth page; the fifth page was a back sheet the inside of which was left blank. In November, 1957, the deceased asked a neighbour and his wife to attest his, the deceased's, signature to the will. The deceased produced from his pocket a number of foolscap sheets of paper; he then turned over what appeared to the neighbour to be an independent unattached sheet and this sheet which was then blank was left uppermost. Then, pressing the sheets of paper flat on the table with his left hand, the deceased signed his name on this blank sheet leaving the top half of the page blank. While the deceased still pressed down the sheets of paper with his left hand, the two witnesses wrote their own names, addresses and occupations below the deceased's signature. Towards the end of November, 1957, the five sheets were deposited at the bank in a sealed envelope. In January, 1958, the deceased died. When the envelope was opened in February, 1958, the five sheets were found to be still fastened together by the brass fastener and there was a crease or fold mark in each sheet close to the hole made by the fastener. Above the signatures of the deceased and the attesting witnesses, which were found to have been written on the inside of the back sheet, there were eight handwritten lines setting out bequests of certain specific chattels to the deceased's daughter. The deceased's daughter now contended that the will was not executed in accordance with the Wills Act, 1837, and the Wills Act Amendment Act, 1852.

Held: the will would be admitted to probate but without the handwritten additional bequests because—

(i) it was to be inferred that the four typewritten sheets of the will were under the blank sheet on which were written the signatures of the deceased and the attesting witnesses, and that the sheets were fastened (*Rees* v. *Rees* (1873), L.R. 3 P. & D. 84, followed), but if at the time of execution the signed sheet was not fastened to the others, the testator's pressing the sheets together on the table had provided a sufficient nexus between them to show that there they were a single testamentary document (*Lewis* v. *Lewis*, [1908] P. 1, applied); and

(ii) the blank space above the signature of the testator and the attesting witnesses did not invalidate the will and the proper inference was that at the time of execution the testator intended the document to have effect immediately as a testamentary disposition (*Gregory* v. *Queen's Proctor* (1846), 4 Notes of Cases, 620, applied).

[As to the execution of a will consisting of several sheets, see 34 Halsbury's Laws (2nd Edn.) 60, para. 73; and for cases on the subject, see 44 Digest 253-255, *803-813*.

For the Wills Act, 1837, s. 9, and for the Wills Act Amendment Act, 1852, s. 1, see 26 Halsbury's Statutes (2nd Edn.) 1332, 1354.]

Cases referred to:

Arthur, In the Goods of, (1871), L.R. 2 P. & D. 273; 25 L.T. 274; 36 J.P. 168; 44 Digest 256, *824*.

Gregory v. *Queen's Proctor*, (1846), 4 Notes of Cases, 620; 7 L.T.O.S. 470; 44 Digest 253, *803*.

Lewis v. *Lewis*, [1908] P. 1; 77 L.J.P. 7; 98 L.T. 58; 44 Digest 253, *804*.

Rees v. *Rees*, (1873), L.R. 3 P. & D. 84; 29 L.T. 375; 37 J.P. 760; 44 Digest 254, *808*.

Tiernan, In the Goods of, [1942] I.R. 572.

Probate Action.

In this action, the plaintiff, one Foster, claimed to be one of the executors named in the will dated Nov. 21, 1957, of George Edward Little, deceased, and to have the will pronounced for in solemn form. The other executor had renounced probate. The first defendant, Mrs. Cooper, was the deceased's daughter; she had entered a caveat and was one of the persons entitled on intestacy. The second, third and fourth defendants, who appeared by their guardian ad litem, were the deceased's infant grandchildren and beneficially interested under the will.

The facts, as found by SACHS, J., were as follows. On Sept. 17, 1956, the deceased went to his solicitor and gave him instructions that since he had amply provided for his daughter and his sons during his lifetime he wished his estate on his death to be held in trust for his three grandchildren. At the end of that month the solicitor sent to the deceased five foolscap sheets. They were typewritten and a carbon copy of the five sheets was kept by the solicitor. The five sheets were fastened together by a small two-pronged brass fastener, the prongs of which were pierced through the sheets and then bent back. The first sheet set out in stock form the commencement of the will, leaving blank spaces for the names of the executors and trustees and for the names and amounts which could be inserted to show who were to be the beneficiaries of specific legacies. The second sheet, after some common form instructions, contained directions for the residue to be accumulated during the lives of the three grandchildren. The third sheet contained the bulk of the disposing provisions and the fourth sheet contained instructions for the trustees. The fourth sheet ended with the words "In witness (etc.)". The fifth sheet was a back sheet the inside of which was blank, and the outside of which had the words "Draft Will". On Nov. 21, 1957, this will was signed by the deceased and attested by a neighbour, one Newton, and the neighbour's wife. Towards the end of November, 1957, the five sheets were deposited with the Westminster Bank, Ltd. in a sealed envelope. The deceased died on Jan. 25, 1958. Shortly thereafter the envelope was opened and photographs were taken which showed that the state of the holes in the five sheets through which the brass fastener was placed was in essence no different from that in which the holes must have been when the sheets left the solicitor's office: and that close to each hole was a fold mark or crease in each sheet.

As to the contents of the will, on the first sheet there had been filled in the executors' names and names of beneficiaries and their legacies. On the second sheet there was an alteration, initialled in ink, of the provision relating to the period of accumulation. The third and fourth pages showed no alterations. On the fifth page, however, there was a considerable amount of handwriting: at the top of the page there were set out in some eight lines certain chattels bequeathed as specific legacies to the deceased's daughter. There was also an attestation clause and the signatures of the deceased and the two attesting witnesses. On the back of the fifth sheet the word "Draft" was struck out before the word "Will".

By her defence the deceased's daughter objected to the admission of the will to probate on the grounds (i) that it was written on separate and distinct pieces

A of paper unattached to one another physically or in any way connected with each other by reasonable inference or implication; (ii) none of the pieces of paper was signed and attested so as to conform with the Wills Act, 1837, or its amending Act; (iii) that the handwriting on the first, second and last pages were inserted after the signatures of the deceased and the attesting witnesses.

B *R. J. A. Temple, Q.C.*, and *K. J. T. Elphinstone* for the plaintiff.

A. Garfitt for the deceased's daughter.

H. S. Law and *J. A. P. Hazel* for the three grandchildren, by their guardian ad litem.

SACHS, J.: The plaintiff propounds a will dated Nov. 21, 1957, and the deceased died shortly afterwards, on Jan. 25, 1958. There is no plea as to the C mind, memory or understanding of the deceased, the sole issue raised is whether the document as executed was so executed as to conform with the Wills Act, 1837, and the amending Act of 1852. The issues which have been so well argued before me centre round the last sheet of the will. I will for convenience call it sheet No. 5 because it is in fact the fifth sheet though it was not so numbered. The arguments of mixed fact and law revolve around questions what is the D effect if sheet No. 5 was at the moment of signature not attached to sheet No. 1; and what is the effect of that large space, which now has a considerable amount of holograph writing on it, having been substantially blank at the moment when the deceased and the witnesses put their signatures on it, with particular regard to the deceased's signature having been so placed as to leave that large space above it. [HIS LORDSHIP stated the facts and continued:] E I should at this stage mention that between Nov. 21 and the date when the document was deposited with the bank the deceased had a conversation with one of the executors, Mr. Foster, the plaintiff in the action. Mr. Foster also had a further conversation with the deceased apparently on Jan. 10, 1958—that being after the deposit of the will at the bank. In January, 1958, Mr. Foster's note of the deceased's testamentary intentions was that the whole residue was to go F to the grand-daughter, that is to say the daughter's daughter, when she was twenty-one. I pause to note that, on the footing of that recollection of Mr. Foster being right, the deceased had altered his intention since Nov. 21 and at the later date intended that one of his grandchildren should have all the residue and not that it should be shared between three. It is also right to note that, whatever change there may have been in his intentions, it seems clear that in G no circumstances was he at that time minded to leave his residue to his daughter, whom he considered to be fully provided for, but who now is the disputant of his will.

I will now turn to the evidence of Mr. Newton, one of the two attesting witnesses. The other attesting witness was his wife, who is unfortunately ill, but there has been placed in evidence without objection from any side a statement H which she made jointly with her husband in February, 1958. Mr. Newton gave his evidence very firmly. Not only did he deal with those points which were mentioned in his statement of February, 1958 (which became evidence under the provisions of Lord Denman's Act (1)) but he also dealt with a number of points that are not mentioned in that statement and to which, I infer, he was not asked to direct his mind at that moment, in February, 1958. His account in the witness-I box of the events of Nov. 21 included amongst the salient points that after a telephone conversation the deceased came round to Mr. Newton's house—Mr. Newton being a neighbour. The deceased then pulled out of his pocket a number of foolscap sheets, of the order, so far as he could see, of six or so, and, after a motion to which I will later refer, those sheets were placed on a table with a blank sheet uppermost. Mr. Newton saw nothing of any of the other sheets. At the moment of placing on the table and thereafter, the deceased, according to

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(1) Evidence Act, 1843; 9 HALSBURY'S STATUTES (2nd Edn.) 562.

Mr. Newton, made what might be called a trimming movement, rather of the style that is made when one has shuffled a pack of cards. The objective of that movement was clearly to get the papers straight. Then the deceased placed his left hand on those sheets of paper, the top one of which was entirely blank. The blank sheet we now know was the inside of the back sheet. On that back blank sheet the deceased first of all wrote his own name some eight inches or a little more from the top; he then, according to Mr. Newton, wrote on succeeding lines the words: " Witness: Address: Occupation: " and did so twice, the topmost of those six lines being some two and a half inches from the bottom of the sheet. Then Mr. Newton and his wife with the deceased still holding the various sheets down with his left hand were asked to, and did, subscribe their signatures, addresses and occupations. Then the sheets were again folded up, put inside the testator's pocket and away he went.

It was Mr. Newton's firm evidence that the folding of the documents, all of which were foolscap, was horizontal both when they came out of the testator's pocket and when they went back. There is no mark of such a folding, but that does not seem to me conclusive one way or the other. There is in fact only a vertical crease on each of the five sheets. He was equally firm that there were no pencil lines on sheet No. 5 when the witnesses put their signatures, and, of course, no explanation has been offered, nor can I think of one, for there not being those lines at that time and yet their being added thereafter. It was equally his firm evidence (though again on a point which apparently had not been put to him in February, 1958), that when the deceased was so to speak in the act of taking the folded sheets from his pocket to place on the table he turned over one of the sheets, which then appeared blank, on top of the others when on the table. Mr. Newton was firm that it was so to speak an independent sheet which was being turned over and not one which was attached by the brass fastener. When he gave evidence of the trimming of the five sheets he made a motion which is more usually made in relation to trimming independent sheets, but which, on the other hand, did not seem to me very much different from the motion which would be made if you had to trim four sheets with one which has been folded over. That was Mr. Newton's evidence.

The first and, perhaps, the most important inference which I draw, is to my mind clear. Indeed counsel for the deceased's daughter, who, in his closing address presented his case with praiseworthy moderation, was not, in the end, prepared to argue to the contrary. The inference which I draw is that under the blank sheet were the four other sheets of this will. I may add, because not only is it obvious but it is common ground, that the present case is one of those in which there is no suggestion of fraud of any sort or kind. Then I turn to the question of fastening. I am disposed to apply the presumption referred to (2) in *Rees* v. *Rees* (3) that

> ". . . sheets bound together and constituting the will, as found . . . were so bound together at the time of the execution and attestation."

I am disposed to the view that, honest witness though Mr. Newton clearly was, this is one of those not infrequent cases where the court takes account of the frailties of human recollection and does not necessarily give effect to that recollection on questions which in essence depend on a balance of probabilities. On this aspect of the matter I have already mentioned the fact that the crease marks were already in existence in February, 1958. Be that as it may, while disposed to take these views on matters which are largely ones of inference, I need not and do not rest the decision in this case on those views.

I will turn to the position that arises on the footing that for some reason or other sheet No. 5 was not attached by the brass fastener to the other sheets. First of all, I should mention that no point has been argued, and indeed to my mind no point could be argued, that merely because the last sheet was on top of the others that could in any way impugn the validity of a will. The law on that subject is clearly to the effect that whatever place a sheet of paper may have in a given bundle at a given time, if it is intended to be in effect the last sheet, then the law so regards it.

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(2) By Sir James Hannen.

(3) (1873), L.R. 3 P. & D. at p. 86.

Next I mention that there was clear evidence, wholly undisputed, that, during the period of signing, the five sheets were pressed together on the table by the deceased. In my view, even though there was no mechanical attachment between those sheets, such a pressing provides a sufficient nexus between all five of them for the purpose of establishing that there was a single testamentary document. In that behalf I follow the lead given in *Lewis* v. *Lewis* (4) where it was stated that two pieces of paper being held together for the moment by the testator's finger and thumb was a sufficient nexus. I should also mention that junior counsel for the plaintiff in his helpful argument referred to the careful judgment of HANNA, J., in *In the Goods of Tiernan* (5). There, at the end of a close consideration of the English authorities, HANNA, J., stated (6) that in his opinion they established

> "that if a will be written on several separate and disconnected sheets of paper and the last only be attested, although no part of the will may have been seen by the witnesses, it should be admitted to probate on the presumption that the whole will was in the room and under the control of the testator at the time of the execution."

All that I need to say is that on the facts of the case before me there is no need for the plaintiff to rely on the wider presumption stated by HANNA, J., and I do not need to have to consider it here. Accordingly, subject to the resolution of the further point of whether or not this document was intended to operate forthwith as a testamentary disposition, I hold that it was properly executed and conforms with the provisions of the Wills Act, 1837.

The further point arises thus: what inference ought to be drawn from the fact that the testator's signature was placed, and to my mind was deliberately placed, so as to leave a blank of half a foolscap sheet above it? The first inference is that it can hardly have been left otherwise than with an intention to add something above it in addition to the words of the attestation clause. That inference is to my mind supported by the fact that within the very few days before the deposit of the will at the bank the eight lines to which I have already referred were added—eight lines making those minor dispositions of chattels to the daughter of the deceased.

I think moreover that this inference is if anything supported by the words which the testator wrote when addressing Mr. Foster in a letter of Jan. 1. There he refers to his last visit to Mr. Foster and says, "Incidentally, following my last visit to you I completed the necessary documents which were duly witnessed and deposited with my bankers in Banstead". That passage is equivocal in some respects and should not be too much relied on, but it does tend at least to support what I have inferred. It seems to show that these eight lines, which may well have been intended on Nov. 21, or may well have been forming in the mind of the testator on Nov. 21, were probably added not on Nov. 21 itself, but a few days later.

The point that then arises is this: which of two inferences as regards the mind of the testator should be adopted—those two inferences having opposite effects on the question of the validity of the will? Each inference assumes some degree of ignorance of the law applicable to wills on the part of the testator. The first possible inference is that at the moment of signing he was minded that the document should have immediate testamentary effect but was also then minded later to add some words rather in the nature of a codicil. The second inference could be that he intended that the document should have no effect until he had added to and thus completed the will. I pause only to note that the mere fact A that there is a blank immediately above the signature is of itself no bar to the validity of a will. The Wills Act Amendment Act, 1852, s. 1, reads:

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(4) [1908] P. 1. (5) [1942] I.R. 572. (6) [1942] I.R. at p. 580.

> "... Every will shall, so far only as regards the position of the signature of the testator ... be deemed to be valid ... if the signature shall be so placed at or after ... the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature B to the writing signed as his will",

and that no such will shall be affected by the circumstance that a blank space shall intervene between the concluding words of the will and the signature.

Rees v. *Rees* (7) contains a passage which is a well-known passage of the law of probate, C

> "If any theory consistent with the validity of the will can be suggested, which appears to the court to be as probable as the theory on which the argument for its invalidity is based, the will as found must be maintained."

My attention has been called to *Gregory* v. *Queen's Proctor* (8), a case decided in the prerogative court of Canterbury. That was a case in which the solicitor for the deceased found him in his usual sitting room. The deceased thereupon D pointed to the table and said, "There, Amos, see what I have done. I have made a new will and the servants have witnessed it in pencil so that we can alter it". The documents to which the deceased in that case pointed were admitted to probate without there having been on it any further signature of the deceased or any further attesting signature. I take account also of the fact that at the time when this document was executed in the present case nothing E was said by the deceased as to any intention that it should not take immediate effect: and counsel for the plaintiff has pointed out that as produced there is a deletion of the word "Draft" before the word "Will". No case has been cited to me in which blanks in a will have precluded its admission to probate, and it is well known that there are a number of cases in which it has fallen to the Chancery Court to construe wills which have indeed had blanks of no inconsiderable order. F

In those circumstances, my view is that the correct inference to be drawn is as follows: that the testator did intend that this document should have effect immediately as a testamentary disposition, but, being ignorant of the law, he intended before long to add something to it in the nature of a codicil. That brings the matter four-square within *Gregory* v. *Queen's Proctor* (8), to which I have just referred, and the result is that the subsequent insertion of the pro- G visions with regard to specific chattels has no more effect than it did in *In the Goods of Arthur* (9), where such a disposition was attempted to be made by inserting after the execution of the document a clause in a space very much narrower than the present. The result is that I pronounce for the will as prayed.

The question next arises whether I pronounce for it with or without certain passages which have been inserted in holograph. The authorities on the matter H are clear and I do not think that there was any argument about this point. I need only, accordingly, say that I propose to include in the pronouncement those parts which are holographed on p. 1; to omit the small holograph alteration on p. 2, and to exclude the whole of the disposing provisions as regards chattels on p. 5. There will be an order accordingly.

Order accordingly.

Solicitors: *Enever, Strong, Freeman & Co.* (for the plaintiff and for the three infant grandchildren, by their guardian ad litem); *Kinch & Richardson*, agents for *Robert H. Kerrison & Co.*, Coulsdon (for the deceased's daughter).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(7) (1873), L.R. 3 P. & D. at p. 86.

(8) (1846), 4 Notes of Cases, 620.

(9) (1871), L.R. 2 P. & D. 273.

Re C.

[COURT OF PROTECTION (Danckwerts, J.), January 18, 1960.]

Person of Unsound Mind—Settlement of property by direction of the court—Restraint from squandering property—Form of settlement—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 171 (1), (5), (7).

In March, 1953, an order was made appointing a receiver of the income of a patient in a mental hospital, and in November, 1955, on the patient being discharged from hospital as being " relieved ", the receiver was discharged. The patient then had full control of his property and between the end of 1955 and October, 1958, he dissipated a large amount of his capital. On Oct. 29, 1958, a receiver was again appointed, the patient being again under disability. According to the medical evidence, the prospect of the patient's recovery was not very great, and, if he did make substantial recovery, his powers of concentration and appreciation were likely to be impaired. Application was made to the court to direct a settlement of the patient's property under s. 171* of the Law of Property Act, 1925. It was proposed that the Public Trustee should be sole trustee of the settlement, with complete power to apply the capital or income of the trust fund for the benefit of the patient while he was under disability; that, in the event of the patient's recovery, the income of the trust fund should be held on protective trusts for him during his life; and that the patient should have a general power of appointment by deed with the consent of the trustee and a general power of appointment by will. The proposed settlement contained no power of revocation in the event of the patient's recovery, but the patient would be able to appoint the property to himself under the general power of appointment by deed with the consent of the trustee, or he could apply to the court for an order varying the settlement, under s. 171 (7) of the Act of 1925, on the ground of a " substantial change in circumstances ".

Held: in the exercise of the court's general discretion under s. 171 (1) of the Law of Property Act, 1925, the court would authorise the proposed settlement of the patient's property to be made because it was expedient in his own interests that he should be restrained from again squandering his property if the receiver were again discharged.

[Section 171 of the Law of Property Act, 1925, is prospectively repealed by s. 149 (2) of and Sch. 8 to the Mental Health Act, 1959, and provisions somewhat similar to those in s. 171 of the Law of Property Act, 1925, are contained in s. 103 of the Act of 1959. At the time of the decision in the present case only s. 1 and s. 149 of the Act of 1959 had been brought into operation for certain limited purposes; see Mental Health Act, 1959 (Commencement No. 1) Order, 1959 (S.I. 1959 No. 1676).

As to the settlement of a patient's property, see 21 HALSBURY'S LAWS (2nd Edn.) 335-338, paras. 582-585; and for cases on the subject, see 33 DIGEST 168, *537-540.*

For the Law of Property Act, 1925, s. 171, see 20 HALSBURY'S STATUTES (2nd Edn.) 780.]

Case referred to:

C.W.M., Re, [1951] 2 All E.R. 707; [1951] 2 K.B. 714; 2nd Digest Supp.

Adjourned Summons.

This was an application to the Court of Protection by the receiver of the income of a patient in a mental hospital and two members of the patient's family, asking that, pursuant to s. 171 of the Law of Property Act, 1925, the receiver might be authorised and directed, in the name and on behalf of the patient, to execute a settlement of the property of the patient.

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* The relevant terms of s. 171 are printed at p. 394, letter I, and p. 395, letters D and F to I, post.

The application was heard in open court.

W. S. Wigglesworth for the applicants.
J. A. Wolfe for the patient.

DANCKWERTS, J.: The essential features of the settlement which the court is asked to approve are as follows. The Public Trustee is to be the sole trustee of the settlement, and it is proposed that there shall be complete power, while the patient is under disability, to apply the capital or income of the trust fund of which he is possessed for his maintenance. That will necessarily be done under the directions of the master. If he should recover and therefore be discharged, it is proposed that he shall in effect not be completely master of the trust fund to which he would otherwise be absolutely entitled. It is proposed that he be subject to protective trusts during his life in respect of the income of the property. But it is also proposed that, with the consent of the trustee, he may be able to make a general appointment by deed which, of course, would enable an appointment to be made, with such consent, to make the fund or the property free from restraint on him. It is also proposed that he should have a general power of appointment by will. Finally, there is a power of advancement of capital which is to be retained in the discretion of the trustee of the settlement.

The facts of this case are very unusual and the circumstances are very special. It should first be stated that the general principle followed by the court as a matter of practice hitherto has been that, when a patient is discharged from the control of the receiver of his income under the appropriate Act, he is usually given his property free from any restriction, so that when he recovers sufficiently to be discharged he is able to deal with his own property completely as he wishes. But, as I have said, the circumstances in this case are rather peculiar. The patient was entitled to considerable funds when an order was made for the appointment of a receiver on Mar. 27, 1953. In 1955, however, he was discharged as being " relieved ", and the appointment of the receiver was discharged on Nov. 22, 1955. Thereupon, it appears that the patient, being free to deal with his property, managed to get rid of £14,000, or possibly £18,000. Among other things, he acquired five motor cars, some of them of rather inferior quality, which he left about the streets without having any proper garage to put them in, and he got into trouble over motoring offences and so on, but, it appears, he did take out third-party insurances. These circumstances certainly show that when he was free to deal with his property he was decidedly irresponsible. He was apparently liable to violence. Eventually, on Oct. 29, 1958, a receiver was again appointed for his estate, and he is under disability at the present time. The prospects of his recovery are not particularly great, but, if he did recover, it would seem, having regard to his previous record, that he might be disposed to deal once more recklessly with his property, and the settlement is suggested as the right and proper thing to do to prevent his property being squandered and the capital lost. It is to be noted that the fund produces a fair income which is sufficient for his maintenance at the present time, but, if the capital were to be squandered again, the situation might become extremely unfortunate. Consequently, on the grounds of common sense and prudence, it seems to be a proper thing to restrain the patient from having the opportunity to deal with his property in a reckless manner if he should recover.

The powers on which I am asked to act are contained in s. 171 of the Law of Property Act, 1925. By s. 171 (1):

> " The court may direct a settlement to be made of the property of a lunatic or defective, or any part thereof or any interest therein, on such trusts

> and subject to such powers and provisions as the court may deem expedient, and in particular may give such directions . . ."

Then follow certain cases in which, in particular, the court may deal by directions. It is not necessary to go through them because the power seems to be perfectly general and those particular directions seem to be intended only to deal with particular cases which do not restrict the generality of the court's powers. I may mention merely in passing para. (b) of the subsection:

> " where the property has been acquired under a settlement, a will or an intestacy, or represents property so acquired."

The property which the patient has is property which he has acquired from somebody else, either by will or settlement, and the larger proportion of it was acquired as a result of a settlement in the Court of Appeal of disputed questions arising on the construction of a will. So that, apart from anything else, this would seem to cover the present case. Another subsection to which I was referred, but which I do not think has much effect in the present case, is sub-s. (3), which reads:

> " This section applies whether or not the lunatic or defective has executed a testamentary disposition and notwithstanding that it is not known whether he has executed such a disposition or not, but does not apply when he is an infant."

The patient in the present case is not an infant. Some suggestions were made that the Variation of Trusts Act, 1958, might be relevant because now the matter could be dealt with under that Act, but I do not think that it is of much assistance to me in the present case. As regards the question of a will, the patient has now made a will. The question whether it will be effective when he dies depends on whether it is opposed or not, and whether he was capable of making a will when he made it.

By s. 171 (5) it is provided:

> " Subject to making due provision for the maintenance of the lunatic or defective in accordance with his station in life, whether out of the capital or income of the property settled or other property or partly in one way and partly in another, and to providing, by means of a power of appointment or revocation, or otherwise, for the possibility of the lunatic or defective recovering full capacity, the court may, in making any order under this section, have regard to [certain matters, which I need not go through] . . ."

The part to which I propose to refer are the provisions by way of power of appointment or revocation. Finally, s. 171 (7) provides:

> " At any time before the death of the lunatic or defective, the court may, as respects any property remaining subject to the trusts of a settlement made under this section, on being satisfied that any material fact was not disclosed to the court when the settlement was made, or on account of any substantial change in circumstances, by order vary the settlement in such manner as it thinks fit, and give any consequential directions."

Thus there is a provision under which, if the patient, having fully recovered, ought to secure full dominion over his property and the trustee has not handed it over in circumstances when he obviously ought to do so, the patient can apply to the court for variation under this subsection. The main provisions of this subsection are preserved in s. 103 (4) of the Mental Health Act, 1959.

In the present case there is no power of revocation in the settlement, but there is a general power of appointment which would enable the property to be appointed to the patient himself if it was exercised with the consent of the trustee of the proposed settlement. It was held in *Re C.W.M.* (1) by the Court of Appeal (2) that the court in its discretion was not bound to insist on a power of revocation. Therefore it would appear that the insertion of a power of revocation is by no means essential. Reliance was also placed on the practice, as set out in HEYWOOD & MASSEY ON COURT OF PROTECTION PRACTICE (7th Edn.) (1954), at p. 45, relating to the provisions in the case of a patient so found. In a case (3), which is there cited, powers derived from s. 105 of the Lunacy Act, 1890 (4), allowed the court to direct a conditional supersedeas in the case of the recovery of the patient so that restraint could be exercised on his property if the court thought it advisable. In that case, it is stated (5), an order was made for supersedeas under s. 105

> "... on the recovered patient undertaking by his solicitor to execute a settlement in the form of a draft initialled by the judge."

Then it is said:

> "Such a settlement should be framed so as to prevent the recovered patient from obtaining control of the settled fund for his own benefit as the sole object of the trust; the power of appointment of new trustees should be vested in him alone, and any power of revocation should be vested in him (and some reliable person), so that if incapacity recurs recourse must be had to the court for the exercise of those powers."

That jurisdiction does not apply in the present case. But in exercising the jurisdiction which is conferred on the court by s. 171 of the Law of Property Act, 1925, the court is entitled to have regard to the spirit of the exercise of the jurisdiction in cases which come within s. 105 of the Lunacy Act, 1890. There is some close analogy between the two cases, that is to say, a case under s. 105 of the Act of 1890 and the jurisdiction which I have to consider now.

It seems to me, therefore, that I have a general discretion under s. 171 of the Law of Property Act, 1925, and the question is whether I should exercise that discretion in the manner which is suggested by the present application. I have come to the conclusion that in the interests of the patient himself it is quite plain that an order should be made by which the settlement in the terms suggested should be executed. It appears that he may recover physically, but that his powers of concentration and appreciation are likely to be impaired. This is a case where it is proper and desirable that the court should restrain the patient if he comes out into the world again, so that he is not able to squander his property to his own detriment. This settlement is for the purpose of preserving and securing that his property shall be available for his maintenance and to secure him against want and misfortune in his financial circumstances: consequently I am prepared to exercise my jurisdiction under s. 171 by authorising the settlement on the terms of the draft which has been put before me. Some formal alterations may be necessary, and consequently I propose to make an order in the terms of the draft minutes which have been prepared for me in the office of the master. [HIS LORDSHIP handed the minutes to counsel. The proposed order, so far as relevant, was that the receiver be authorised in the name and on behalf of the patient "(a) to execute such settlement to give effect to the [draft settlement that had been before the court] as the master should settle and approve, and (b) on the certificate of the master of the due execution of the settlement to request [certain trustees] to transfer and pay the investments and cash representing the absolute interest of the patient in the estate of [a deceased testator] to the trustee of the settlement . . .".]

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(1) [1951] 2 All E.R. 707; [1951] 2 K.B. 714.

(2) The Court of Appeal were sitting as Judges in Lunacy.

(3) *Re A.L.S.* (1936), unreported.

(4) The Lunacy Act, 1890, is prospectively repealed by the Mental Health Act, 1959, see p. 393, letter G, ante.

(5) In HEYWOOD & MASSEY ON COURT OF PROTECTION PRACTICE (7th Edn.) at p. 45.

Order accordingly.

Solicitors: *A. M. Longhurst & Butler* (for the applicants); *Official Solicitor* (for the patient).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

DAWS *v.* DAILY SKETCH & SUNDAY GRAPHIC, LTD. AND ANOTHER.

DARKE AND OTHERS *v.* SAME.

[COURT OF APPEAL (Willmer and Harman, L.JJ.), December 16, 1959.]

Practice—Consolidation of actions—Libel actions brought by different plaintiffs against same defendants—Plaintiffs in both actions represented by same solicitors—Defences in both actions not identical—Application by defendants on summons for directions in second action for consolidation of both actions—No summons issued in first action—Jurisdiction—Discretion—R.S.C., Ord. 49, *r.* 8.

Two libel actions were brought against the same defendants in respect of the same article. The plaintiff in the first action and the plaintiffs in the second action were represented by the same solicitors. In the first action the defendants admitted that the words complained of referred to the plaintiff, denied that the words were defamatory, and pleaded an offer of an apology in mitigation of damage. In the second action the defendants denied that the words complained of referred to the plaintiffs, and denied that they were defamatory, but did not rely on any offer of an apology. At the hearing of the summons for directions in the second action the defendants, after informing the solicitors for the plaintiffs of their intention, applied for an order for the consolidation of the two actions. No notice was given on summons issued in the first action. The judge in chambers ordered consolidation of the two actions on the ground that the omission to give notice in the first action was a mere technicality. On appeal by the plaintiffs,

Held: (i) in the absence of any summons in the first action the court had no jurisdiction to make an order in the second action purporting to direct how the first action should proceed.

(ii) even if the court had jurisdiction, consolidation would not in the circumstances be ordered since there were not common questions of law or fact in the two actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time.

Observations of SCRUTTON, L.J., in *Payne* v. *British Time Recorder Co., Ltd. & Curtis, Ltd.* ([1921] 2 K.B. at p. 16) and in *Horwood* v. *Statesman Publishing Co., Ltd.* ([1929] All E.R. Rep. at p. 558) applied.

(iii) the proper order in the circumstances would be that the two actions be tried consecutively by the same judge and the same jury.

[As to consolidation of actions, see 26 Halsbury's Laws (2nd Edn.) 57, para. 94; and for cases on the subject, see Digest (Practice) 658-660, *2786-2800*.]

Cases referred to:

Horwood v. *Statesman Publishing Co., Ltd.*, [1929] All E.R. Rep. 554; 98 L.J.K.B. 450; 141 L.T. 54; Digest (Practice) 659, *2799*.

Payne v. *British Time Recorder Co., Ltd. & Curtis, Ltd.*, [1921] 2 K.B. 1; 90 L.J.K.B. 445; 124 L.T. 719; Digest (Practice) 408, *1084*.

Motion.

The plaintiffs applied for leave to appeal and for leave to appeal out of time against an order of Havers, J., in chambers, dated Oct. 30, 1959, allowing an appeal against an order of Master Harwood dated Oct. 20, 1959, and ordering the consolidation of two actions.

On Feb. 5, 1959, one Daws, issued a writ against the defendants, Daily Sketch & Daily Graphic, Ltd. and one Duffy claiming damages for libel in respect of an article in the " Daily Sketch ". The action was numbered 1959 D No. 167. The statement of claim in that action was delivered on Feb. 27, 1959, and the defence was filed on Mar. 31, 1959. By their defence the defendants admitted that the words complained of referred to the plaintiff but denied that the words were defamatory of him: they further pleaded that they had offered to publish an apology in terms therein set out but that the plaintiff had not approved the terms, and they denied damage. A summons for directions came before the master in May, 1959.

On June 25, 1959, a writ was issued against the same defendants by one Darke and four other plaintiffs for damages for libel in respect of the same article. That action was numbered 1959 D No. 848. The statement of claim was delivered on June 27, 1959, and the defence was delivered on July 16, 1959. By that defence the defendants denied that the words referred or were capable of referring to the plaintiffs and they denied that the words were defamatory of any of the plaintiffs; further in the defence they apologised to those plaintiffs, if any, to whom the words were found to refer and they denied damage. The summons for directions came before Master Harwood on Oct. 20, 1959, when application was made by the defendants that that action (i.e., the action brought by Darke and others) should be consolidated with the first action (i.e., that brought by Daws). The solicitors for the plaintiffs in the second action who were also solicitors for the plaintiff in the first action were informed that this application would be made, but no summons was issued in the first action. Master Harwood declined to make any order consolidating the two actions. On appeal, Havers, J., ordered that the second action be consolidated with the first action. On Nov. 17, 1959, the plaintiff Daws and the plaintiffs Darke and others gave notice of appeal on the grounds (i) that the judge had no jurisdiction to make an order consolidating the actions since no notice had been served on the plaintiff Daws whereby he could be present or be represented at the hearing of the summons for directions in the second action, 1959 D No 848; (ii) that the judge erred in principle in the exercise of his discretion; (iii) that the effective issues in action 1959 D No. 848 were different from those in action 1959 D No. 167.

Gilbert Beyfus, Q.C., and *L. J. Belcourt* for the plaintiffs.

Neville Faulks, Q.C., and *David Hirst* for the defendants.

WILLMER, L.J., stated the facts and continued: When it came to the summons for directions in the second action, 1959 D No. 848, one of the reliefs asked for was an order consolidating the two actions. The same solicitors acted for both sets of plaintiffs, and there is no doubt that the solicitors appearing

A for all the plaintiffs were duly informed that the application for consolidation was going to be made on the summons for directions in action 1959 D No. 848. But no summons in action 1959 D No. 167 was issued. I make that observation bearing in mind that a form of summons for use in such circumstances is provided in the ANNUAL PRACTICE (1960 Edn.) at p. 2374, and appears as form No. 4D, 1. No such summons was taken out. When the matter came before Master HARWOOD B he declined to make any order consolidating the two actions. On appeal, HAVERS, J., took the other view. He apparently regarded the fact that notice had not been given in the first action, No. 167, as a mere technicality, and on the merits of the application he made an order consolidating the two actions. The order was in fact made in action No. 848. So far as I know, up to date no order has been made in action No. 167. In the absence of any summons in C action No. 167, I do not see how any order could have been made in that action.

In those circumstances, the first point taken by the plaintiffs is that there was no jurisdiction in the learned judge to make any order at all affecting action No. 167. It has been argued before us very forcibly by counsel for the defendants that that point is the merest technicality, that there is no merit in it at all, that the common solicitors knew all about it all the time, and that it would D have been the easiest possible matter to cure, and, indeed, to cure even now, by drawing up an order in each of the two actions. But I have drawn attention to the provision of a form suitable for use in a case such as this, and I am bound to say that on this issue in my judgment the plaintiffs must succeed. I think that it is a fatal objection, however unmeritorious it may be, that an order was made in action No. 848 purporting to direct how action No. 167 should proceed.

E I confess that, for myself, I dislike deciding an issue like this on a mere technical ground, and I am therefore consoled by the fact that I am now able to say that in my judgment, on the merits, the case is one in which the learned judge erred in the exercise of his discretion, and, as I see it, erred in principle in such a way as to entitle this court to interfere. The learned judge, we were told, relied very much on the words used by SCRUTTON, L.J., in *Horwood* v. *Statesman Publishing* F *Co., Ltd.* (1), words which I think he was repeating from an earlier case of *Payne* v. *British Time Recorder Co., Ltd. & Curtis, Ltd.* (2). The learned lord justice said (1):

> " The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common G questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing, to strike out one or more of the parties. It is impossible to lay down any rule as to how the discretion of the court ought to be exercised. Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact, H bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

It seems to me, however, that when we look at the issues raised in the present I cases we are far from finding here

> " a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time . . ."

The only issue in the two actions which is, strictly speaking, common to both of them is the issue whether the words are defamatory at all, an issue which, as counsel for the plaintiffs suggested, might well be one which would not give the jury very much trouble. But there are very distinctive differences between the matters in issue in the two actions, having regard to the different defences put forward, to which I have already referred. In so far, therefore, as SCRUTTON, L.J., was setting out any principle on which discretion should be exercised in what he said in *Horwood's* case (3), I do not think that this case falls within that principle, and I am prepared to say that in my judgment the learned judge in this case erred in principle in the order which he made.

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(1) [1929] All E.R. Rep. at p. 558.

(2) [1921] 2 K.B. at p. 16.

The matter, however, does not rest there, for, thanks to the good sense of counsel who appear before us, there has been a certain amount of mutual concession, and both of them, I understand, are disposed to agree that, in lieu of an order for consolidation, it would be a proper case in which to make an order that the two cases be tried consecutively. That would involve action No. 848 being expedited so as to follow immediately after action No. 167. The only issue which appeared to remain between counsel after having applied their minds to that suggestion was that on one side it was said that the actions should follow each other so as to be tried by the same judge and jury, whereas on the other side it was said that that should be left to the discretion of the judge at the time, because it might be inconvenient to employ the same jury on the hearing of the second action as on the hearing of the first. As to that, speaking for myself, I should have thought it was most important that the two actions should be dealt with by the same jury.

In those circumstances, and especially having regard to the close measure of agreement between counsel, I have come to the conclusion that this is a case in which leave to appeal should be granted, notwithstanding the fact that the plaintiffs are out of time, and that on the appeal the proper order should be that the appeal is allowed, the order for consolidation set aside and replaced by an order that the two actions be tried consecutively by the same judge and jury.

HARMAN, L.J.: There will be one order in the two actions.

WILLMER, L.J.: I apprehend that we shall have to make an order in each action, because both actions are before us today.

Beyfus, Q.C.: Both actions are before your Lordships today because we have treated the learned judge's order as valid until set aside, and therefore we have appealed in the consolidated action.

WILLMER, L.J.: Therefore we shall have to make a new order.

HARMAN, L.J.: Although we have split them apart again, one order will be for both.

Beyfus, Q.C.: I think that is right, my Lord.

HARMAN, L.J.: I agree, and have nothing to add.

Order accordingly.

Solicitors: *Edward Thompson & Co.* (for the plaintiffs); *Swepstone, Walsh & Son* (for the defendants).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(3) [1929] All E.R. Rep. at p. 558.

PRACTICE DIRECTION.

Costs—Taxation—Bill of costs—Bills lodged after Jan. 1, 1960*—Rules of the Supreme Court* (*No.* 3), 1959 (*S.I.* 1959 *No.* 1958), *Sch.* 2, *Appendix* 2.

The Supreme Court Costs Rules, 1959*, apply to contentious work done after Jan. 1, 1960. All bills for taxation lodged subsequently will be drawn in two parts, one for work done prior to that date, drawn according to Appendix N to the Rules of the Supreme Court, the other for work done after, drawn according to Appendix 2 to the Supreme Court Costs Rules, 1959. In the case of the latter all items in the bill will be identified by inserting the appropriate Appendix 2 item number.

PAUL ADAMS,
Chief Master.

December, 1959.

PRACTICE DIRECTION.

CHANCERY DIVISION.

Costs—Taxation—Order—Chancery Division—Application for construction of document, or variation of trusts, or similar application—Form of order.

The following precedent of an order for the taxation and payment of costs has been approved by the judges of the Chancery Division for use on an application by originating summons for the construction of a document or under the Variation of Trusts Act, 1958, or other like application:—

IT IS ORDERED that it be referred to the taxing master

FIRST to tax the costs of an incidental to the said application of the plaintiffs the trustees of the said will

SECONDLY to tax on the common fund basis the costs of the defendants of and incidental to the said application and

THIRDLY to tax on the common fund basis the costs to which the said Legal Aid and Advice Act applies and which have been incurred on behalf of the defendant A.B.

AND IT IS ORDERED that the first and secondly mentioned costs be respectively retained and paid out of the fund held by the plaintiffs upon the trusts of the said will

NOTE: Sub-rule (2) of r. 1 of the Supreme Court Costs Rules, 1959†, contains the following definition:—

"'costs' includes fees, charges, disbursements, expenses and remuneration."

J. B. H. WYMAN,
Chief Registrar,
Chancery Division.

Jan. 27, 1960.

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* Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

† The rules are set out in the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959 No. 1958), Sch. 2.

JAQUIN *v.* HOLLAND.

[COURT OF APPEAL (Ormerod and Devlin, L.JJ., and Gorman, J.), January 19, 20, 1960.]

Landlord and Tenant—Repair—Damages for failure to repair—Measure of damages—Determination of tenancy—Premises immediately re-let, owing to housing shortage, after small expenditure on repair—Value of reversion found to have been diminished by more than twice sum expended—Larger sum still would have been required to put premises into good and tenantable repair—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5 *c.* 36), *s.* 18 (1).

In an action brought by a landlord against her tenant after the end of the tenancy for breach of a covenant by the tenant to keep and deliver up the demised bungalow in " good and tenantable repair " the landlord's surveyor and the tenant's surveyor estimated the sum required to put the bungalow into good repair to be £102 16s. and £91 13s. 6d. respectively. The defendant relied on s. 18* of the Landlord and Tenant Act, 1927, by which the damages were limited to the amount by which the value of the reversion in the premises was diminished. It was found that the diminution of value of the reversion was £50. At the time there was demand for premises in the neighbourhood and the landlord had immediately re-let the premises at the same rent as the tenant had been paying; she had expended £19 10s. only on making the premises presentable for re-letting. On appeal the landlord did not contend that the figure of £50 for the amount of damage to the reversion should be increased.

Held: (i) in assessing damages for the breach of the repairing covenant the test of the measure of damage (viz., in this case, the test established by *Proudfoot* v. *Hart* (1890), 25 Q.B.D. 42) was to be applied without regard to scarcity of and demand for housing at the time, and the fact that the premises were immediately re-let was an extraneous consideration; the damages were not limited, therefore, to the sum of £19 10s. (dictum of LAWRENCE, L.J., in *Hanson* v. *Newman*, [1933] All E.R. Rep. at p. 194, applied).

(ii) the recoverable damages were, however, limited by s. 18 of the Landlord and Tenant Act, 1927, to £50, which had been found to be the amount of the diminution in the value of the reversion, though, apart from this limit, they would have been more.

QUAERE (per DEVLIN, L.J.) whether in determining diminution in value of a reversion it was right to take into consideration a present demand for housing and the consequent possibility that a purchaser would accept a measure of disrepair without reducing the price that he would pay.

Appeal dismissed.

[As to the measure of damages for breach of covenant to repair, see 23 HALSBURY'S LAWS (3rd Edn.) 590, para. 1276; and for cases on the subject, see 31 DIGEST (Repl.) 374, *5044*, 375, 376, *5049-5052*.

For the Landlord and Tenant Act, 1927, s. 18 (1), see 13 HALSBURY'S STATUTES (2nd Edn.) 902.]

Cases referred to:

Hanson v. *Newman*, [1933] All E.R. Rep. 193; [1934] Ch. 298; 103 L.J.Ch. 124; 150 L.T. 345; 31 Digest (Repl.) 373, *5039*.

Joyner v. *Weeks*, [1891] 2 Q.B. 31; 60 L.J.Q.B. 510; 65 L.T. 16; 55 J.P. 725; 31 Digest (Repl.) 373, *5042*.

Proudfoot v. *Hart*, (1890), 25 Q.B.D. 42; 59 L.J.Q.B. 389; 63 L.T. 171; 55 J.P. 20; 31 Digest (Repl.) 359, *4900*.

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* The relevant terms of s. 18 (1) of the Landlord and Tenant Act, 1927, are printed at p. 404, letter E, post.

Appeal.

This was an appeal by the defendant, the former tenant of a bungalow and garden of which the plaintiff was the landlord, from a judgment given by His Honour JUDGE GLAZEBROOK at Sevenoaks County Court on July 6, 1959, allowing an appeal by the plaintiff from a judgment of Mr. Registrar LEON, given on June 15, 1959, in proceedings by the plaintiff, after termination of the tenancy, for damages against the defendant for breach of the repairing covenant, which included obligation to cultivate the garden, in a tenancy agreement between the parties. By his judgment the registrar awarded £29 10s. damages (being £19 10s. for disrepair of the bungalow and £10 for failure to cultivate the garden) to the plaintiff. The county court judge set aside the judgment of the registrar and awarded £60 damages (being £50 for disrepair of the bungalow and £10 for failure to cultivate the garden) to the plaintiff.

The facts appear in the judgment of ORMEROD, L.J.

J. M. Drinkwater for the defendant, the tenant.

J. H. Gower for the plaintiff, the landlord.

ORMEROD, L.J.: This is an appeal from a judgment of His Honour JUDGE GLAZEBROOK given at Sevenoaks on July 6, 1959. The case arises in these circumstances. The plaintiff in the action is the owner of a bungalow, No. 49, Oakdene Road, Sevenoaks, which she had let on a tenancy agreement for a period of one year for the sum of £265 to the defendant. The agreement was dated Mar. 18, 1958, and the only terms in the agreement with which we are concerned are the terms relating to the repair of the premises. By para. 4 of the agreement, the tenant agreed with the landlord:

> "(c) To keep the interior of the said premises and all blinds windows shutters doors locks fastenings bells and other fixtures fittings and conveniences now belonging thereto in good and tenantable repair (damage by accidental fire storm or tempest excepted) and to cultivate the garden in a proper manner . . . (k) To yield up the said premises at the end of the tenancy with all additions (if any) thereto and fixtures thereof except tenant's fixtures in good and tenantable repair (except as aforesaid)."

The tenant entered into occupation of the bungalow on the terms of the agreement, but, at the end of eight months of his tenancy, he wished to vacate the premises. There was some correspondence with the landlord or his solicitors on that matter, and the result was that the tenant was allowed to give up his tenancy, the landlord having found another tenant who was willing to take over the premises. The tenant vacated the premises on Nov. 28, 1958. After the premises were vacated, Mr. Coles, the surveyor appointed on behalf of the landlord, inspected the premises and made a schedule of dilapidations which has been before the court. The only matter that I need mention with regard to that schedule is that the total sum came to £102 16s. Mr. Platts, the surveyor appointed by the tenant, also inspected the premises and prepared a schedule of dilapidations. The two surveyors attempted to agree the amount of dilapidations, but were unable to do so, with the result that these proceedings were commenced by the landlord against the tenant for damages arising from the tenant's breach of the covenant to repair.

The matter came before the learned county court judge, and, by agreement, it was remitted by him to the registrar of the county court. The parties appeared before the registrar, who heard the matter and delivered a careful judgment which showed that he had given full consideration to the various matters in question. The hearing before the registrar occupied two days. On one day he heard the evidence which was called by the parties (the evidence being that of the plaintiff and Mr. Coles, on the one hand, and of Mr. Platts, on the other hand) and, on a subsequent day, he heard legal submissions from the parties and the matter was thoroughly investigated by him. The registrar came to the conclusion that the tenant had been in breach of his covenant and that the proper sum to award in damages was the sum of £29 10s., which was the sum of £19 10s. for repairs to the house and £10 (a sum which is not in issue now), being the amount which was required to put the garden into proper order after the tenant's neglect of it. The landlord, not being satisfied with the finding of the registrar, appealed to the county court judge, as he had power to do under C.C.R., Ord. 37, r. 5. The matter thereupon came before the county court judge for argument, and the county court judge, having considered it, varied the finding of the registrar and found that the sum to which the landlord was entitled was £60, being £50 in respect of damages for breach of covenant for non-repair of the house and £10 for the garden. It is against that decision of the county court judge that the tenant now appeals.

The claim, in the landlord's particulars of claim, was for damages for breach of the covenant to repair, and the particulars were set out in the schedule of dilapidations which was attached to the particulars of claim. By his defence, the tenant denied that there was a breach of covenant, and alleged that, if there were, the schedule was unreasonable and the cost of doing the works required was excessive. Further, the defendant pleaded s. 18 of the Landlord and Tenant Act, 1927, and it might be well at this stage to refer to the provisions of that section. Section 18 (1) provides:

> "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid . . ."

The second part of the subsection is not material to the issues in this case. The effect of that provision, shortly, appears to be that, whatever may be found to be the cost of doing the repairs rendered necessary by the failure of the tenant to observe his covenant to repair, the damages which the landlord is entitled to recover shall be limited to the diminution in the value of the reversion of the premises.

According to the findings of the registrar, set out in his judgment, the evidence of Mr. Coles, the surveyor called on behalf of the landlord, was that there was a want of repair which would cost £102 16s. to put right. According to the judgment, Mr. Coles said that he prepared his schedule on what he regarded as proper grounds, that is, on the footing that the premises be put into good and tenantable repair on his understanding of the covenant, and he said that he had put into the schedule every possible defect, and that, in his view, that was the correct interpretation of the covenant. In his summary of Mr. Coles's evidence on these matters, the registrar went on to say:

> "He also said that with regard to selling the property he would not advise any abatement in the asking price in view of the condition of the house, but he might so advise during negotiations for a sale. He also said that the property was lettable in the condition it was left because the demand was so high."

The evidence of Mr. Platts, according to the registrar, was that in Mr. Platts' view no damages at all were payable by the tenant in respect of want of repair, because there had been no diminution in the value of the freehold reversion. According to the registrar, Mr. Platts came to that conclusion for two reasons: first, that the items of non-repair were trivial in themselves, and, therefore, not likely to affect the value, and secondly that the demand for houses was so great in Sevenoaks that these matters were not likely to affect any price which might be procured for the sale of the house. But, according to the registrar again, Mr. Platts agreed that, if damages were to be paid, and if there had been liability on the tenant for these various items of non-repair, there were a number of items for which he would be liable, and those items are set out in the registrar's judgment by number in reference to the schedule of dilapidations. According to the registrar, the total of those items is £91 13s. 6d. Counsel for the tenant, on instructions, has submitted that that figure of £91 13s. 6d. is not the correct figure and that there is no evidence to justify it. Whatever the figure was, it was certainly a substantial figure which may or may not have been as much as the registrar calculated it to be, namely, £91 13s. 6d. In effect, according to the registrar, what Mr. Platts was saying was: " Here no damages should be paid because there has been no diminution in the value of the reversion of the property. But, if I am wrong about that, and there has been diminution, then the amount of items for which the tenant is responsible, I admit, are the items set out by the registrar "—which, according to the registrar, amount to £91 13s. 6d. That is the evidence of the two surveyors. In addition, the landlord herself had said that she had spent the sum of £25 11s. 2d. (which is, as a matter of fact, a wrong figure; the correct figure is £19 10s.) on work on the house to put the house in what she called " presentable " condition, and that, after that, she had let the house in that condition for the same rent to the new tenant.

That is how the matter stood when the learned registrar had to consider his findings. He appears to have directed himself correctly on the rule which he had to consider on the question whether or not there had been a breach of the covenant in this case. That was the first matter to which he had to direct his attention. He founded his consideration of that point on *Proudfoot* v. *Hart* (1), which is a very well-known case on this matter. It is only necessary for me to read the headnote in that case, which sets out, I think, quite clearly what the rule is as expressed by LORD ESHER, M.R. (2). The headnote runs as follows:

> " Under an agreement to keep a house in ' good tenantable repair,' and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it."

In the present case both parties agreed that this was a covenant which came within the rule in *Proudfoot* v. *Hart* (1), and that, before the registrar and before the learned county court judge, that was the rule to be considered in deciding whether there had been a breach of the covenant. The registrar, in his judgment, says:

> " I am quite satisfied on the authorities that the test is the cost of putting the property into a condition in which a reasonable tenant would be likely to take the house having regard to its class, character and locality."

As to that, I think that there can be no quarrel, and I do not think that anybody has quarrelled with that part of the registrar's judgment. But he then goes on to say:

> " Here we find a reasonable tenant actually taking the premises, but with certain work actually done. The cost of this work I calculate at £25 11s. 2d., but I will hear the parties later as to the exact amount of this calculation."

A little later in his judgment he says this:

> " But I have come to the conclusion that the tenant is only liable for the work necessary to make the house lettable. [Perhaps, that is a short way of putting the rule in *Proudfoot* v. *Hart* (1).] I calculate the figure from the

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(1) (1890), 25 Q.B.D. 42.

(2) (1890), 25 Q.B.D. at p. 52.

> account at £25 11s. 2d.; accordingly that is the amount the [tenant] is liable to pay to the [landlord] . . ."

What, in fact, the registrar did was to say: " Some work has been done on this house by the landlord herself. That work having been done, she was able to let the house. Therefore, the amount which she has spent on the house has been sufficient to put it in a condition which would enable it to be let to a reasonable tenant ". So far as I know, there was no evidence before the court whether the new tenant was a reasonable man or was not, and there was no evidence before the court as to the considerations which had affected the mind of the new tenant when he took the house. The registrar appears to have taken the view that, if £25 was all that was necessary to put the premises into repair so that they could and would be taken by a new tenant, the fact that a new tenant had taken them was evidence that all that was necessary had been done, and, in those circumstances, that was all that the former tenant (the defendant) was liable to pay.

It was contended on behalf of the landlord—and contended with very considerable force here—that what the registrar had done was to take into account the property market, not at what might be regarded as a normal time, but at the present time when, as the evidence showed, there was a very great demand for houses, particularly houses to let, in this particular district. In consequence, the registrar found that the sum of £25 11s. 2d. (which was later altered to £19 10s.) was the figure which he should award as being the cost of putting these premises into repair.

The registrar then had to consider the further question whether that sum was a larger sum than the diminution in the value of the freehold reversion. It was submitted, on the one hand, that the diminution in value was the sum of £102 contended for by Mr. Coles, and, on the other hand, that there had been no diminution in value at all, and that was contended by Mr. Platts on the ground that the property would be sold for the same price, whether this work was done or not. The registrar did not agree with either of the parties. He said:

> " My own view is that the truth lies somewhere between the two views. I think the purchaser might ask for a reduction or the vendor ask for something less. My view is that £50 is the proper figure for the reduction in the selling price at the time of Mr. Coles's inspection."

Counsel for the tenant submitted that that was not a finding that there had been a diminution in the value of the reversion to the extent of £50, as in this case it was never intended that this should go on the market. That, I think, is not a proper view. It appears to me that there must be a moment of time when the freehold reversion, unincumbered, is vested in the landlord, and the question is: What is the value of the freehold reversion at that time? It appears to me that the finding of the registrar that there would be a reduction in the selling price of £50 at that time does mean that there would be a diminution of £50 in the value of the freehold reversion.

In those circumstances, the registrar having come to the conclusion that £19 10s., plus £10, was the proper figure, and that that was within the maximum sum of £50 which he found was the diminution in the value of the reversion, he gave judgment for that figure of £29 10s. The matter came before the learned county court judge, and he varied the order of the registrar, and came to the conclusion that the proper figure to which the landlord was entitled was the sum of £50, plus the £10 for the damage to the garden. He put it in this way:

> " The registrar further found that the premises had been re-let at the same rent. From a common-sense point of view there is a great deal to be said for what the registrar found. He says that in this case after spending £19 10s. the premises were re-let at the same rent. That, however, is not the diminution in value. Somebody might have taken the premises as they were,

without anything being done. I think that the registrar made a mistake in going on to consider the letting which had been made."

Counsel for the tenant contended that the sum of £19 10s. was the proper sum in that it was all that was necessary to put the premises into a lettable condition—and that is what the registrar found—and that, as this was a covenant to which the rule in *Proudfoot* v. *Hart* (3) applied, a proper application of that rule showed that only a sum of £19 10s. was due in respect of this breach of covenant. Counsel for the landlord, on the other hand, contended that there was no evidence to justify the registrar in coming to the conclusion that £19 10s. was the proper figure: it was true that that was the amount which had actually been spent by the landlord in doing such repairs as she considered necessary to make the house presentable, and that she was then able to let the house at the same figure, but that was not the proper way to apply the test. The test was not whether the house could be let in all circumstances, and whatever the pressure for houses might be in that particular area at any particular time. The real test to apply was the test of the amount that was necessary to put the house into a proper condition for letting in accordance with the terms of the covenant, so that it would be taken by a reasonable man wanting a home in reasonable condition, having regard to the nature and type of house involved. Counsel pointed out that the surveyor called by the landlord had said that the sum of £102 was necessary to put the house in proper repair. The surveyor called by the tenant had said that a lesser sum of £91, or some other approximate sum, would be necessary, if any sum was necessary at all—and that the reason why it was not necessary was because, in these particular circumstances, there had been no diminution in the value of the freehold reversion. The registrar held—and nobody has quarrelled with his finding—that in fact there had been a diminution to the extent of £50. In those circumstances, says counsel for the landlord, the amount to which the landlord is entitled is the sum of £50. But he would be entitled to a larger sum—either £90 or £100—whatever the registrar found in the circumstances necessary—were it not for the restriction imposed by s. 18 of the Act of 1927. In view of that restriction and the registrar's finding, £50 is the largest sum in the circumstances which can be claimed by the landlord.

All that I need say is that I accept that view. It is not correct, in a case of this kind, to take the circumstances of letting and say that, because any house can be let almost in any condition at the present time, then there is no obligation on a tenant to perform his covenant to repair. The rule in *Proudfoot* v. *Hart* (3) is a guide as to the extent of repair which may be necessary in order to comply with a covenant of this kind. But it is a guide which calls in that useful individual, the reasonable man, acting in reasonable circumstances. In those circumstances, I think that it must be clear from the evidence that a larger sum than the sum which the registrar had awarded would be the sum which would be payable. I am, therefore, of the view that the figure which the registrar should have found is some figure larger than the sum of £50—how much larger matters not for the purposes of this case—but reduced to the sum of £50 because that is the sum which has been found by the registrar to be the diminution in the value of the reversion. In those circumstances it follows that the learned county court judge was right in varying the order of the registrar, and ordering that the sum which should be paid should be the sum of £50 plus the undisputed sum of £10 for the garden. In my judgment, therefore, this appeal should be dismissed.

DEVLIN, L.J.: Where, at the end of a tenancy, there is a claim for dilapidations, clearly the first thing that has to be done is to draw up a list of the work that it is necessary to do in order to put the premises into " good and tenantable repair ", these words being the words of the covenant in this case. The test that is very frequently applied in order to ascertain exactly what is meant by " good and tenantable repair ", and, therefore, to ascertain exactly what work it is necessary to do, is the test that was laid down in *Proudfoot* v. *Hart* (4), to which ORMEROD, L.J., has referred. We need not go into the question whether or not that is the universal test. It has not been disputed in this case as being the appropriate test. Accordingly, in accordance with that test, the surveyors on both sides, for the landlord and for the tenant, drew up their lists of dilapidations, and, as I read the judgment of the learned registrar, the conclusion at which he arrived was that the work that it was necessary to do, according to the evidence of the landlord's surveyor, came out at £102 16s., whereas, according to the evidence of the tenant's surveyor, it came out at £91 13s. 6d.

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(3) (1890), 25 Q.B.D. 42.

Having ascertained the amount of work that it is necessary to do in accordance with *Proudfoot* v. *Hart* (4), and having put a figure on it, that does not necessarily conclude the matter, because s. 18 of the Landlord and Tenant Act, 1927, provides that the damages are not to exceed the amount, if any, by which the value of the reversion in the premises is diminished. Therefore, one has to go on to inquire to what extent the value of the reversion has been diminished. That inquiry the registrar made, and he came to the conclusion that the reduction in the selling price amounted to £50, that is to say, he appears to have held that, notwithstanding that it would cost at least £91 13s. 6d. in his view to put the premises into good and tenantable repair, the damage to the reversion did not amount to more than £50. He arrived at that conclusion because of the shortage of houses in Sevenoaks and the desirability of them from the point of view of buyers. Thus he was saying that a buyer who was making a bid for this house, if it were put on the market, would say to himself: " I will put up with £41 odd of damage to the house, which I shall have to spend on repairs, because houses are short and it is very desirable to get one ". I am not at all sure—and I should like to guard myself against deciding it and reserve the point for consideration when it arises—whether that was the right thing to do. I can imagine, for example, a house that is worth £5,000, which is let, let us say, at a rental of £250 per annum, where at the end of the tenancy £50 worth of damage had been done, and £50 would have to be spent on it in order to put it into good and tenantable repair. That is an appreciable sum, if one looks at it from the point of view of the rent which the landlord is getting. It is twenty per cent. of the rent. On the other hand, if one looks at it from the point of view of the capital value of the house, it may not matter very much. Even if there were no particular shortage or particular desirability of houses to be taken into consideration, I can still imagine that an auctioneer might be found who would say: " Well, where the damage is so small a figure as £50, a prospective buyer, in making his bid, is likely to disregard it altogether ". I do not think that it necessarily follows from that that it is the intention of the Act of 1927 that it should be disregarded altogether, or that a landlord will just have to put up with what is, in effect, a real loss. As I say, I would desire to reserve my opinion on that question. It does not arise here, and it does not arise because counsel for the landlord is not asking for the higher figure of £91. He is content, very sensibly, with the figure of £50 which has been found by the learned registrar as the reduction in the selling price. I say " very sensibly " because these are small figures, and there has been a good deal of litigation about them already. Although he contended before the county court judge that £91 was the right figure, the county court judge rejected it, but gave him still something more than the registrar gave him, that is to say, the sum of £50, and he has taken that sum of £50. Therefore, the question does not arise here.

I have said that the learned county court judge gave the landlord something more than the registrar had given him, and that is because the registrar, although he found the reduction in selling price to be £50, did not accept that reduction

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(4) (1890), 25 Q.B.D. 42.

A in the selling price as being the true measure of damage. The test which he propounded is set out in his judgment in the following words:

> " . . . The test is the cost of putting the property into a condition in which a reasonable tenant would be likely to take the house having regard to its class, character and locality. Here we find a reasonable tenant actually B taking the premises, but with certain work actually done. The cost of this work I calculate at [I substitute the figure which ultimately emerged as being the correct one] £19 10s."

Therefore, the registrar limited the damages to £19 10s.

The issue between the parties before us, therefore, has been simply whether it should be the reduction in the selling price of £50 which the registrar found, C and which the learned county court judge adopted, or whether it should be the lower sum of £19 10s. Counsel for the tenant has supported the registrar's judgment, and is asking us to reverse the conclusion of the learned county court judge. He is supporting the registrar's judgment on two grounds. First, he submits that, as the premises were actually re-let in this case, and as on the particular facts of this case the re-letting was, so to speak, stipulated for before D the tenancy ended (that is to say, the landlord said that he would not agree to a surrender of the tenancy unless he could succeed in re-letting the premises), therefore what fell back into the landlord's hands, and what is properly described as the reversion, is the new lease, and that, as the new lease was at the same rent, subject to the payment of £19 10s., £19 10s. is the diminution in the value of the reversion. I think that that argument is unsound. There must always be E a notional moment of time, even if one lease immediately succeeds the other, in which the estate finds its way back into the hands of the landlord, and the value of the reversion is, therefore, the value of the freehold as it has come back into the hands of the landlord before he lets it out again. That that is what is intended by the meaning of " reversion " in s. 18 (1) of the Act of 1927 is, I think, made quite clear by the judgment of LAWRENCE, L.J., in *Hanson* v. *Newman* (5). He F referred to the words of s. 18 (1) of the Act:

> " . . . shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished . . ."

He then said (6):

> " The expression ' whether immediate or not ' in that part of the section G which I have read is, I think, explained by reference to the case, to which our attention has been called, of *Joyner* v. *Weeks* (7). A reversion may not be a reversion in possession (i.e., it may not be immediate) by reason of the freeholder having granted a reversionary lease, and in that case the reversionary lease is not to be taken into account in assessing the damages."

That is dealing with the position in which the landlord has already got a rever- H sionary lease before the termination of the one which is being considered for the purpose of dilapidations. In my judgment, the position must be exactly the same whether the second lease is granted before the completion of the first lease or after it. It still has got to be disregarded, and what has to be ascertained as the value of the reversion is the value of the freehold.

Alternatively, counsel for the tenant contended that, if " reversion " must be I given this meaning as the value of the freehold, nevertheless the lettable value of the freehold is something which ought to be taken into account in valuing the reversion. That raises, although in a more acute form, the point to which I have already referred, how far market values ought to be taken into account in cases of this sort. In one sense it can be said that the lettable value of a house is a good enough guide to what its capital value is, and, if that is all that is meant by the argument, then I see no objection to it. But in this matter of repairs it may A assume a very different aspect. Take again the example which I quoted, £5,000 being the value of a house with £50 to be spent on repairs. If one considered lettable value—and taking five per cent. of £50, it is only £2 10s.—it is extremely improbable that any tenant will say, if he is asked to take it again for £250: "No, I am only going to pay £247 10s., because I shall have to spend £50 on repairs to it". Moreover, the length of the proposed tenancy might affect the B rent. Therefore, I should have thought that, in general, the rent which could have been obtained for the house is not any very valuable guide to the value of the reversion. Clearly, in the way in which the test has been applied by the registrar in this case, it is a wrong one, because he has taken an actual letting which plainly—I think it is clear from the terms of his judgment—was only effected because of the shortage and desirability of houses in Sevenoaks. He has C found, in terms, that the diminution of the selling price is £50. If he finds that, notwithstanding that, the house can be re-let at an expenditure of only £19 10s., he must be finding that other considerations besides the diminution in the value of the reversion are affecting the tenant's mind, those other considerations being the shortage and desirability of a house in Sevenoaks. Those considerations, in my judgment must be extraneous to the true principle on which the value should D be arrived at. Therefore, I agree that the learned county court judge took the right view, and that this appeal should be dismissed.

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(5) [1933] All E.R. Rep. 193; [1934] Ch. 298.
(6) [1933] All E.R. Rep. at p. 194; [1934] Ch. at p. 304. (7) [1891] 2 Q.B. 31.

GORMAN, J.: I also agree, and I desire to say this only. It is quite obvious that the registrar gave the most careful consideration to this matter. He said:

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> "I am quite satisfied on the authorities that the test is the cost of putting the property into a condition in which a reasonable tenant would be likely to take the house having regard to its class, character and locality."

There is no question, therefore, that he correctly applied the test laid down in *Proudfoot* v. *Hart* (8). But where, in my view, he went wrong is in the next three or four lines of his judgment. He said: F

> "Here we find a reasonable tenant actually taking the premises, but with certain work actually done. The cost of this work I calculate at £25 11s. 2d. [which was later reduced to £19 10s.]"

In my view, the registrar, having stated correctly the principle to be applied, went wrong in restricting the figure, in the circumstances of this case, to the G amount of work which had actually been done before the new tenant would take possession of this house. I have nothing further to add.

Appeal dismissed.

Solicitors: *Neve, Beck & Co.*, agents for *W. H. House & Son*, Sevenoaks (for the defendant); *Vallis & Struthers*, Sevenoaks (for the plaintiff).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

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(8) (1890), 25 Q.B.D. 42.

A

CROWE (VALUATION OFFICER) *v.* LLOYDS BRITISH TESTING CO., LTD.

[COURT OF APPEAL (Morris, Willmer and Harman, L.JJ.), December 9, 10, 11, 18, 1959.]

B *Rates—Assessment—Gross value—Non-industrial building—Chain and anchor testing house—Hereditament was a factory—Whether used wholly or mainly for " industrial purposes "—Rating and Valuation Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 90), *s.* 22 (1) (*a*), (*b*), *s.* 22 (4)—*Rating and Valuation* (*Miscellaneous Provisions*) *Act,* 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 5 (1), (2), (3).

Statute—Construction—Construing Acts as one—Whether later Act affects the
C *construction of earlier Act—Amendment of earlier Act by subsequent Act.*

In the Rating and Valuation (Apportionment) Act, 1928, s. 4 (2), the term " industrial purposes " means the manufacturing purposes that make the hereditament a factory and accordingly the term when used in s. 22 (4) of the Rating and Valuation Act, 1925, which was added by amendment in 1955, has the same meaning, since the Act of 1925 is by s. 84 of the Local
D Government Act, 1929, to be construed as one with the Act of 1928 (see p. 420, letter I, to p. 421, letter A, p. 422, letter A, and p. 423, letter H, post).

A hereditament was used for the testing of chains and anchors to ensure that they complied with the provisions of the Anchors and Chain Cables Act, 1899. The testing house had been held in 1931 not to be an industrial hereditament within the meaning of the Rating and Valuation (Apportion-
E ment) Act, 1928, s. 3 (1), and the occupiers claimed that it should be assessed under the Rating and Valuation Act, 1925, not to net annual value under s. 22 (1) (b) but direct to gross value under s. 22 (1) (a), as a non-industrial building within the definition of that term in s. 22 (4) added by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5 (3), on which basis the hereditament would qualify for a measure of relief under the Rating and
F Valuation Act, 1957. By s. 22 (4) non-industrial building meant " a building . . . of any description, with the exception of factories, mills and other premises of a similar character used wholly or mainly for industrial purposes . . ."

Held (MORRIS, L.J., dissenting): the testing house was assessable under s. 22 (1) (a) of the Rating and Valuation Act, 1925, as a non-industrial
G building within s. 22 (4) for the following reasons—

(i) the words " used wholly or mainly for industrial purposes " in the exception in s. 22 (4) qualified the descriptions " factories ", " mills " and " other premises of a similar character " preceding them, and

(ii) though the testing house was a factory, it was not used for " industrial purposes " (which term in s. 22 (4) bore the meaning stated at letter C,
H above) and thus was not within the exception.

Grove v. *Lloyds British Testing Co., Ltd.* ([1931] All E.R. Rep. 242) applied.

Appeal dismissed.

[As to hereditaments requiring a gross value for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 383, para. 820; and for cases on the subject, see DIGEST Supp.

I For the Rating and Valuation Act, 1925, s. 22 (1), as originally enacted, see 20 HALSBURY'S STATUTES (2nd Edn.) 127; and for the amended subsection and s. 22 (4) as enacted by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5 (1), (2), (3), see 35 ibid., 388.]

Cases referred to:

International Bridge Co. v. *Canada Southern Ry. Co., Canada Southern Ry. Co.* v. *International Bridge Co.,* (1883), 8 App. Cas. 723; 42 Digest 664, *745.*

Cardiff Revenue Officer v. *Cardiff Assessment Committee & Western Mail, etc.*, [1930] All E.R. Rep. 30; [1931] 1 K.B. 47; 96 L.J.K.B. 672; 143 L.T. 500; 94 J.P. 146; Digest Supp.

Grove (*Dudley Revenue Officer*) v. *Lloyds British Testing Co., Ltd.*, [1931] 1 K.B. 404; *revsd.* H.L., [1931] All E.R. Rep. 242; [1931] A.C. 450; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; Digest Supp.

Preston & Area Rent Tribunal v. *Pickavance*, [1953] 2 All E.R. 438; [1953] A.C. 502; 117 J.P. 398; [1953] 3 W.L.R. 242; 3rd Digest Supp.

Case Stated.

The valuation officer appealed by way of Case Stated against a decision of the Lands Tribunal (Erskine Simes, Esq., Q.C.), given on Nov. 24, 1958 (4 R.R.C. 148), dismissing an appeal by the valuation officer against a decision of a local valuation court of Stafford South Local Valuation Panel.

The respondent ratepayers were the occupiers of a hereditament comprising a testing house and premises assessed at £2,500 rateable value in the valuation list for Dudley County Borough. They contended that the hereditament consisted of one or more houses or other non-industrial buildings within the meaning of s. 22 (1) (a) of the Rating and Valuation Act, 1925, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5 (3), and should be assessed direct to gross value at £2,700 gross value, £2,247 net annual value (for which the appropriate rateable value would be £1,798). The valuation officer contended that the hereditament did not fall within the classes of hereditament referred to in s. 22 (1) (a) but required to be assessed direct to net annual value under s. 22 (1) (b). The Lands Tribunal held that the hereditament required to be assessed to gross value under s. 22 (1) (a). The valuation officer appealed to the Court of Appeal.

W. L. Roots, Q.C., and *J. R. Phillips* for the valuation officer.

J. P. Widgery, Q.C., and *D. G. Widdicombe* for the ratepayers.

Cur. adv. vult.

Dec. 18. The following judgments were read.

MORRIS, L.J.: This is a Case Stated by the Lands Tribunal for the decision of the Court of Appeal pursuant to s. 3 (4) of the Lands Tribunal Act, 1949. The question is whether, on the facts as found, the premises of Lloyds British Testing Co., Ltd., the respondent ratepayers, are to have their rateable value ascertained under s. 22 (1) (a) of the Rating and Valuation Act, 1925, as amended, or under s. 22 (1) (b). The figures which respectively become applicable on the basis of the alternative contentions are not in dispute.

The ratepayers own and occupy a hereditament which is described as testing house and premises in Dudley. They occupy and use the hereditament for the purpose of testing, proving and finishing chain cables and anchors in accordance with the provisions of the Anchors and Chain Cables Act, 1899. Under that Act it is provided that a maker of or dealer in anchors or chain cables shall not sell or contract to sell, nor shall any person purchase or contract to purchase, for use on any British ship, any chain cable or any anchor exceeding 168 lb. in weight unless it has been previously proved in accordance with the Act. A contract for the sale of any such chain, cable or anchor carries with it, in the absence of an express stipulation to the contrary, an implied warranty that the anchor or cable has before delivery been proved in accordance with the Act. A chain cable or anchor must be tested and proved by authorities independent of the manufacturer, of whom the Committee of Lloyd's Register of British and Foreign Shipping for testing establishments is one. The ratepayers had a licence pursuant to the provisions of s. 5 of the Act for the testing of anchors and chain cables with a view to their proof. The Act lays down the methods of testing anchors and chain cables, and prescribes the tensile strength and the breaking strain used for the purpose of testing anchors and chain cables. Provision is

A made for the authorising of the maximum charges which may be made by a licensed tester, who must clearly show in his testing establishment both the authorised scale of maximum charges and the charges actually made by him. An inspector of testing establishments is appointed. It is important to appreciate the nature of the work involved in the testing and finishing of chain cables. A statement in regard to it can conveniently be found in the report of a case (1) B concerning the ratepayers, to which case I will later refer. I cite from that report the following passage (2):

> "The cables were sent to the occupiers' works in their manufactured state but unfinished in the respects hereinafter mentioned. In accordance with the provisions of s. 9 of the Act of 1899 a piece of three links was C selected and cut out of the length of chain cable. This cutting out was performed by a heavy hydraulic cutter which severed two links one on each side of the piece of three links. The sample piece was then taken to a hydraulic machine and subjected to a test load, called the breaking strain, determined as to load by the provisions of Sch. 2 to the said Act. If the piece selected failed to withstand the breaking strain, a further sample piece D was cut out in the aforesaid manner and subjected to the same test. If neither of the samples withstood the breaking strain the whole length was rejected.
>
> "If one of the sample pieces satisfactorily withstood the breaking strain the several parts of the cable length were joined together by a welded link formed and welded at a forge on the premises by the occupiers' employees. E The restored cable length was then placed in its entire length in the chain proving machine and subjected to a reduced test load, as provided by the Act, and termed the tensile strain, and this test resulted in appreciable elongation of the cable and a certain change in shape in each link. The cable was then carefully examined link by link by two separate sets of examiners successively who in the course of examination detected any flaws F and removed all scale from the links. In the event of any defective links being found on this examination these were cut out and replaced by welded links formed and joined in the manner above described, and the whole length was then retested. When the said tests had been applied in accordance with the Act the occupiers, as licensed testers, were under obligation to, and did in fact, stamp with a distinctive mark, as laid down in s. 10 of the G Act, each cable that had withstood the said strains and was in the opinion of the licensed tester without flaw or material weakness. Thereafter the cable length was drawn into a tank and submerged in hot water. Whilst still hot it was then drawn through a second tank containing an anti-corrosive tar preparation and after that it was ready for despatch to the ultimate consignee. These last two processes were necessary in order to H make the cable commercially saleable, and if not carried out at the occupiers' works would have to be carried out at some other place and either by the manufacturer, purchaser or some other person. With regard to anchors, these were similarly received in their manufactured state from the makers but unfinished in the respects hereinafter mentioned. The anchor was weighed to determine the test load. It was then placed in the anchor I testing machine and submitted to the statutory proof strain required. It was then taken to pieces for examination of the various parts, and if satisfactory was reassembled. In some types of anchor, the riveting of heated pins inserted by the occupiers' workmen was necessary in the process of reassembly. When an anchor had passed the test, the obligations and practice of the occupiers as regards stamping was the same mutatis mutandis

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(1) *Grove* v. *Lloyds British Testing Co., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450.
(2) [1931] 1 K.B. at p. 405.

> as in the case of cables. Before delivery to the consignees anchors were painted by hand. A
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> " It was further the obligation under the Act and practice of the occupiers, upon request, to deliver a certificate in respect of any cable or anchor which had respectively withstood the said strains and in the opinion of the occupiers was without flaw or material weakness.
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> " The hereditament contained heavy machinery and plant both hydraulic and electric for the purpose of carrying out the work above mentioned and also of other work carried out upon the hereditament, which consisted of testing samples of metal, cable, wire rope and other metal substances for other manufacturers, such tests not being in any way connected with the Act of 1899. In the case of such wire rope the method employed was to test to destruction, i.e., to place strain upon the rope until it broke, and the result of such test was communicated to the manufacturers by means of a written statement or formula showing the result of the test. In the hereditament there was a machine shop installed with power and machinery in which the manufacture and repair of tools and plant used by the occupiers and the shaping of portions of metal for the above mentioned tests were carried out." B C D

The Lands Tribunal has found that the hereditament is similarly used today save that the three links for the breaking test are now cut at the maker's premises and not on the hereditament, and that the amount of " forging " of links has been considerably reduced since 1931 consequent on the use of high tensile steel, which cannot be forged on the hereditament, for cables.

Section 22 of the Rating and Valuation Act, 1925, provided for the method of ascertaining the rateable value of a hereditament for the purposes of the first new valuation list to be prepared under the Act and of any subsequent valuation list. For hereditaments coming under sub-s. (1) (a) there was one method of ascertaining the net annual value; for those coming under sub-s. (1) (b) there was another. A hereditament was under (a) if it belonged to one of the classes specified in the first column of the table contained in Part 1 of Sch. 2 to the Act. A hereditament was under (b) if it was not such a hereditament as mentioned under (a). If reference is made to Part 1 of Sch. 2, it will be seen that the first five classes of hereditaments are " houses and buildings without land other than gardens " of varying gross values. But there is an important note to Part 1 of the Schedule which reads: E F

> " For the purposes of this Part of this Schedule the expression ' houses and buildings ' does not include mills, manufactories or premises of a similar character used wholly or mainly for industrial purposes or hereditaments valued as part of any railway, dock, canal, gas, water, electricity, or other public utility undertaking." G

There was no definition of the word " manufactories " nor of the phrase " industrial purposes ". The words that I have quoted from Sch. 2 remained in effective operation until slightly altered in 1955. Were the premises at Dudley a manufactory or were they of a similar character to a manufactory? Were they used wholly or mainly for industrial purposes? The words to which I refer must be given ordinary reasonable meanings. The word " manufactory " was probably in 1925 synonymous with factory or workshop, but, whether this was so or not, I would consider that the testing establishment would aptly be described as premises of a similar character to a manufactory. Were they used wholly or mainly for " industrial purposes "? I would have thought clearly so. As Parliament did not define the phrase, it would be inapposite to seek to do more than to decide whether or not a particular purpose does come within the phrase " industrial purpose ". The phrase denotes a contrast with various other purposes such as, e.g., residential purposes, or the purposes of a retail shop. An industrial purpose connotes to my mind a purpose connected with industry. If an industrial H I concern makes and sells chain cables and anchors, and if the concern can only sell them if it pays a testing establishment to prove and test them, I would consider that the premises of the testing establishment were being used either wholly or mainly for industrial purposes.

If I am right in my view of the position under the Act of 1925, then the question arises whether any change was made as a result of any later legislation or as a result of an amendment made in 1955 of the Act of 1925. In 1928 the Rating and Valuation (Apportionment) Act, 1928, was passed. It was required that in valuation lists certain classes of hereditaments were to be distinguished from each other and " agricultural hereditaments ", " industrial hereditaments " and " freight-transport hereditaments " were to be so distinguished. The Act proceeded to prescribe a highly technical definition of an industrial hereditament. Subject to a qualification, it meant a hereditament occupied and used as a mine or mineral railway or as a factory or workshop. The expressions " factory " and " workshop " were " for the purposes of " that Act to have the same meanings as in the Factory and Workshop Acts, 1901 to 1920. The qualification was that, though a hereditament might be occupied and used as a " factory " or " workshop " (those words having for the purposes of the Act their meanings as in the Factory and Workshop Acts), yet it would not be an " industrial hereditament " if it were primarily occupied and used for certain specified purposes or any combination of them. One group of such purposes consisted of the purposes of a public supply undertaking. Another group of such specified purposes consisted of purposes " which are not those of a factory or workshop ". In that context again the words factory and workshop have their attributed meanings.

After the passing of the Act of 1928 and of the Local Government Act, 1929, the ratepayers sought to establish that their hereditament was an " industrial hereditament ". The resultant litigation went to the House of Lords. The final decision was adverse to the contentions of the ratepayers. In the House of Lords it was agreed and it was held that the premises came within the definition of a " factory ". They were within the words " any works, warehouses, furnaces, mills, foundries or places named in Part 1 of Sch. 6 " to the Factory and Workshop Act, 1901, (3). Group 13 in Part 1 of that Sch. 6 consisted of

> " ' Metal and india-rubber works ', that is to say, any premises in which steam, water or other mechanical power is used for moving machinery employed in the manufacture of machinery or in the manufacture of any article of metal not being machinery or in the manufacture of india-rubber or gutta-percha or of articles made wholly or partially of india-rubber or gutta-percha."

Though the premises came by this rather unanticipated route within the statutory definition of a factory, they failed to qualify as an industrial hereditament because testing, for which the premises were primarily occupied and used, was not, within the definitions of the Act of 1901, a " factory " purpose. The premises qualified to be regarded as a " factory " because there was the manufacture of articles of metal. The premises failed to qualify to be regarded as an " industrial hereditament " because it was for the testing, and not for the manufacture of metal articles, that the premises were primarily occupied and used. " Testing " did not amount to " adapting for sale " and " testing " was not within any statutorily defined factory purpose. LORD DUNEDIN in his speech in the House of Lords in *Grove* v. *Lloyds British Testing Co., Ltd.* (4), said:

> " Undoubtedly, there is in these works the forging of links to join up the chains which have been severed, and that forging gives to the premises the character of a factory. The Attorney-General admits this in his case, but then he says: ' True, it becomes a factory, but it is not an industrial heredi-

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(3) See the definition of " non-textile factory " in the Factory and Workshop Act, 1901, s. 149 (1).

(4) [1931] All E.R. Rep. at p. 253; [1931] A.C. at p. 468.

> tament because it is struck at by s. 3 (1) (f) of the Act of 1928, namely, being primarily occupied and used for other purposes which are not those of a factory or workshop '. The question, put in this way, was, as I have said, not dealt with in the courts below. In answer to the argument of the Attorney-General, counsel for the [ratepayers] presented an argument to this effect: 'This is ', said he, ' admittedly a factory, but this factory has only one purpose, to wit, testing. Therefore, it cannot be said that it is mainly used for a purpose which is not a factory purpose '. This argument is very ingenious and seems, at first sight, difficult to answer, but, on consideration, I am satisfied that it is unsound. One must begin by remembering that, in considering this argument, testing alone is, ex hypothesi, not a factory purpose. The purpose of a particular factory must be gathered from that which makes it a factory. If it was made a factory because it fell within an actual description in Part 1 of the schedule, you must gather the purpose from that description. Here the hereditament is made a factory because of the manufacture of articles of metal. Therefore, so far as this hereditament is a factory, its purpose is the manufacture of metal. But the hereditament is, without doubt, primarily occupied and used for the purposes of testing operations, and such operations are, ex hypothesi, not factory purposes, and, consequently, the case falls within the words of the exception, and the hereditament, although a factory, is not an industrial hereditament."

The rateable value of the testing establishment was and continued to be ascertained on the basis that it came within s. 22 (1) (b). That meant that it was treated as being within the words " mills, manufactories or premises of a similar character used wholly or mainly for industrial purposes ". So matters remained for very many years. The ratepayers point out that until 1957 there was, however, no difference from the point of view of what amount the ratepayers would actually have to pay, whether the rateable value was assessed under s. 22 (1) (a) or under s. 22 (1) (b). When the Rating and Valuation Act, 1957, was passed, the ratepayers realised that they would be more favourably placed if they could come within s. 22 (1) (a), and they claimed accordingly. The local valuation court acceded to the ratepayers' claim and assessed the hereditament under s. 22 (1) (a), and on appeal by the valuation officer to the Lands Tribunal this basis of assessment was upheld.

The wording of s. 22 of the Act of 1925 had been by that time to some extent varied. The amendment was effected by s. 5 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The opening words of s. 22 (1) (a) now read:

> " If the hereditament consists of one or more houses or other non-industrial buildings, with or without any garden, yard, court, forecourt, outhouse or other appurtenance belonging thereto, but without other land . . ."

It will be seen that the phrase " non-industrial buildings " is introduced. Consequent on that a new subsection (sub-s. (4)) was enacted which reads:

> " In this section the expression ' house ' includes part of a house, the expression ' non-industrial building ' means a building, or part of a building, of any description, with the exception of factories, mills and other premises of a similar character used wholly or mainly for industrial purposes, and of premises valued as part of—(a) a railway. dock, canal, gas, water or electricity undertaking, or (b) any public utility undertaking not falling within the preceding paragraph, and the expression ' appurtenance ', in relation to a dwelling-house, or to a school, college or other educational establishment, shall be taken to include all land occupied therewith and used for the purposes thereof '."

It will be seen that the definition of " non-industrial building " has the words of exception closely following the note in the schedule to the Act of 1925 to which

I have referred previously (5), and which was in effective operation for the thirty years between 1925 and 1955. Instead of mention of manufactories there is mention of factories. The phrase "industrial purposes" exists as before. A factory is not stated to be a factory as defined in any Act relating to factories. There is no definition of industrial purposes. All the words must, in my judgment, be given their ordinary meanings, and it seems to me that the position is not effectively altered from what it was in the years following 1925. The agreed description of the testing establishment and of the character of the equipment and the nature of the operations leads me to the view that, whether or not it could appropriately be described as a factory, it falls to be described as premises having a character similar to that of a factory. Furthermore, I consider that the premises were used wholly or mainly for industrial purposes. They were used for a purpose connected with the industry of making and selling anchors and chain cables. The view of the Lands Tribunal in the present case was that "industrial purposes" connotes production processes. With respect, I do not agree. The phrase may include production processes but it includes much else.

Though the phrase "industrial purposes" is nowhere defined, it is contended on behalf of the ratepayers that some guidance can be found by considering s. 4 of the Act of 1928, and that, if so, assistance is afforded in the determination of the present case because by s. 10 (2) of the Act of 1928 that Act is to be construed as one with the Act of 1925, and because in s. 84 of the Local Government Act, 1929, it is provided as follows:

> "In this Part of this Act the expression the 'principal Act' means, in relation to places outside London, the Rating and Valuation Act, 1925, as amended by any subsequent enactment, and in relation to London, the Valuation (Metropolis) Act, 1869, as so amended as aforesaid, and the principal Act, the Rating and Valuation (Apportionment) Act, 1928, and this Part of this Act shall be construed as one, and may be cited together as the Rating and Valuation Acts, 1925 to 1929, or as the Rating and Valuation (Metropolis) Acts, 1869 to 1929, as the case may be."

As to the effect of this, reference may be made to *Preston & Area Rent Tribunal* v. *Pickavance* (6). The Landlord and Tenant (Rent Control) Act, 1949, provided by s. 11 (5) as follows:

> "This section shall be construed as one with the [Furnished Houses (Rent Control) Act, 1946], and references in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

LORD PORTER in his speech said (7):

> "Moreover, it has to be borne in mind that the Act of 1949 does not provide that s. 11 is to be read with s. 5 of the earlier Act: it is to be read with that Act generally, and there are many other provisions of that Act to which that reference is applicable, e.g., s. 2 (1) and (3). Such an application seems to me to justify the use of the words 'read with' in s. 11 of the Act of 1949, and negatives the necessity of confining the meaning of those words in that Act to a notice such as would be required under s. 5 of the Act of 1946."

LORD REID in his speech said in reference to these words (8):

> "In my opinion, this means neither more nor less than that s. 11 must be read as if it were a section in the Act of 1946. There is no difficulty about so reading it. It does not alter or amend anything in the Act of 1946. It adds something new, which is materially different in character from anything in the Act of 1946."

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(5) See p. 414, letter G. ante.
(6) [1953] 2 All E.R. 438; [1953] A.C. 502.
(7) [1953] 2 All E.R. at p. 442; [1953] A.C. at p. 575.
(8) [1953] 2 All E.R. at p. 446; [1953] A.C. at p. 580.

LORD TUCKER in his speech said (9):

> "The exact consequence of a provision that one Act is to be construed as one with another, beyond incorporating the definitions contained in the first Act, is not altogether easy to ascertain, because it would seem that, if both Acts are dealing with the same subject-matter, it would in any event in a case of ambiguity be necessary to construe the second Act in the light of the provisions of the first. In the present case, having regard to s. 8 of the Act of 1946, which gives power to make procedural regulations, it would seem that, in order to make it clear that such regulations apply to applications under s. 11 of the Act of 1949, some such provision as that contained in sub-s. (5) was desirable."

The argument for the ratepayers is based on a consideration of s. 4 of the Act of 1928. That section, which only comes into operation if a hereditament is shown to be an " industrial hereditament ", provides that a valuation list must show whether an industrial hereditament is occupied and used wholly or only partly for industrial purposes, and the net annual value must when necessary be apportioned. Here again is the phrase " industrial purposes ". It is not defined. Prima facie, and particularly as the Act of 1928 is to be construed as one with the existing Act of 1925, the phrase must be given its existing or ordinary meaning. In so far as any help in construction may be gleaned from the Act of 1928, it is to be noted that when in s. 5 (2) the phrase " transport purposes " is being defined there are references to " all purposes connected with ". Section 4 (2) proceeds to direct how to determine the proportions in which an industrial hereditament is occupied and used for industrial purposes, or, alternatively, for other purposes. There is a simple test. It is to be " deemed " to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be nor to form part of a mine, factory or workshop.

It is said on behalf of the ratepayers that this section gives guidance as to the meaning of the phrase " industrial purposes ", or, in other words, impliedly defines the phrase. It is said that an industrial purpose is equated with a factory purpose. But, where Parliament has refrained from defining and has used words capable of ordinary interpretation, I cannot think that an indirect definition is to be extracted from the Act of 1928. An industrial hereditament must be either a mine or a mineral railway or a " factory " or " workshop " as these two latter words were statutorily defined by the Act of 1901. Section 4 (2) merely says that an industrial hereditament is " deemed " to be occupied and used for industrial purposes except in so far as any part is " deemed " not to be a part. Thus, if a mine is held to be an industrial hereditament, it is deemed to be occupied and used for industrial purposes except in so far as under some enactment relating to the regulation of mines some part is " deemed " not to be a part of the mine. That does not involve equating an industrial purpose to or with a factory purpose: nor does it in any way limit or modify the ordinary meaning of the phrase " industrial purposes ". Under s. 3 (2) of the Act of 1928, it is provided that, if the " industrial hereditament " is a " factory " or " workshop " (as statutorily defined for the purposes of the Act), then the part within the close, curtilage or precincts used by the occupier for the housing or maintenance of his road vehicles or as stables is to be " deemed " not to form part of the factory or workshop. Another illustration of the way in which a part of a factory or workshop is " deemed " not to form part may be found by reference to s. 149 (4) of the Factory and Workshop Act, 1901. That subsection reads:

> " Where a place situate within the close, curtilage or precincts forming a factory or workshop is solely used for some purpose other than the manufacturing process or handicraft carried on in the factory or workshop, that

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(9) [1953] 2 All E.R. at p. 447; [1953] A.C. at p. 582.

> place shall not be deemed to form part of the factory or workshop for the purposes of this Act, but shall, if otherwise it would be a factory or workshop, be deemed to be a separate factory or workshop and be regulated accordingly."

On the application of that subsection, a part of an " industrial hereditament " was excluded in *Cardiff Revenue Officer* v. *Cardiff Assessment Committee & Western Mail, etc.* (10).

It was held by the Lands Tribunal that it followed from the decision of the House of Lords in 1931 (11) that the hereditament at Dudley is not used mainly for industrial purposes. With every respect, I do not share this view. The House of Lords held that, though the testing establishment was a " factory " within the statutory definition of that word, it was not, by reason of the proviso to s. 3 (1) of the Act of 1928, an " industrial hereditament ", because the establishment was primarily used for testing and because testing was not a purpose of a " factory " within the statutory definition of that word. The House of Lords never had occasion to consider s. 4 of the Act of 1928, nor to consider the phrase " industrial purposes ".

For the reasons which I have endeavoured to state, it does not seem to me that the " deeming " processes laid down by s. 4 (2) of the Act of 1928 form any basis for seeking to ascribe to the phrase " industrial purposes " any meaning other than its ordinary meaning. When the phrase was used in the Act of 1928, it could not be that some sort of implied amendment of the Act of 1925 was being introduced. It is said that the Act of 1928 could be resolving an existing ambiguity in the meaning of the phrase as used in the Act of 1925. But it seems to me (a) that there was no ambiguity in the phrase as used in the Act of 1925; (b) that s. 4 (2) of the Act of 1928 does not equate " industrial purposes " with anything; (c) that if Parliament had been intending to lay down some definition or to remove some ambiguity it would have said so and done so expressly. It is further to be noted that, when in 1955 Parliament amended the Act of 1925 and introduced the phrase " non-industrial building ", Parliament refrained, when defining the phrase, from incorporating the existing statutory definition of an industrial hereditament.

In my judgment, the premises of the testing establishment of the ratepayers should be regarded as being premises of a similar character to factory premises and as being wholly or mainly used for industrial purposes. It is said that, if this view be correct, the ratepayers would have the misfortune to have failed to qualify for some relief after the Acts of 1928 and 1929 and now to fail to qualify under the Act of 1957. But, in my judgment, I must be uninfluenced by this consideration and must only be guided to a conclusion by the statutory words which apply. I would answer the question raised in the Case Stated in the negative, and I consider that the assessment should be under s. 22 (1) (b).

WILLMER, L.J.: I differ from MORRIS, L.J., with diffidence, but for my part I have come to the conclusion that the Lands Tribunal came to a correct decision in holding that the ratepayers' hereditament ought to be valued in accordance with s. 22 (1) (a) of the Rating and Valuation Act, 1925. The effect of this would be that the net annual value would be calculated by reference to a gross value, from which the appropriate deduction would be made in accordance with the table contained in Part 1 of Sch. 2 to the Act in order to arrive at the net annual value.

As a matter of history, it should be recorded that in 1931 the ratepayers sought to obtain relief under s. 68 of the Local Government Act, 1929, on the ground that the hereditament was an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. That attempt failed because, although it was conceded that the hereditament was a

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(10) [1930] All E.R. Rep. 30; [1931] 1 K.B. 47.

(11) *Grove* v. *Lloyds British Testing Co. Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450.

" factory ", as being within para. (13) of Part 1 of Sch. 6 to the Factory and Workshop Act, 1901, it was decided by the House of Lords in *Grove* v. *Lloyds British Testing Co., Ltd.* (12) that it was not an " industrial hereditament " within the meaning of the Act of 1928. The work of forging links was sufficient to make the hereditament a factory, but it was not an " industrial hereditament " because, in the view of the House of Lords, it was primarily occupied and used for the purpose of merely testing the cables, which was not a factory purpose.

From 1931 onwards until 1957 it made little or no financial difference to the ratepayers whether the hereditament was assessed under para. (a) or (b) of s. 22 (1) of the Act of 1925. By the Rating and Valuation Act, 1957, a measure of relief was accorded in the case of a hereditament, other than a dwelling-house, private garage or private storage space, whose net annual value was calculated by reference to its gross value, i.e., in accordance with s. 22 (1) (a). In the present proceedings the ratepayers have sought to claim the benefit of this relief, and have claimed that their hereditament consists of non-industrial buildings which ought to be assessed under that paragraph. They are met, however, with the contention that their hereditament is excluded by the definition of " non-industrial building " contained in s. 22 (4), as enacted by s. 5 (3) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The material words of the definition are as follows:

> ". . . ' non-industrial building ' means a building, or part of a building, of any description, with the exception of factories, mills and other premises of a similar character used wholly or mainly for industrial purposes . . ."

If the valuation officer's contention be right, the effect would be that the ratepayers, having been shut out from relief under the Local Government Act, 1929, on the ground that their hereditament was not an industrial hereditament, would now find themselves equally shut out from relief under the Act of 1957 on the apparently diametrically opposite ground that their hereditament is not a non-industrial building. Prima facie this would be a strange result, and it seems to me that the grounds on which the valuation officer's argument is based require careful examination.

The valuation officer's contention in the first place is that the building in question is a factory, as conceded in the litigation in 1931, and as found by the House of Lords (13). That, according to the valuation officer, is the end of the matter, because it is argued that the word " factories " in s. 22 (4) is not qualified by any of the words which follow. On this point I find the argument for the valuation officer wholly unacceptable. In my judgment, the words " used wholly or mainly for industrial purposes " must be construed as governing each of the three categories previously mentioned, namely, " factories ", " mills " and " other premises of a similar character ". That is the natural way to read the words. Had the draftsman not intended the words " factories " and " mills " to be so qualified, he could, and I have no doubt would, have made such intention plain, e.g., by numbering or lettering the various categories, so that the material words would read: " with the exception of: (a) factories; (b) mills; and (c) other premises of a similar character used wholly or mainly for industrial purposes ".

The valuation officer's next contention is that, even assuming the word " factories " to be qualified by the words that follow, the expression " industrial purposes " is to be construed in a broad sense as meaning any purposes connected with industry; and the testing of cables, it is argued, is a process connected with the industrial process of producing cables. The ratepayers' hereditament, therefore, would still fall within the exception, and consequently outside the definition of " non-industrial building ". The ratepayers' answer to this argument is that the Act of 1925 (as amended in 1955) is to be construed as one with the

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(12) [1931] All E.R. Rep. 242; [1931] A.C. 450.

(13) *Grove* v. *Lloyds British Testing Co., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450.

Act of 1928, so that prima facie the same words and phrases should be construed in the same sense in the two Acts. So far the ratepayers' contention appears to me to be unassailable, for s. 84 of the Local Government Act, 1929, provides as follows:

> " In this Part of this Act [i.e., Part V, which deals with rating and valuation] the expression the ' principal Act ' means, in relation to places outside London, the Rating and Valuation Act, 1925, as amended by any subsequent enactment . . . and the principal Act, the Rating and Valuation (Apportionment) Act, 1928, and this Part of this Act shall be construed as one . . ."

I entertain no doubt, therefore, that it is not only permissible but necessary to refer to the provisions of the Act of 1928 in order to construe s. 22 (4) of the Act of 1925, as enacted by the Act of 1955. I look, accordingly, at s. 3 (1) of the Act of 1928 for the definition of " industrial hereditament ", which, omitting immaterial words, is in the following terms:

> " In this Act the expression ' industrial hereditament ' means a hereditament . . . occupied and used . . . as a factory . . .: Provided that the expression industrial hereditament does not include a hereditament occupied and used as a factory . . . if it is primarily occupied and used for the following purposes . . . (f) any other purposes, whether or not similar to any of the foregoing, which are not those of a factory . . ."

By sub-s. (2) the expression " factory " is defined as having the same meaning as in the Factory and Workshop Acts, 1901 to 1920. So far, then, the result is that a hereditament, although it be a factory within the meaning of the Factory and Workshop Acts, is not an industrial hereditament—i.e., it is a non-industrial hereditament—if it is primarily occupied and used for purposes which are not those of a factory.

The expression " industrial purposes ", which is the expression that we have to construe in this case, occurs first in s. 4, which deals with apportionment of the net annual value in the case of an industrial hereditament occupied and used partly for industrial purposes and partly for other purposes. The material part of s. 4 provides as follows:

> " (1) In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used, and as respects every such hereditament occupied and used partly for industrial purposes, the net annual value thereof shall be shown, in the prescribed manner, as being apportioned between the occupation and user of the hereditament for industrial purposes, and the occupation and user thereof for other purposes.
>
> " (2) For the purpose of determining in what proportions an industrial hereditament is occupied and used for industrial purposes and for other purposes respectively, the following provisions shall have effect: (a) The hereditament shall be deemed to be occupied and used for industrial purposes except in so far as any part thereof is, under this Act or under the enactments relating to the regulation of mines, factories and workshops, to be deemed neither to be, nor to form part of, a mine, factory, or workshop."

The reference to a hereditament any part of which is deemed not to form part of a factory is clearly a reference to s. 149 (4) of the Factory and Workshop Act, 1901, whereby it was enacted that a place within a factory, which is used solely for some purpose other than the manufacturing process carried on in the factory shall not be deemed to form part of the factory. " Industrial purposes " are thus contrasted with purposes other than the manufacturing process carried on in the factory, i.e., purposes other than those which make it a factory. Reading s. 3 and s. 4 of the Act of 1928 together, therefore, the conclusion seems to me to be irresistible that the expression in s. 3 (1) (f) " other purposes which are not those of a factory " must mean purposes which are not " industrial purposes ". This explains why it is enacted that a hereditament primarily occupied and used for such purposes, i.e., purposes which are not " industrial purposes ", is not an " industrial hereditament ".

In my judgment, therefore, the true effect of s. 3 and s. 4 of the Act of 1928 is to equate " industrial purposes " with factory purposes—i.e., the purposes which make the hereditament a factory—and " other purposes " with purposes other than factory purposes—i.e., other than the purposes which make the hereditament a factory. If that is the meaning of the words " industrial purposes " in the Act of 1928, I think that they must be held to bear the same meaning in s. 22 (4) of the Act of 1925, as enacted by the Act of 1955.

What then is the result in relation to the ratepayers' hereditament? The House of Lords has decided that the work of testing cables, which is the purpose for which the hereditament is primarily occupied and used, is not a factory purpose (14). It is not, therefore, an industrial purpose. Consequently the hereditament does not fall within the exception in s. 22 (4), for it is not a factory used wholly or mainly for industrial purposes. It is, therefore, a " non-industrial building ", and as such ought to be valued, as the Lands Tribunal held, in accordance with s. 22 (1) (a).

I venture to think that the construction which I have put on the words " industrial purposes " is not only consonant with common sense, but also ensures consistency between the Acts of 1925 and 1928, which are to be read as one. At least it has the merit of avoiding the absurdity of holding that a hereditament, which has been held not to be an " industrial hereditament ", is at one and the same time not a " non-industrial building ". For these reasons, I am of the opinion that the appeal should be dismissed.

HARMAN, L.J.: In my judgment also, this appeal should be dismissed. As the court is not unanimous, I shall explain the reasons for my view as shortly as I may. The statute to be construed is the Rating and Valuation Act, 1925, s. 22, as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 5 (3). Under s. 22 as it originally appeared in the Act of 1925, all real property was described as hereditaments: these were divided into two categories, one described in s. 22 (1) (a) and the other in (b). Category (a) consisted of hereditaments belonging to one of the classes specified in Sch. 2 which were all there described as " houses and buildings ", and (b) of " all other hereditaments ", and by the note to Part 1 of Sch. 2 to the Act there were excluded from the expression " houses and buildings ", " mills, manufactories or premises of a similar character used wholly or mainly for industrial purposes ". It will be observed that the word " hereditaments " is used to cover houses and buildings. Apparently it did not matter to the ratepayer whether the hereditament in question came within (a) or (b), the net annual value amounting to the same in either case. It was classed under (b).

In 1928 there was passed the Rating and Valuation (Apportionment) Act of that year designed to give relief to what were there called industrial hereditaments. To these were given certain relief, and the ratepayer sought to bring itself within that relief. The question whether it could do so gave rise to *Grove* v. *Lloyds British Testing Co., Ltd.* (15), which was eventually decided in the House of Lords. The House there held that the ratepayer could not claim relief under the Act of 1928 because the hereditament, i.e., the ratepayer's building, was not an industrial hereditament. It is not for us to question the convenience, still less the good sense, of this decision.

The Act of 1955 amended the Act of 1925, s. 22 (1) (a), by classifying all the hereditaments included in it as " houses or other non-industrial buildings ", by substituting a new table, and by striking out the note. It also added a new sub-s. (4), of which the part here material has already been read by MORRIS, L.J.

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(14) *Grove* v. *Lloyds British Testing Co., Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450.

(15) [1931] All E.R. Rep. 242; [1931] A.C. 450.

I may say at once that I construe the words " wholly or mainly ", etc., as applying to factories. The ratepayer's property continued to appear in the list under s. 22 (1) (b) of the Act of 1925. There was still no advantage to be gained by arguing that it fell within s. 22 (1) (a). This, however, became a live question after the passing of the Rating and Valuation Act, 1957, which gave further relief to hereditaments of which the net annual value was an amount ascertained by reference to gross value as defined in s. 68 (1) of the Act of 1925. Now this relief only applied to hereditaments which could be brought within s. 22 (1) (a) and not to those within s. 22 (1) (b). The ratepayer applied to the local valuation court, which in 1958 decided in the ratepayer's favour by classifying its building as being within category (a): on appeal to the Lands Tribunal this decision was affirmed. The valuation officer now appeals to this court.

It will thus be seen that in order to come within category (a) the ratepayer must prove that its building is a " non-industrial building ". These are the words to be construed by the court and not the words " industrial purposes ", though, no doubt, it was the purpose of sub-s. (4) to explain the former by the latter. Should the appeal be successful, it would follow that the ratepayer's building, though not ranking as an industrial hereditament under the Act of 1928 having regard to the decision of the House of Lords, will yet rank as an industrial building for the purposes of the Act of 1925 as amended by the Act of 1955. This would be a most bizarre result, for, after all, a building is only one sort of hereditament, as the Act of 1925 recognises. This word is now used chiefly in connexion with rating, though the conveyancer still not infrequently writes " lands and hereditaments " in his parcels. Hereditaments, of course, originally meant any species of property which would descend to the heir at law, and it is still so defined in the Law of Property Act, 1925. By s. 205 (1) (ix) of that Act land is said to include buildings and other corporeal hereditaments, and hereditaments to mean any real property which on an intestacy before the Act might have devolved on an heir. In the Rating and Valuation Act, 1925, s. 68 (1), " hereditament " means " any lands, tenements, hereditaments or property which are or may become liable to any rate . . .". Moreover, the Acts of 1925, 1928 and 1955 are all to be read together as provided by s. 10 (2) of the Act of 1928 and s. 84 of the Local Government Act, 1929, and therefore the expressions in all of them must be construed as if contained in one Act (see per the EARL OF SELBORNE, L.C., in *International Bridge Co.* v. *Canada Southern Ry. Co.* (16)):

> " It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

It follows, in my judgment, that the two expressions " industrial hereditaments " and " industrial buildings " ought to receive the same interpretation in the absence of some manifest discrepancy making a different interpretation necessary. For my part, I can find no such discrepancy, and that is enough, as the Lands Tribunal held, to dispose of this appeal.

The argument for the valuation officer was that the House of Lords in the case in 1931 (17) did not decide that this building was not being used for industrial purposes but only that for the purposes of relief under the Act of 1928 the building was not an industrial hereditament because it was not primarily used for factory purposes. The House held that the only portion of the building used for those purposes was a small portion used as a forge for working metal and that that was not the primary purpose for which the building was used, which was for testing purposes. It was argued that it did not follow from this that the main purpose, though not a factory purpose, was not in the ordinary sense of the word an A industrial purpose, and reliance was placed on s. 4 of the Act of 1928, which has been dealt with by MORRIS, L.J., in his judgment. I agree that this is so and that the testing operations, which are the main purpose of the factory and are described in the report of the case (18) might, if there were no other guide, properly be described as industrial as being connected with industry, i.e., the industry of making anchors and chains, but this method of reasoning lands the user of it in B the absurdity described above and in giving to the same expression used in two Acts which are to be read together a different meaning: quod est absurdum, as Euclid has it. I therefore feel constrained to reject this line of reasoning and to conclude that, read in the light of the Act of 1928, it is right to hold that for this purpose industrial purposes must be tantamount to factory purposes. This is the only way that I can see to construe the two Acts consistently. The principle C of interpreting an earlier Act by a later one where both are concerned with the same subject-matter is well established, as appears from MAXWELL ON STATUTES (10th Edn.), pp. 33 and 35 and the cases there cited.

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(16) (1883), 8 App. Cas. 723 at p. 727.

(17) *Grove* v. *Lloyds British Testing Co. Ltd.*, [1931] All E.R. Rep. 242; [1931] A.C. 450.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Gregory,* D *Rowcliffe & Co.*, agents for *Shakespeare & Vernon*, Birmingham (for the ratepayers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

R. *v.* BURT, *Ex parte* PRESBURG. E

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Ashworth, JJ.), January 22, 1960.]

Criminal Law—Costs—Magistrates' court—Police prosecutor—Police not legally represented—Jurisdiction to award costs—Discretion and amount—Costs in Criminal Cases Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 48), *s.* 6, *s.* 17.

P. was convicted on a charge, laid by a police constable by information F before a magistrate, of not conforming to the indications given by a traffic sign. He was fined £1 and ordered to pay £2 2s. costs. The prosecution's case consisted solely of the evidence of the police constable. The police were not legally represented at the hearing.

Held: (i) costs may be awarded under s. 6 (1) (a) of the Costs in Criminal Cases Act, 1952, where a salaried member of the police force has had to G spend time on the prosecution.

A.-G. v. *Shillibeer* ((1849), 19 L.J.Ex. 115) followed.

(ii) the reasonableness of an amount awarded as costs, where a police officer has prosecuted, should be viewed having regard to the structure of police administration, not merely to the police officer's salary and the time spent by him in attending the prosecution; so viewed, two guineas was a H reasonable sum in this case.

Per CURIAM: the prosecutor for present purposes (having regard to s. 17 of the Costs in Criminal Cases Act, 1952) was the Commissioner of Metropolitan Police or the Metropolitan Police Force on whose behalf the prosecuting police constable was acting (see p. 428, letter H, post).

Observations on the derivation and meaning of the word " costs ", in I different provisions of the Costs in Criminal Cases Act, 1952 (see p. 427, letters A to C, post).

[**Editorial Note.** The court did not concern itself with the exact amount of the police constable's pay apportionable to the work of prosecution. So, too, where civil litigation is conducted for a client by a solicitor employed at a salary, and the client recovers costs, the court does not investigate the question

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(18) [1931] 1 K.B. at p. 405.

A whether the costs on taxation (which are not intended to be more than an indemnity) exceed the salary paid for the work unless it is plain that they very probably do exceed it; see *Henderson* v. *Merthyr Tydfil U.D.C.* ([1900] 1 Q.B. 434) and *Galloway* v. *Corpn. of London* ((1867), L.R. 4 Eq. 90, 94).

As to costs as between parties in criminal cases before magistrates, see 25 HALSBURY'S LAWS (3rd Edn.) 219, para. 404.

B For the Costs in Criminal Cases Act, 1952, s. 1, s. 5, s. 6, s. 12 and s. 17, see 32 HALSBURY'S STATUTES (2nd Edn.) 62, 413, 414, 69 and 71.]

Cases referred to:

A.-G. v. *Shillibeer*, (1849), 4 Exch. 606; 19 L.J.Ex. 115; 14 L.T.O.S. 273; 14 J.P. 7; 154 E.R. 1356; 11 Digest (Repl.) 607, *386*.

C *Lord Advocate* v. *Stewart* (*No. 2*), (1899), 63 J.P. 473; 11 Digest (Repl.) 619, *360*.

Motion for Certiorari.

This was a motion by the applicant, David Presburg, for an order of certiorari to remove into the Divisional Court and quash an order made by a stipendiary magistrate on the hearing of a summons alleging that the applicant on Aug. 25, 1958, did unlawfully fail to conform to the indication given by a traffic sign D in breach of s. 49 of the Road Traffic Act, 1930, which order directed that the applicant should pay a fine of £1 and £2 2s. costs. The motion asked also that the conviction of the applicant of the said offence should be quashed, but at the hearing of the motion the issue was confined to the question whether so much of the order as related to costs should be quashed.

The information was laid by a police constable against the applicant for, in E effect, driving a car across traffic lights when they were against him. The case was heard on Mar. 11, 1959. The applicant pleaded not guilty. The police were not legally represented. The prosecution's case consisted solely of the evidence of one police officer. The magistrate found the case proved, fined the applicant £1 and ordered him to pay £2 2s. costs. His solicitor asked, " Might I ask why you have ordered costs ? " The magistrate replied, " Because F I say so ". The solicitor then said, " But the police are not represented ", to which the magistrate replied, " That is my order ". It was deposed by affidavit that earlier on the same day another accused, who had pleaded not guilty to a charge of exceeding the speed limit had been tried by the same magistrate. In that case also the police were not legally represented and only police evidence was called. That accused had been fined £1 and his licence G had been endorsed, but no order had been made as to costs. The grounds on which the applicant sought an order of certiorari were that the magistrate's only jurisdiction to make the applicant pay costs was to make him pay such costs as the magistrate thought to be just and reasonable and that—(a) the prosecution had in fact incurred no costs and the costs awarded were neither just nor reasonable; (b) the costs were awarded as a fine or penalty, and (c) H in the premises the magistrate exceeded his jurisdiction. In affidavit evidence the magistrate stated that, after deciding to convict the applicant, he had considered what costs had been incurred by the prosecution, as he thought it was a case in which it would be just to make an order that would make a reasonable contribution to the prosecution for the costs which had been incurred. He appreciated that the prosecution had not been legally represented and that I the Metropolitan Police had been involved in the trouble and loss of time inevitably incurred in carrying on the prosecution. In particular he had regard to the fact that for this purpose it had been necessary for the police constable to attend at court and give evidence on the day of the hearing. He estimated that the Metropolitan Police had thus been prevented from employing the police officer on other police duties for half a day. He took the view that it was reasonable in these circumstances to order the applicant to pay the sum of £2 2s. as a fair contribution to the costs that had been incurred by the prosecution by appropriation to the case of the time of the police force. Referring to the applicant's grounds for seeking relief the magistrate deposed that he took the view that the prosecution had in fact incurred costs, that he did not make the order for costs as a fine or penalty but as a contribution to the costs which he considered had in fact been incurred, and that he thought that the costs which he awarded were just and reasonable.

J. W. Miskin for the applicant.
J. R. Cumming-Bruce as amicus curiae.

LORD PARKER, C.J., after referring to the nature of the application and stating the facts, continued: It is urged in this court that the order for the payment of £2 2s. costs was in excess of the magistrate's jurisdiction. The argument can be summarised in this way. It is said that costs are no more and can be no more than an indemnity. Before the magistrate exercises his jurisdiction to award costs he must find as a fact that costs have been incurred. That is a collateral fact on which his jurisdiction is founded, and by the wrong finding of a collateral fact he cannot give himself jurisdiction. So far, the argument is, I think, absolutely sound. It is then said that costs cannot include any sum of money as compensation for the salary paid to a police witness. It is said that this police officer was employed; that he was getting his salary whether he was there or whether he was not, and that no expense has been incurred.

Before considering the matter more closely, it is necessary to look at the Act under which the magistrate's jurisdiction arose. It is the Costs in Criminal Cases Act, 1952, and the relevant section is s. 6, which is in the widest possible terms. Subsection (1) provides:

> "On the summary trial of an information a magistrates' court shall have power to make such order as to costs—
> (a) on conviction, to be paid by the accused to the prosecutor;
> (b) on dismissal of the information, to be paid by the prosecutor to the accused,
> as it thinks just and reasonable: . . ."

What, then, is included in the word "costs"? One argument addressed to us by counsel for the applicant, to whom, incidentally, the court is indebted for his careful argument, is a reference to other sections of the Act where reference is made to costs and it is stated what costs are there being dealt with. Thus, in s. 1 (2), which is dealing with costs to be awarded by assizes and quarter sessions out of local funds, it is provided:

> "The costs payable out of local funds under the preceding subsection shall be such sums as appear to the court reasonably sufficient to compensate the prosecutor, or as the case may be the accused, for the expenses properly incurred by him in carrying on the prosecution or the defence, [that is to the prosecutor] and to compensate any witness for the prosecution, or as the case may be for the defence, for the expense, trouble or loss of time properly incurred in or incidental to his attendance and giving evidence."

Pausing there, it is said that that subsection is drawing a distinction in regard to costs being paid to the prosecution and costs being paid to the witness. Costs being paid to the witness are to include not merely expense but something for his trouble and loss, whereas, so it is said, when the prosecutor is being compensated there is no compensation for trouble or loss but only for expenses, which means the actual expenses that he incurs. A similar provision is made by s. 5 (3) in regard to costs to be awarded out of local funds. It is said, accordingly, that when one comes to s. 6, which is dealing with the prosecutor's costs, the word "costs" there means no more than the costs which could be paid to the prosecution under the earlier provisions dealing with payment out of local funds and, properly construed, cover only actual expenses incurred. It is, I think, A sufficient to say in answer to that argument that s. 1 (2) and s. 5 (3) have their origin in a completely different set of legislation to that from which s. 6 (1) is derived.

Mr. Cumming-Bruce, who has appeared here as amicus curiae, and has assisted the court very considerably, has traced the history of these sections, and whereas the provisions for payment out of local funds can be traced to a series of Acts B beginning in 1752 and culminating in the Costs in Criminal Cases Act, 1908, s. 6 derives directly from the Summary Jurisdiction Act, 1848, s. 18. It is quite clear, in my judgment, that those are two completely separate codes and that there is no reason whatsoever for reading " costs " in one part of the Costs in Criminal Cases Act, 1952, which is an Act made under the Consolidation of Enactments (Procedure) Act, 1949, as meaning the same as " costs " in another C part of the Act. Again, reference was made to the fact that in regard to the costs that may be awarded out of local funds, the Home Secretary has power to make regulations. That is derived from s. 12 of the Act of 1952, and the regulations, which were made in 1955, the Witnesses' Allowances Regulations, 1955 (1), expressly provide in reg. 11 (1):

> D " Notwithstanding anything contained in the preceding regulations, no sum shall be allowed under these regulations in respect of -(a) a member of a police force attending court in his capacity as such; . . ."

Counsel for the applicant concedes, as he must, that those regulations are made under the provisions dealing with the award of costs out of local funds; but he can at any rate say this, that police officers are looked on as being in a peculiar position and that so far as those provisions are concerned nothing will be awarded E to a police officer attending court as a witness on behalf of the prosecution. As I have said, I do not think that any help is to be derived from those other sections and regulations in construing s. 6 of this Act.

What, then, is included in the word " costs "? Must it be confined and confined only to disbursements and expenses properly so called? I confess that I should be surprised if it was necessary to confine the word " costs " in that limited way. F An illustration was given in the course of the argument of some of these big stores today who employ private detectives and others to keep an eye on shoplifting. If such an employer uses one of his salaried staff in and about the prosecution of an offender, is it to be said that the employer has been put to no expense? It seems to me that he has been put to expense in that he has employed a member of his salaried staff to do this and thereby lost that man's labour for the time G being, and is put to the expense of having to find another person to perform the work which the first employee would otherwise be doing.

The matter, to my mind, is put beyond argument by an old case—which is none the worse for that—to which we have been referred, *A.-G.* v. *Shillibeer* (2). In that case there was an excise information in which the Crown had the services of the Crown Solicitor. The Crown Solicitor was a salaried employee of the Crown. H The Crown succeeded and was awarded costs, and it was said that the Crown by making a special bargain with its solicitor, not employing a solicitor ad hoc, but paying the Crown Solicitor a salary, could not recover the solicitor's costs which otherwise would have been recovered if an outside solicitor had been employed. The judgment of the court was delivered by PARKE, B., and I must read some of his judgment. He said (3):

> I " . . . there was an objection made that the plaintiff was bound under the statute 2 & 3 Will. 4 c. 120, s. 121, which gives costs, and could not charge the ordinary costs against the subject, because the Crown employed the solicitor of the Excise at an annual salary, and did not incur any expenditure in matters depending in the particular suit. We took time to consider the case, and we are clearly of opinion that that argument ought not to prevail,

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(1) S.I. 1955 No. 1655, amended by the Witnesses' Allowances Regulations, 1958 (S.I. 1958 No. 1717). (2) (1849), 19 L.J.Ex. 115. (3) (1849), 19 L.J.Ex. at p. 117.

> and that the Crown is entitled to full costs in the suit . . . Then it was said that it is the fault of the Crown, because they have made such a bargain with the solicitor that they cannot tell how much salary is paid for the costs of a particular suit since they made such a bargain with the solicitor. We think that objection really has no weight. The Crown has a solicitor, and makes a perfectly fair bargain with him, very much to the benefit of the public, and we think that ought to make no difference in the case."

To much the same effect was a Scottish case, *Lord Advocate* v. *Stewart* (*No. 2*) (4).

In my judgment, there is no distinction between that case and the case of the salary paid to a police officer or any other salary which a prosecutor has to pay to a person whose activities are necessary in and about a prosecution. It matters not that, unlike the case of *A.-G.* v. *Shillibeer* (5) the person to whom the salary is paid is not a solicitor or a professional man.

Counsel for the applicant, however, goes further, and he says that even if it is right to say that some costs have been properly incurred by the prosecution here, yet the sum of £2 2s. which was awarded is so plainly excessive that it appears on its face to be a fine and therefore to have been imposed without jurisdiction. In a case such as this the onus of showing that the collateral facts are such that the magistrate had no jurisdiction, is on him who asserts it, namely, the applicant. The applicant, accordingly, must show that the costs properly incurred could not equal or exceed £2 2s. For my part, the applicant has totally failed to satisfy me on that point. It is quite wrong to make a rough calculation of what the pay of a policeman would amount to for four hours one afternoon. One must look at the whole structure of the police administration and consider the matter in that light. Quite apart from that, a magistrate with very considerable experience has stated in his affidavit that he formed the view that £2 2s. was a reasonable contribution to the costs. Further, although he does not say so in his affidavit, he must in his position and with his experience have known that at any rate there were certain disbursements which must have been paid, fees paid on the laying of the information, fees for service, and matters of that sort. In my judgment, it has not been shown that £2 2s. in these circumstances is such a sum as could not represent costs properly incurred.

That is really an end of this case, but I would like also to say this, and I should have said it earlier. It has been conceded that although the information was laid by a particular police constable, he must be taken to have been acting on behalf of the Metropolitan Police in laying that information. It would be quite artificial to treat him as a private individual and to say that as a private individual he had been put to no expense or loss or trouble because he himself was being paid all the time. Not only would that be an artificial approach, but if one looks at s. 17 (1) of the Costs in Criminal Cases Act, 1952, it is expressly provided:

> " ' Prosecutor ' includes any person who appears to the court to be a person at whose instance the prosecution has been instituted, or under whose conduct the prosecution is at any time carried on."

Accordingly, counsel for the applicant conceded, quite rightly, that the prosecutor here and the person entitled to costs, if costs be payable, is the Commissioner of Metropolitan Police or the Metropolitan Police Force. Accordingly, in my judgment, this application fails.

CASSELS, J.: I agree.

ASHWORTH, J.: I also agree.

Application dismissed.

Solicitors: *Amery-Parkes & Co.* (for the applicant); *Treasury Solicitor* (for amicus curiae).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

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(4) (1899), 63 J.P. 473.

(5) (1849), 19 L.J.Ex. 115.

STANTON AND ANOTHER *v.* EWART F. YOULDEN, LTD.

[QUEEN'S BENCH DIVISION (McNair, J.), January 21, 22, 1960.]

Fatal Accident—Damages—Measure of damages—Funeral expenses—Erection of marble memorial over grave—No dependency within Fatal Accidents Acts proved—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 41), *s.* 1 (2) (*c*), *s.* 2 (3)—*Fatal Accidents Act,* 1846 (9 *&* 10 *Vict. c.* 93), *s.* 2.

The funeral expenses recoverable in an action for causing a fatal accident, whether brought for the benefit of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act, 1934, or brought for the benefit of relatives etc. under the Fatal Accidents Act, 1846, may include (by virtue of s. 1 (2) (c) or s. 2 (3) of the Act of 1934) such expenditure on erecting a stone over the deceased's grave as is reasonable for persons in the position of the deceased and of the relatives who are responsible for the actual ordering of the stone; but, in so far as the stone is merely a memorial set up as a sign of love and affection, the cost of erecting it is not part of the funeral expenses (see p. 432, letter G, post).

The plaintiff, whose wife died as a result of a road accident for which the defendants admitted liability, claimed damages, the material issue being as to funeral expenses. These included a sum of £194 15s. comprising £155 for a marble memorial erected over the grave six months after the death, synagogue fees of £34 10s. and £5 5s. for letters on the memorial. The plaintiff claimed that there should be also included in the damages £5 paid to the minister of the plaintiff for attending the funeral, £8 for two additional limousine cars at the funeral and £5 for removing the body to the house (£18 in all). The plaintiff had contributed to a funeral expenses scheme by which the other funeral expenses were provided. He had been married to his wife for forty-two years and they had lived in comfortable circumstances. He was her executor. His claim was made both as executor (under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (2)) and under the Fatal Accidents Acts, 1846 to 1908, personally as widower. The plaintiff had made the payments but had made them in fact, so the court found, on behalf of his wife's estate, which amounted to about £1,500 net.

Held: (i) the plaintiff was entitled as executor to recover reasonable expenditure on a gravestone for his wife's grave, and, in the circumstances, an amount of £40 would be included in the damages in respect of the stone.

(ii) the payments, amounting to £18 and specified above, would also be included as funeral expenses in the damages recoverable by the plaintiff as executor.

Per CURIAM: a person can recover damages under the Fatal Accidents Act, 1846 (by virtue of s. 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934), in respect of reasonable funeral expenses notwithstanding that he can prove no dependency, but subject to making allowance, where appropriate, for any benefit received in consequence of the death (compare p. 431, letter G, post and see s. 2 of the Act of 1846).

[**Editorial Note.** The decision in the present case should be considered with that in *Hart* v. *Griffiths-Jones* ([1948] 2 All E.R. 729), which was cited to the court, where expenditure on a monument to be erected over a child's grave was excluded from damages under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (2) (c). There was quoted in that case (ibid., p. 730, letter G) a passage from *Goldstein* v. *Salvation Army Assurance Society* ([1917] 2 K.B. at p. 297), where a Divisional Court held that the cost of a tombstone was part of " funeral expenses " within the Assurance Companies Act, 1909, s. 36 (since repealed), and McCARDIE, J., said that the expense allowed must be reasonable, remembering the station in life, the occupation, the creed of the deceased and the general circumstances of the case.

As to damages under the Fatal Accidents Acts, 1846 to 1959, see 28 HALSBURY'S LAWS (3rd Edn.) 100, 101, para. 110 and SUPPLEMENT; and for cases on the subject, see 36 DIGEST (Repl.) 221-224, *1176-1194*. A

As to damages under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, see 11 HALSBURY'S LAWS (3rd Edn.) 256, 257, para. 428; and for cases on the subject, see 36 DIGEST (Repl.) 229-232, *1209-1234*.

For the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (2) (c), see 9 HALSBURY'S STATUTES (2nd Edn.) 793; and for s. 2 (3) of the Act of 1934, see 17 HALSBURY'S STATUTES (2nd Edn.) 11. B

For the Fatal Accidents Act, 1846, s. 2, see 17 HALSBURY'S STATUTES (2nd Edn.) 5.]

Action.

The plaintiff, Isaac Steingold Stanton, claimed as executor of the estate of his wife, Sarah Steingold Stanton, deceased, damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and in his personal capacity as a widower, damages under the Fatal Accidents Acts, 1846 to 1908, in respect of his wife's death on Feb. 6, 1956, as the result of the negligent driving of the defendants' vehicle on Jan. 28, 1956. The defendants, Ewart F. Youlden, Ltd., admitted liability. The plaintiff was of the Jewish faith. He lived in comfortable circumstances. At the time of the wife's death he had been happily married to her for forty-two years. Under the wife's will the plaintiff was the sole beneficiary of her estate which amounted to £1,500. The will was proved on June 27, 1956. In his capacity of executor the plaintiff, in addition to claiming damages for the wife's loss of expectation of life and damages for her pain and suffering during the nine days she survived the accident, claimed certain funeral expenses. In his personal capacity, the plaintiff's claim was limited at the trial of this action to funeral expenses which he alleged he, personally, had incurred, although on the pleadings he had made a substantial claim for damages under the Fatal Accidents Acts. Among the items claimed by the plaintiff as funeral expenses under both the Act of 1934 and the Fatal Accidents Acts was the sum of £194 15s., the cost of erecting a memorial stone over the wife's grave six months after her death. The case is reported on the question whether the cost of the memorial stone, or any part of the cost, was recoverable as funeral expenses of the wife's estate or of the plaintiff in his personal capacity, and also whether certain other minor items, which are referred to in the judgment of McNAIR, J., were recoverable as funeral expenses. C D E F

G. G. Blackledge, Q.C., and *L. J. Solley* for the plaintiff. G

N. R. Fox-Andrews, Q.C., and *W. H. Griffiths* for the defendants.

McNAIR, J., having referred to the facts and the pleadings, said in regard to the claim for loss of expectation of life that the deceased wife at the time of her death was just approaching seventy years of age and that she had had a mild cerebral thrombosis some time before and had also had some affliction of diabetes. The medical evidence was that both these matters were under control, and that her expectation of life was about five or seven years. HIS LORDSHIP accepted that estimate of her expectation of life, and in respect of that head of claim awarded the sum of £75. H

In regard to the claim for the wife's pain and suffering during the nine days by which she survived the accident, the facts were that in the accident she suffered a fracture of the pelvis in two places, a fracture of the fourth rib, some cerebral contusion, and severe shock. The surgeon who was responsible for her care whilst she was in hospital, and whose evidence HIS LORDSHIP accepted entirely, said that for part of the time, the first four or five days, she was confused in her mind and was suffering from some cerebral post-concussional amnesia, but that on the fourth and fifth days there was a marked recovery. He had also said that the sedation given to her did not indicate that she was suffering from very severe pain. On the other hand, both the plaintiff and one of the I

A wife's daughters who visited her frequently deposed to having the impression that all the time she was in severe pain. In His Lordship's judgment this was not a case where it could be said that for those nine days the deceased wife was in anything like agonising pain. She was severely injured; she was treated in hospital; she remained conscious; she was able to communicate with her relations. In these circumstances, His Lordship assessed the damages for the B pain and suffering during that period at the sum of £75. His Lordship continued:

As regards the funeral expenses, the position both in fact and in law is a little more difficult. The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (2), provides, in relation to the damages recoverable by the estate of a deceased person, as follows:

C

> "Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:— . . . (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be D included."

I think that it is quite clear, on the construction of that provision, that it enables the court to award damages in respect of funeral expenses to the extent that funeral expenses have been reasonably and properly incurred as a liability of the estate, and I do not think from that point of view that it matters whether the bills were in the first place paid out of the executor's account as long as it E can fairly and properly be said that those funeral expenses were expenses which were a liability of the estate.

As regards the claim for funeral expenses made by the plaintiff on his own behalf under the Fatal Accidents Acts, 1846 to 1908, the position is now governed by s. 2 (3) of the Law Reform (Miscellaneous Provisions) Act, 1934, which provides as follows:

F

> "In an action brought under the Fatal Accidents Acts, 1846 to 1908, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought."

On that it seems to me that the legal position is that under Lord Campbell's G Act (1) the plaintiff in this case can claim damages in respect of the funeral expenses which he has incurred, provided they are reasonable, notwithstanding that he has no other claim under Lord Campbell's Act—notwithstanding that he can prove no dependency—but that his claim for the payment of damages for funeral expenses, like any other claim by a claimant under Lord Campbell's Act is subject to any benefit which he may have received from the estate other H than those benefits which are expressly excluded by the Fatal Accidents (Damages) Act, 1908, namely, recoveries of insurance (2). That seems to me to be the legal position, and I now approach the factual position as regards the funeral expenses in this case.

The plaintiff, the husband, was a member of the United Synagogue Funeral Expenses Scheme, under which in return for an annual payment, in this case of I £1 6s. a year, the scheme assumed, under law 1, the burden of bearing the cost of a funeral at one of the cemeteries of the United Synagogue of a qualified contributor or his dependants. Accordingly, for that annual subscription the plaintiff claimed the benefit that if either he or his wife were liable for the cost of a funeral at one of those cemeteries, that cost would be borne by the United Synagogue Funeral Expenses Scheme. The funeral having taken place at a

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(1) Viz., the Fatal Accidents Act, 1846.

(2) Certain other benefits have subsequently been excluded also by the Fatal Accidents Act, 1959, s. 2.

cemetery recognised by that body, an account was rendered on Feb. 8, 1956, A
to the plaintiff in respect of the funeral of his wife, in which the only charges
made were for two additional limousine cars, £8, and £5 for the removal of the
body to the house, making a total of £13. It seems to me that that sum of £13,
though paid by the plaintiff himself by cheque, is a part of the funeral expenses
which are properly the liability of the estate.

[HIS LORDSHIP then said that he could not accept the plaintiff's evidence B
regarding a number of other items which he claimed as funeral expenses except
in so far as those items were confirmed by contemporary documents. HIS
LORDSHIP continued:] There was produced to me in support of the plaintiff's
claim that he had paid his own minister the sum of five guineas in cash for his
attendance at the funeral, a cheque in favour of the minister not for five guineas,
but for £5. I accept that as evidence that his minister was paid £5 for his C
attendance at the funeral, and I include that as part of the proper funeral
expenses which are a liability on the estate. I do not regard as proved to my
satisfaction the following items, to which the plaintiff spoke: First, the five
guineas paid in cash to the minister for attendance during the seven days of
mourning, which sum, if it was paid, I do not regard as a proper funeral expense;
nor am I satisfied as to the payment to the watcher, or the gratuities to the D
drivers. Accordingly, in my judgment the funeral expenses properly incurred
on behalf of the estate amount to a sum of £18 so far.

There remains for consideration an item of £194 15s. which was the amount
of an account by Messrs. J. Samuel & Sons, monumental masons. That account
was rendered on Aug. 27, 1956, and it covers the following items: " To marble
memorial erected over the grave of Sarah Stanton including 120 lead letters, E
£155; To synagogue fees, £34 10s.; to 90 extra letters at 1s. 2d. each, £5 5s.",
making a total of £194 15s. That was paid by the plaintiff by two cheques,
one for £100, dated Sept. 3, 1956, and the other for £94 15s., dated Oct. 10, 1956.

The question which I have to consider here is whether any part of that account
can properly be regarded as funeral expenses, either as funeral expenses of the
estate or as funeral expenses reasonably and properly incurred by the plaintiff F
in his personal capacity. The evidence on this point is extremely scanty. I
am quite clear that in so far as the stone is merely a memorial erected some six
months later to the memory of the wife, the payment for it, although it is a
perfectly proper payment for a man in the plaintiff's position to make on his
own behalf, cannot on any view be considered to be a funeral expense; on the
other hand, if the truth be that no stone of any kind was erected over the grave G
at the time and that some time would have to be allowed for the grave to settle
completely, then some part of the payment ought to be considered as a funeral
expense. The legal position is that a stone over a grave may properly be
considered as part of the funeral expenses if it is a reasonable expenditure
for the persons in the position of the deceased and of the relatives who are responsible
for the actual ordering of the stone; but in so far as it is merely a memorial H
set up as a sign of love and affection, then it should not be included.

Making the best estimate that I can, I have reached the conclusion that
of this sum of £194 15s. the sum of £40 should be allowed in respect of the simple
gravestone which would complete the funeral expenses. The result of that is
that I do not find that the plaintiff on his own behalf incurred any proper funeral
expenses, but that he did disburse on behalf of the estate some £58 (3) in respect I
of funeral expenses. Accordingly there will be judgment for the plaintiff in
his capacity as executor for £208.

[On the question of costs counsel for the defendants stated that the defendants
paid into court £200 on May 20, 1957, and a further sum of £160 14s. on July
3, 1958, and that the master gave leave for both sums to be paid in without

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(3) I.e., £40 allowed in respect of a gravestone plus £18 allowed for two cars at the funeral, removal of the body to the plaintiff's house and the minister's attendance at the funeral (see letters A to D, supra).

A allocation between the plaintiff's claim as executor and the claim in his personal capacity; therefore, from July 3, 1958, £360 14s. had been in court in respect of both claims. Counsel submitted that the defendants were entitled to costs since July 3, 1958, and should in the circumstances be awarded costs since May 20, 1957. His Lordship said that he could not, as had been suggested to him, award the defendants costs from May 20, 1957, on the ground that the B plaintiff had recovered only a few pounds more than the sum of £200 paid into court on that date. His Lordship gave the plaintiff costs up to May 20, 1957, but in view of the fact that the plaintiff had persisted in his substantial claim for damages under the Fatal Accidents Acts up to the date of the trial and in the witness-box had maintained that particulars in the pleadings supporting that claim were true although under cross-examination he admitted that C they were untrue, the plaintiff would receive no costs after May 20, 1957. The defendants would receive their costs from July 3, 1958.]

Judgment for the plaintiff, as executor of his wife's estate, for £208.

Solicitors: *Harold Miller & Co.* (for the plaintiff); *Wm. Easton & Sons* (for the defendants).

D [*Reported by* Wendy Shockett, *Barrister-at-Law.*]

E

ISAACS AND OTHERS *v.* MARKET BOSWORTH RURAL DISTRICT COUNCIL.

F [Queen's Bench Division (Lord Parker, C.J., Cassels and Ashworth, JJ.), January 18, 19, 1960.]

Rates—Limitation of rates chargeable—" Occupied for the purposes of an organisation "—Trade union war memorial convalescent home vested in trustees under trust deeds—Home conducted for benefit of union members and their wives—Trustees under strict union control—Whether trustees or union the G *organisation for whose purposes the home was occupied—Rating and Valuation (Miscellaneous Provisions) Act,* 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

Premises used as a convalescent home, which was conducted for the benefit of members of a trade union and their wives, were vested in trustees who under their trust deeds were subject to strict control by the executive council of the union, which had full power to make rules and regulations H relating to the day-to-day and general management of the home, and which appointed one of its members controller of the home to act in its day-to-day management on behalf of the trustees. The trustees consisted of four officers of the union, one trustee elected by the members of the union, and one trustee appointed by the executive council. By the union rules the governing council of the union had power " to do all things necessary I in connexion with the management of " the home. The home had been erected by the union as a war memorial, and the funds for its erection and maintenance were provided partly out of union funds, partly by a levy on union members, and partly by voluntary donations. The trustees had no power to contravene the provisions of the trust deed, even if directed by the executive council to do so. On a claim for partial relief from rates the trustees contended that they were an " organisation . . . not established . . . for profit and whose main objects are charitable or are otherwise concerned with the advancement of . . . social welfare " and that the premises were a hereditament " occupied for the purposes of " such an organisation (i.e., the trustees) within the meaning of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955*. It was conceded that the main objects of the union did not fall within s. 8 (1) (a).

Held: the trustees were not entitled to limitation of rates because the organisation " for the purposes of " which the premises were occupied was the union (see p. 439, letters B and C, post).

Appeal allowed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

National Deposit Friendly Society Trustees v. *Skegness U.D.C.*, [1958] 2 All E.R. 601; [1959] A.C. 293; 122 J.P. 399; [1958] 3 W.L.R. 172; 3rd Digest Supp.

Skegness U.D.C. v. *Derbyshire Miners' Welfare Committee*, [1959] 2 All E.R. 258; [1959] A.C. 807; 123 J.P. 338; [1959] 2 W.L.R. 711; 3rd Digest Supp.

Case Stated.

A rating authority, Market Bosworth Rural District Council, appealed, by Case Stated, from the decision of Leicestershire County Quarter Sessions on an appeal under s. 4 of the Poor Relief Act, 1743, by the ratepayers, the Trustees of Natsopa Memorial Homes, against a rate made on them in respect of the homes by the rating authority, that the trustees were entitled to a limitation of the rate, by virtue of s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, on the ground that the homes were " occupied for the purposes of an organisation . . . not established or conducted for profit and whose main objects are . . . concerned with the advancement of . . . social welfare " within the meaning of s. 8 (1) (a). The facts are stated in the judgment of ASHWORTH, J.

F. A. Amies and *R. St. G. Calvocoressi* for the rating authority.
S. W. Templeman for the ratepayers, the trustees.

LORD PARKER, C.J.: I will ask ASHWORTH, J., to give the first judgment.

ASHWORTH, J.: This is an appeal by way of Case Stated from a decision of the Court of General Quarter Sessions for the County of Leicester, sitting at Leicester. The present appellants, who were the respondents in the court below, are Market Bosworth Rural District Council, the rating authority, and the present respondents, the ratepayers, are conveniently referred to as the Trustees of Natsopa Memorial Homes. N.A.T.S.O.P.A. is the condensed title of the National Society of Operative Printers and Assistants, which is a well-known trade union; I shall refer to it as the society. In the court below the trustees appealed against a rate made by the rating authority, contending that the premises in question fell within the ambit of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The trustees were successful, hence the present appeal.

The hereditaments in question are situate at Bosworth Road, Wellsboro, and are known as Natsopa Memorial Homes. They are vested in trustees on the trust contained in a deed dated Sept. 27, 1920, varied by a later deed dated Dec. 6, 1948, and also by an intervening deed which is not relevant for the purposes of this appeal. The buildings include an administrative block, a dining hall, bedrooms, conference hall, sick bay, a chapel and accommodation for old people, and other services. It is found as a fact that the homes are conducted for the benefit of members of the society and the wives of such members. The society has approximately 43,000 members, and its affairs and business are administered by an executive council subject to the control and direction of the governing council, and in r. 2 (of the Rules of the Society, 1957) there are set out the objects of the society. It is found in para. 2 (g) of the Case Stated that

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* Section 8 (1) (a) is printed at p. 437, letter G, post.

> " The main objects of the society are those concerned with the conditions of employment and industrial disputes."

Rule 2 does, however, include in sub-rules the following " objects of the society ":

> " (h) to provide superannuation for old members, and for members of the staff or employees of the society; (i) to provide and maintain a convalescent home for the benefit of members and wives."

In para. 2 (h) and (i) of the Case Stated further facts are found in the following form:

> " As mentioned in the pamphlet [' Natsopa Memorial Homes '] the moneys for the erection and establishment of the homes were provided by the society its members and friends. The trustees at present receive an annual sum of £18,000 from the society representing a contribution of 2d. per member per week. The trustees receive some income from investments, the sale of garden produce, and the Natsopa Co-operative Society which runs a shop at the homes. The balance sheet relating to the homes shows an excess of income over expenditure for the year ending Dec. 31, 1955, of £605; (i) There is convalescent accommodation at the home for some sixty to sixty-nine members of the society or members' wives, including members not recovering from illness but in need of a period of residence to prevent a breakdown of health. Applicants are normally admitted for a period of three weeks. Applications for admission in accordance with r. 33F (p. 125) of the society's rules are made on a form obtained from the appropriate branch secretary of the society, supported by a doctor's certificate. Only those qualifying as mentioned in the society's rules under the title Natsopa Memorial Home (1) are regarded as entitled to admission. In practice there are sufficient vacancies for all such applicants, and applicants are sometimes admitted although not qualifying as aforesaid, for example members with less than twelve months' membership of the society."

It is not necessary, in my view, to read sub-paras. 2 (j) or (k) of the Case Stated but the facts stated in para. 2 (l) may be material:

> " At all material times it has been the practice to hold at the homes (i) the annual governing council meeting of the society lasting four days and attended by some ninety delegates, and (ii) two meetings of the executive council of the society, of two days each attended by some thirty members. Accommodation has been provided for persons attending these meetings at the homes at cost. In future these meetings will be held elsewhere."

The two deeds to which I have already referred are lengthy documents, to which I will now refer only briefly. The first of them sets out the trusts on which the trustees hold the premises. Clause 1 shows that the primary purpose of the purchase, namely, as a memorial for members of the society who fell in the First World War, is followed by secondary and further purposes, namely,

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(1) The following is a short summary of the effect of certain relevant provisions of the rules set out beneath the title Natsopa Memorial Home. Those qualifying under the rules are (a) members with twelve months' continuous membership, who have been under six weeks in arrears with contributions and clear of all other dues for at least four weeks before admission, who are recovering from a specific illness or disease or whom a doctor certifies to need a period of convalescent residence to prevent a breakdown of health, and who are not in need of medical, surgical or nursing treatment or special diet and not convalescent from infectious disease or suffering from certain specified diseases or conditions; (b) wives of members qualified for admission as indicated first above, if the wives are recovering from a specific illness or disease that has caused actual incapacity and are not disqualified as above set out.

> " for the other purposes in connexion therewith hereinafter more particularly mentioned."

In cl. 2 some of the further purposes are mentioned:

> " (i) A sanatorium for consumptive patients being members of the society. (ii) A convalescent home for members of the society recovering from illness of any kind. (iii) A home for aged members of the society who are no longer able to support themselves by working at their trade and for the wives of such members."

Throughout this deed there are frequent references to the executive council, and it is plain that the trustees are subject to strict control by that body. As examples, I refer to cl. 6 and cl. 8. Clause 6 provides:

> " (i) The home shall be managed by the trustees under and subject to the direction and control of the executive council, (ii) The executive council may appoint a management committee consisting of not more than ten or less than three persons being members of the society whether members of the executive council or not to supervise and control the management of the home . . ."

Clause 8 provides:

> " (i) The executive council shall have full power to make rules and regulations dealing with all or any of the following matters, namely "

—matters which are lettered from (a) to (e), are incidental matters relating to the general day-to-day management of the home, such as the engagement and dismissal of officers and servants, the rights, duties, remuneration and terms of employment of such officers and servants and the qualification and selection of inmates. Paragraph (e) is a composite provision in these words: " Any other matters relating to the management, discipline and good government of the home ".

The link between the executive council and the trustees which appears from that first deed is, in my view, further emphasised by the provisions contained in the deed of 1948, which provided a new cl. 13 as to the appointment of trustees. Clause 13 (i) now reads:

> " The present trustees are the two trustees of the society the president of the society the general secretary of the society one trustee chosen by the members of the society by ballot and one trustee being a member of the society appointed by resolution of the executive council."

Moreover, by this same deed the following sub-clause was added to cl. 13:

> " (xi) The trustees shall nominate for the decision of the executive council one of their number to be designated ' controller ' of the memorial home services, and such controller shall act for and on behalf of all the trustees in all matters relating to the day-to-day administration of the memorial home."

There is one further provision in the 1920 deed to which reference should be made, namely, cl. 14, which provides:

> " It shall be lawful for the trustees from time to time by deed with the approval of the executive council to make such alterations variations and modifications of the trust powers and provisions of these presents as having regard to the experience acquired in the administration of the trust and the circumstances of the time may seem to be necessary desirable or expedient but so that no such alteration variation or modification shall in any way prejudice or affect the main object of the trust namely the establishment and maintenance of the Natsopa Memorial Home for the purposes hereinbefore expressed."

The governing council is dealt with in r. 10 of the society's rules. Sub-rule (3) of r. 10 provides:

> "The governing council shall have supreme control and management of all the affairs and officers of the society, and its decisions shall be final and binding upon all members."

By sub-r. (4) (*i*) of r. 10 the powers of the governing council are made to include:

> "Do all things necessary in connexion with the management of the memorial home."

The rules dealing with the Natsopa Memorial Home are r. 33 (F) and the rules set out under the name of the home at the end of the book of rules, but it is not necessary to refer to them in detail (2).

One further document was exhibited to the Case, namely, the pamphlet already mentioned, "Natsopa Memorial Homes". In it there are statements of considerable importance. It is there stated:

> "The necessary funds for the purchase of the land and erection and equipment of the building were raised by a grant of £1,000 from the society's general fund, by a levy on the membership spread over three years and by voluntary donations from friends. In the first three years the levy produced £24,876, and voluntary donations to date amount to £29,596. Maintenance was provided by allocating to the home fund a percentage of each member's weekly contribution to the society. The purposes of the homes were set out in a trust deed dated Sept. 27, 1920, which placed the property in the possession of a board of trustees. To ensure that the property was always to be used for the purpose for which it had been created the deed provides [and then are set out four summary statements of the provisions. There follows this paragraph:] It will therefore be noted that the property though vested in several trustees, is at the same time under the complete authority of the executive council and is created as a permanent memorial."

That seems to me to emphasise still further the very close link which connects the trustees with the society.

I now turn to the section of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a). That reads as follows:

> "This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

It was not suggested that either the trustees or the society are an organisation established or conducted for profit, and that issue does not enter into this case.

The rating authority contends, first, that the organisation for the purposes of which the hereditament is occupied is the society, and that its main objects do not fall within the types mentioned in para. (a) of the subsection. Secondly, the rating authority contends that even if the trustees are to be regarded as the organisation occupying the hereditament, the main object of the trustees was the provision of the convalescent home for the society, and their main objects do not fall within the qualifying types.

Section 8 of this Act has already been before the courts in a number of cases, and has at least twice been considered in the House of Lords, namely, in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (3), and *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee* (4).

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(2) Rule 33 (E) was concerned with application for convalescent home benefit and the other rules were those governing admission to the home, qualification for residence, etc., summarised in the footnote on p. 435, ante.

So far as the first of the rating authority's contentions is concerned, it is in my view clear that one of the crucial issues is the question: What is the organisation for the purposes of which the hereditament is occupied? In *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee* (5) Viscount Simonds said:

> " My Lords, I turn again to the relevant section and note first the curious wording 'occupied for the purposes of an organisation . . . whose main objects', etc. It is by no means clear to me what is the 'organisation' whose main objects have to be considered. Is it the 'Social Welfare Organisation' set up under the Act of 1952 to which I have already referred? Or is it the body of trustees who appear in fact to manage the holiday centre, or is it a committee, whether the Miners' Welfare Committee which has been mentioned or some other committee? It is not a satisfactory way of disposing of the case, but I see no alternative to saying that, whatever the 'organisation' may be, its main object is nothing else than the provision of a holiday centre such as is described in the Case. If so, the question is whether such a provision is concerned with the advancement of social welfare."

Lord Denning said (6):

> " Such being the facts, if I were asked: 'For what purpose is this land used? Is it used "for the advancement of social welfare"?' I should probably say 'Yes'. But I would hasten to point out that the question is not 'For *what* purpose is the land used ?'. The question is: 'For *whose* purpose is it used?' or more accurately: 'For the purposes of *what organisation* is it used, or rather, occupied?'. Many a holiday camp is used for similar purposes to this one. The holiday camps of Messrs. Butlin provide holidays at low cost for people who could not otherwise afford them, but they do not obtain relief from rates on this score. The reason is because that organisation does not qualify under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. Again, many convalescent homes obtain relief, but only if the relevant organisation qualifies. The convalescent home in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (3) did not get relief, because the friendly society did not qualify. And I would add that it is not always right to take the occupier and treat him as the 'organisation'. In the case of a members' club, the committee of management occupy the club house, but it is occupied, not for the purposes of the committee-men, but for the purposes of the club itself. The relevant organisation is the club itself—the unincorporated association—and, in order to get relief from rates, the club itself must qualify under s. 8 (1) (a)."

It is to be noted that s. 8 (1) (a) contains no reference to the occupier himself nor, as Lord Denning pointed out, does the section refer to the purpose of the occupation. In order to qualify for relief an occupier must show that his occupation is for the purposes of an organisation falling within the qualifying conditions.

In the course of what, if I may say so, was a careful and persuasive argument, counsel for the trustees contended on their behalf that it was unnecessary to look beyond them since they were in fact the occupiers. He contended that they were an unincorporated organisation and that their occupation was for the purposes set out in the trust deed and that their main objects were either charitable or at least concerned with the advancement of social welfare. He conceded that if the trustees could properly be described as bare trustees the relevant organisation would be the society, and that as indeed is found in the Case Stated their main objects were not such as to fall within the subsection; but he urged that these trustees were not bare trustees and that they would have no right to act outside the powers and duties set out in the deed even if the executive council directed them to do so. In my view, the fact that contravention of the provisions of the trust deed may and no doubt would be prevented does not provide conclusive evidence that the trustees are themselves the organisation for whose purposes the hereditament is occupied. For myself, I think that the approach suggested on behalf of the trustees is somewhat narrow and that it does not take sufficiently into account the relevant operative words of the section "for the purposes of an organisation". If one keeps in mind the following factors, first, the provisions of the deed, secondly, the constitution of the trustees, thirdly, the rules of the society and, fourthly, the statements in the pamphlet, there is in my view cogent evidence to show that the organisation for the purposes of which the hereditament is occupied is indeed the society. I would go further: in my judgment the evidence on this first issue does not admit of any other conclusion but that the organisation for the purposes of which the hereditament is occupied is the society, and on this ground in my view the appeal should succeed. In these circumstances, I do not think it necessary to embark on a discussion of the other issue, namely, whether occupation for the purposes of the trustees would itself justify a claim for relief.

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(3) [1958] 2 All E.R. 601; [1959] A.C. 293.
(4) [1959] 2 All E.R. 258; [1959] A.C. 807.
(5) [1959] 2 All E.R. at p. 262; [1959] A.C. at p. 823.
(6) [1959] 2 All E.R. at p. 265; [1959] A.C. at p. 827.

CASSELS, J.: I agree.

LORD PARKER, C.J.: I agree and have nothing to add.

F. A. Amies: My Lord, might I mention the question of the costs in quarter sessions. I have not been able to trace any authority, but could the costs include costs at quarter sessions?

LORD PARKER, C.J.: No, we have no jurisdiction over those.

F. A. Amies: I think the position is this: Certainly in an earlier case relating to an appeal from a court of summary jurisdiction this court held that it had no power to make an order for costs, but that was because there is limited provision as regards costs in quarter sessions. I have not been able to find anything authoritative in the White Book.

CASSELS, J.: This is purely procedural. I should have thought it was perfectly simple. You will go back to quarter sessions and ask for a reversal of their order, and you can then apply for your costs. As you were ordered to pay costs there, that order goes with the decision of this court. Having succeeded, you should have your costs below, and they would have power to reverse their order as to paying the other side's costs and make them pay your costs.

F. A. Amies: Yes, I know that has been done in previous cases, but I was thinking of saving trouble in repeating it in this case.

S. W. Templeman: I do not know whether I can help. There is a reference in the White Book to the fact that the costs of proceedings are in the discretion of the court, by which I take it to mean the Divisional Court, and I think it would be convenient that your Lordships should make that order.

LORD PARKER, C.J.: I gather you would be perfectly happy if we say: Appeal allowed, costs in this court, appellants to have the costs below to be taxed out of court?

Both parties agreed to this.

Appeal allowed: appellants to have their costs of this appeal, and their costs below to be taxed out of quarter sessions.

Solicitors: *Robinson & Bradley*, agents for *Thomas Flavell & Sons*, Hinckley, Leicester (for the rating authority); *Shaen, Roscoe & Co.* (for the ratepayers, the trustees).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

OFFICIAL ASSIGNEE OF THE PROPERTY OF KOH HOR KHOON AND OTHERS, BANKRUPTS *v.* EK LIONG HIN, LTD.

[Privy Council (Lord Denning, Lord Jenkins and Mr. L. M. D. de Silva), November 9, 10, 1959, January 14, 1960.]

Privy Council—Singapore—Moneylender—Loans on security of goods stored by firm whose primary business was that of rubber merchants and shippers —Loans only to selected customers—" Moneylender "—Singapore Moneylenders Ordinance (Laws of the Colony of Singapore, 1955, *c.* 193), *s.* 2 (*d*).

The definition of " moneylender " in s. 2 of the Moneylenders Ordinance of Singapore excluded " (d) any person . . . bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money ".

The respondent company, which was incorporated in Singapore, carried on the business of rubber merchants and shippers and had storage facilities there for goods. The company lent money to its customers, believing that if it did not lend money it would lose customers for its merchant and shipping business. The company had no separate moneylending business, nor did it advertise that it lent money. A firm borrowed money from the company on the security of iron sheets stored with the company. The firm became bankrupt and the official assignee claimed the value of the iron sheets, contending that the security of the company thereon was invalid for want of compliance with formalities required by the ordinance. In the year next before that of the hearing of the action the company had on loan to customers a total of about 1,000,000 dollars out of assets of about 10,000,000 dollars.

Held: loan transactions which were undertaken genuinely for the purposes of preserving, advancing or otherwise assisting the respondent company's business of rubber merchants and shippers, though not necessarily undertaken in connexion with its primary objects, were made " for the purposes " of that business within s. 2 of the Moneylenders Ordinance (see p. 444, letter B, post); accordingly, as the company had genuinely believed that if the loan transactions were not undertaken it would lose customers, it was within the exception from the definition of " moneylender ", the material factor on this question being the genuineness of the belief not its correctness in fact.

Furber v. *Fieldings, Ltd.* ((1907), 23 T.L.R. 362) applied.

Edgelow v. *MacElwee* ([1918] 1 K.B. 205) explained.

Appeal dismissed.

[**Editorial Note.** The Singapore Moneylenders Ordinance, s. 2 and s. 5 (1) and (3), are similar to the United Kingdom Money-lenders Act, 1900, s. 6, and the Moneylenders Act, 1927, s. 6, respectively.

As to the meaning of moneylender, see 27 Halsbury's Laws (3rd Edn.) 18, para. 26; and for cases on the subject, see 35 Digest 202, 203, *282-291*.

For the Money-lenders Act, 1900, s. 6, and the Moneylenders Act, 1927, s. 6, see 16 Halsbury's Statutes (2nd Edn.) 375, 386.]

Cases referred to:

Edgelow v. *MacElwee*, [1918] 1 K.B. 205; 87 L.J.K.B. 738; 118 L.T. 177; 35 Digest 203, *290*.

Furber v. *Fieldings, Ltd.*, (1907), 23 T.L.R. 362; 35 Digest 203, *288*.

Appeal.

Appeal by the Official Assignee of the property of Koh Hor Khoon, Ong Leng Sim, Koh Chwee Geok, Koh Hai Khoon and Loh Seng Chor, bankrupts, from a judgment of the Court of Appeal of the Colony of Singapore (Whyatt, C.J., Tan Ah Tah, J., and Chua, J.), dated Jan. 13, 1958, allowing an appeal by the

A respondent, Ek Liong Hin, Ltd., from a judgment of KNIGHT, J., in the High Court of the Colony of Singapore, dated June 24, 1957. The facts are set out in the judgment of the Board.

Eustace Roskill, Q.C., and *Basil Eckersley* for the appellant.
C. P. Harvey, Q.C., and *I. S. Hill* for the respondent.

B **MR. L. M. D. DE SILVA:** The appellant, who is the plaintiff in this case, is the Official Assignee of the property of four persons who had been adjudicated bankrupt on Feb. 27, 1953, and who, before that date, had been trading together under the name of Koh Bian Seng. The firm had borrowed certain sums of money from the defendant company (respondent to this appeal) on the security of a quantity of galvanised iron sheets placed in its possession. In this action C instituted in the High Court of Singapore, the appellant asked for the return to him by the respondent of the iron sheets or their value and for certain other relief on the ground that the respondent was a moneylender within the meaning of that term in the Moneylenders Ordinance of Singapore (c. 193, Laws of the Colony of Singapore, 1955), that it had failed, when dealing with Koh Bian Seng, to comply with the formalities required by s. 5 of the ordinance and that, consequently, D the security taken could not be enforced. Section 5 of the ordinance is to the following effect:

> " (1) No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent on or after Jan. 1, 1936 or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid E in respect of any such contract, shall be enforceable, unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract or their respective agents, or, in the case of a loan to a partnership firm, by a partner in or agent of the firm, and unless a copy thereof authenticated by the lender or his agent be delivered to the borrower or his agent, or, in the case of a loan to a partnership firm, to a F partner in or agent of the firm, before the money is lent; and no such contract or security shall be enforceable, if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given, as the case may be: "

There is a proviso to this subsection and three subsections, (2), (4) and (5), G which have no bearing on the matter under consideration in this case. Subsection (3) reads:

> " The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show separately and distinctly— (a) the date of the loan; (b) the principal; and (c) the rate of interest per centum per annum payable in respect of such loan or, where the interest H is not expressed in terms of a rate per centum per annum, the amount of such interest."

The respondent admits that the formalities required by the section were not observed, but denies that it is a moneylender. The High Court of Singapore held that it was. On appeal, the Court of Appeal held that it was not. This is an appeal from that decision.

I Under s. 2 of the Moneylenders Ordinance of Singapore " moneylender " is defined thus:

> " ' moneylender ' shall include every person whose business is that of moneylending, or who carries on or advertises or announces himself or holds himself out in any way as carrying on that business, whether or not that person also possesses or earns property or money derived from sources other than the lending of money, and whether or not that person carries on the business as a principal or as an agent; but shall not include . . ."

then follow certain exceptions (a), (b), (c), (d), (e) and (f), of which the only one relevant on the facts of this case to the question to be decided is

> " (d) any person bona fide carrying on the business of banking or insurance, or bona fide carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; "

The definition is the same as that to be found in s. 6 of the English Act of 1900, (1), except that the words " whether or not that person also possesses or earns property or money derived from sources other than the lending of money . . . " do not appear in the English Act. The Singapore Ordinance also contains (s. 3) the following provision not to be found in the English Act:

> " Save as excepted in paras. (a), (b), (c), (d), (e) and (f) of the definition of ' moneylender ' in s. 2, any person who lends money at interest or who lends a sum of money in consideration of a larger sum being repaid shall be presumed, until the contrary be proved, to be a moneylender."

The respondent admits that it carries on the business of moneylending, but claims that it is not a moneylender within the meaning of the ordinance on the ground that it is a person, which, in the language of s. 2 (d) (see above), carries on a

> " business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money."

It has been found by the learned trial judge that

> " there is no suggestion that the [respondent] company's primary object is moneylending—in fact they are rubber merchants and shippers—and the only question for determination is whether these loans were made ' in the course of their business and for its purposes '."

It is on this question that the courts in Singapore have disagreed, and it is the only question for decision on this appeal. It is common ground that, if the respondent is held as a result of the answer to the question to be a moneylender this appeal should be allowed, and that, if it is held not to be a moneylender, the appeal should be dismissed.

The respondent is a limited company incorporated in Singapore in 1948 with a nominal capital of 2,000,000 dollars and assets approximately of the value of 10,000,000 dollars. Its primary business, as found by the trial judge, was that of " rubber merchants and shippers ". They had a rubber estate and ships that plied between Singapore and Indonesia. In 1951 they started a godown storage department as a facility for their customers, and in the same year they also started as an additional facility to make loans on the security of the goods stored in their godowns. The audited figures in the balance sheet " at Dec. 31, 1952 " show that, out of their total assets of about 10,000,000 dollars, about 1,000,000 was out on loan. They made loans only to selected customers who stored goods with them. They did not advertise the fact that they were willing to lend money. It does not appear to what extent the moneys raised were utilised by the borrowers in connexion with the other branches of the respondent's business, and it is assumed for the purposes of this judgment that a large part of it was not so used. The learned trial judge opened his judgment with the words " The facts in this case are not in dispute ". No question of credibility arose in this case, and the lowest at which the case for the respondent on the facts can be viewed is that the witnesses called by it believed what they said, even if it can be suggested that they were mistaken in certain inferences of fact which they made.

On the question whether the respondent " lent money (a) in the course of

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(1) I.e., the Money-lenders Act, 1900; 16 HALSBURY'S STATUTES (2nd Edn.) 375.

A their business and (b) for the purposes of their business ", WHYATT, C.J., who wrote the principal judgment of the Court of Appeal said:

> " As regards (a), it is clear from the evidence that these loans were made in accordance with the normal commercial practice of shipping and godown companies in Singapore and therefore it follows, in my view that they B were made in the course of the [respondent's] business. As regards (b), the evidence shows that the purpose of these loan transactions was to prevent the [respondent] losing customers to their competitors and it cannot, in my view, be said that money lent for such a purpose was not lent for the purposes of the [respondent's] business. As the [respondent's] godown manager put it: 'If we did not allow certain customers loans C against their goods, we would lose a lot of them. Several of our customers who use our godown storage also use our ships'."

Their Lordships agree with the conclusions arrived at by the Court of Appeal. It was said for the appellant that the evidence did not warrant a finding that there was " a normal commercial practice " as found. There was evidence that " several other firms do this sort of business which is a useful facility for members D of the business community ". So that, even if the practice was not " normal " in the strict sense of the word, it was not infrequent. The moneylending transactions could not properly be regarded as a separate business and, as observed by the learned Chief Justice, it was never suggested in the course of the argument before the Court of Appeal that it was. They were undertaken in the course of the previous business and as a part of its activities as a whole. It also E appears from the evidence that they were undertaken by offering facilities to retain the existing customers and to gain fresh ones and thus to preserve and advance the business previously done. They can, therefore, legitimately be said to have been undertaken and carried on for the purposes thereof.

On the question discussed in the preceding paragraph, the learned trial judge said:

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> " The evidence on this point is very slight. The manager of [respondent] company's godown department stated that unless they allowed these facilities to persons who stored their goods in the company's godowns, these customers would go elsewhere. This, of course, might result in a loss to the company's godown business though I do not see how its primary objects, i.e., rubber G trading and shipping, would be affected. It is true the witness inferred that if customers left the company's godowns they might cease to use the company's ships—but there is no concrete evidence in this regard whatsoever and mere inference, as I see it, is wholly insufficient."

It will be seen that the learned trial judge was of the opinion that there was not sufficient material on which he could accept the correctness of the view H which, as a matter of business judgment, was held by the respondent, that, if the moneylending transactions had not been undertaken, some of the customers might have ceased to do business with the company in spheres (other than that of moneylending) such as shipping. In their Lordships' opinion, the correctness of the view held by the respondent is immaterial to their case. The important thing is that it was genuinely held. If it was, then the money- I lending transactions were carried out with the object of preserving and advancing the business and, therefore, for the purposes of the business. The trial judge refused to accept the correctness of the view held by the respondent, but he did not hold, and the whole tenor of his judgment indicates that he would not have held, that the view was not genuinely held. Even if the view was incorrect, in the words of the Court of Appeal,

> " the evidence shows that the purpose of these loan transactions was to prevent the [respondent] losing customers to their competitors "

and, therefore, they were undertaken for the purposes of the business. It would be most unsafe to hold that a business view such as the one mentioned was, in fact, incorrect without very much more investigation than has taken place. And, as already stated, correctness was immaterial so long as it was genuinely held. The trial judge seems to have thought that the words " for the purposes whereof he lends money " indicate that the money lent must be shown to have been lent for the purposes of the primary objects of the business. Their Lordships do not think this is the true construction of the subsection. " Whereof " refers to the business and not to the primary objects. It is sufficient, in their opinion, that the moneylending transactions are undertaken genuinely for the purposes of the business, that is, with the object of preserving, advancing or otherwise assisting the business, and not necessarily in connexion with its primary objects.

Their Lordships would observe that the decision of PHILLIMORE, J., in *Furber* v. *Fieldings, Ltd.* (1) has followed the same general line of reasoning as their own. In that case the question arose whether the plaintiff was a moneylender within the meaning of the Money-lenders Act, 1900. If he had been, his claim would have failed. He carried on the business of a surveyor, valuer and auctioneer and also lent money. It was argued for him that, by reason of the provision in s. 6 (d) of that Act (identical with s. 2 (d) of the Sinagpore Ordinance), he was not a moneylender. It appeared from the evidence that (2)

> " substantially any person who asked [him] for a loan on the security of chattels would receive that loan if the security were sufficient unless there was some personal objection to the applicant ",

and that

> " [His] object in advancing money upon bills of sale was that by that means [he] obtained a valuation fee, in the first instance, and the business also brought [him] in touch with a class of person from whom [he] got other business. [He] charged fifteen per cent. interest as a regular rate. [He] never advertised or paid commissions to people introducing business, and [he] never discounted bills or lent money on personal security."

It was argued for the defendants that, though the plaintiff was a person who came within the first part of the section as he was a " person who carried on a bona fide business not having for its primary object the lending of money ", yet he did not come within the second part of the section because the moneylending transactions were not " transactions in that business ". It was argued that:

> " The large sum lent by the plaintiff's firm had not been lent in the course of their business of valuers or auctioneers, and to say that the business of advancing money could be run together with and help the other business was a very different thing from saying that the lending of money was a natural incident of the business of an auctioneer and surveyor "

and, further, that, because the business of valuers and auctioneers which the plaintiff carried on was a business which did not involve the lending of money, the moneys lent were not lent in the course of carrying on that business within the meaning of s. 6 of the Act. The facts (though not the inferences) as stated in the above argument appear to have been admitted. PHILLIMORE, J., held that the plaintiff had brought himself within s. 6 (d), and was not a moneylender within the meaning of the Act. The judgment has not been reported in detail, but it does not appear that the fact that the plaintiff secured valuation fees was the basis of, or a principal point in, the decision.

Edgelow v. *MacElwee* (3) was cited by the appellant. In that case, MCCARDIE J., said (4):

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(1) (1907), 23 T.L.R. 362.

(2) (1907), 23 T.L.R. at p. 363.

(3) [1918] 1 K.B. 205.

(4) [1918] 1 K.B. at p. 208.

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> "If the court comes to the conclusion that the solicitor carries on the actual business of a moneylender as well as the vocation of a solicitor, then his professional calling will not free him from the requirement of registration under the Act of 1900."

(Registration is a requirement of the English Act though not of the Singapore Ordinance.) Their Lordships agree. The mere fact that he carried on the B vocation of a solicitor will not have released him. It was necessary to consider whether the primary object of his business was moneylending and, if not, whether the moneylending took place "in the course of and for the purposes" of that business. In the case considered by McCARDIE, J., it was found on the facts that (5) the

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> "vocation as a solicitor, so far as he carried it on, was used as a mere disguise in order to give a colourable professional appearance to the course of ordinary moneylending transactions."

The primary object of the business was moneylending, and the solicitor could not, therefore, have been heard to say that the provisions of the Money-lenders Act, 1900, were not applicable to him. There are dicta in McCARDIE, J.'s judgment D on which an argument was based before their Lordships that the exception could not be utilised by a person who had not shown that the money lent was used in connexion with the primary objects of the business. As already stated, their Lordships are of opinion that this argument is not sound. It is sufficient if it is lent in the course of, and for the purposes of, the business as a whole, and not merely of its primary objects.

E Figures based on the accounts produced in the case were placed before their Lordships to show that the profits from the moneylending branch of the business for the particular year to which they related were large when compared with other profits. It was suggested that these figures gave an indication of the relative size of the moneylending business when compared with other business done. Their Lordships cannot accept this suggestion. In any particular year F the profits from the other business may be very low, or even show a loss for reasons connected with that particular year. Without taking into account (this has not been done) this and other relevant factors, no inference can be drawn. In any case, there is a finding of fact by the trial judge, affirmed by the Court of Appeal, that the primary object of the business is not moneylending and, consequently, the submission loses most, if not all, of its relevance.

G For the reasons which they have given, their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Slaughter & May* (for the appellant); *E. F. Turner & Sons* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(5) [1918] 1 K.B. at p. 209.

MUNGONI *v.* ATTORNEY-GENERAL OF NORTHERN RHODESIA.

[Privy Council (Lord Tucker, Lord Denning and Mr. L. M. D. de Silva), December 3, 7, 1959, January 25, 1960.]

Privy Council—Rhodesia and Nyasaland—Northern Rhodesia—Emergency legislation—Detention order—Regulation authorising governor to delegate "powers" under emergency regulations—Whether regulation enabled governor to delegate duty of being satisfied of necessity to exercise power—Northern Rhodesia Emergency Powers Regulations, 1956, *reg.* 16 (1), *reg.* 47.

In September, 1956, the Acting Governor of Northern Rhodesia made a proclamation in which he proclaimed that the provisions of the Orders in Council dealing with emergencies should have effect in the Western Province of Northern Rhodesia. At the same time he issued the Emergency Powers Regulations, 1956, of which reg. 16 (1)* provided that whenever the governor was satisfied that for the purpose of maintaining public order it was necessary to exercise control over any person he might make a detention order against such person directing that such person be detained. By reg. 47* the governor was authorised to delegate all or any of the powers conferred on him by the regulations. The governor also issued an instrument delegating many of his powers, including the powers conferred by reg. 16 (1), to the Provincial Commissioner of the Western Province. The appellant was living in the Western Province and on Sept. 16, 1956, the provincial commissioner made a detention order against him under reg. 16, in which it was stated that the provincial commissioner was satisfied that it was necessary to exercise control over the appellant. The appellant was taken to a detention camp, but was discharged by order of the court on Nov. 29, 1956. A restriction order was then made against him by the governor prohibiting him from being in the Western Province except under written permit, which order continued until it was revoked in October, 1959. The appellant claimed damages for false imprisonment for the period Sept. 16 to Nov. 29, 1956, on the ground that the detention order of Sept. 16, 1956, was invalid as the governor could not validly delegate the duty, imposed on him by reg. 16 (1), of deciding whether he were satisfied that the detention order was necessary before it was made.

Held: the authority to delegate "powers" that was conferred by reg. 47 (1) enabled the governor validly to delegate not only his power under reg. 16 (1) to make detention orders but also the performance of the condition necessary for the exercise of the power, viz., the fulfilment of the duty to decide whether he was satisfied of the necessity for the order being made.

Appeal dismissed.

[As to the delegation of statutory authority and duties, see 31 Halsbury's Laws (2nd Edn.) 467, 535, paras. 574, 700.]

Cases referred to:

Budd v. *Anderson*, [1943] 2 All E.R. 452; [1943] K.B. 642; 113 L.J.K.B. 33; 169 L.T. 141; 2nd Digest Supp.

Liversidge v. *Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; 2nd Digest Supp.

Mwenya, Re, [1959] 3 All E.R. 525; [1959] 3 W.L.R. 767.

Stewart v. *Chief Secretary of Northern Rhodesia*, [1956] R. & N. 617.

Appeal.

Appeal by special leave in formâ pauperis by Edward Liso Mungoni from a judgment of the Federal Supreme Court of Rhodesia and Nyasaland (Tredgold, C.J., Lewey, F.J., and Paterson, C.J. (Northern Rhodesia)), dated Sept. 10, 1958, reversing a judgment of the High Court of Northern Rhodesia (Mosdell,

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* Regulation 16 (1) and reg. 47 are set out at p. 449, letters C and E, post.

J.), dated Apr. 19, 1958, whereby the appellant was awarded £25 damages for wrongful imprisonment. The facts are set out in the judgment of the Board.

E. L. Mallalieu, Q.C., *A. I. Kaufman* and *J. O. Haines* for the appellant.

B. C. Roberts and *M. Heald* for the respondent.

LORD DENNING: The appellant, Edward Liso Mungoni, is an African resident in Northern Rhodesia. He claims damages for wrongful arrest and detention. The High Court of Northern Rhodesia (MOSDELL, J.) found in his favour and awarded him £25 damages. That decision was reversed by the Federal Supreme Court of Rhodesia and Nyasaland (TREDGOLD, C.J., LEWEY, F.J., and PATERSON, C.J. (Northern Rhodesia)), who held that he had not been wrongfully arrested or detained. Edward Liso Mungoni now appeals to Her Majesty in Council asking not only that the judgment in his favour should be restored but also that the damages should be increased, because the sum of £25 was, he says, inadequate.

On Sept. 11, 1956, the Acting Governor of Northern Rhodesia made a proclamation in which he said he was satisfied that a public emergency existed and he proclaimed that the provisions of the Orders in Council (those dealing with emergencies) should have effect in the Western Province of Northern Rhodesia. On the very same day, he issued emergency regulations which gave the authorities wide powers, and, in particular, gave the governor power to make detention orders. He also issued an instrument delegating many of his powers to the Provincial Commissioner of the Western Province. At the time when the emergency was declared, the appellant was living in the Twapia African Township, Ndola, which is in the Western Province of Northern Rhodesia. He was an official of the African National Congress. At 6 a.m. on Sept. 16, 1956, police officers came to his house and arrested him. He was arrested for breaking the Emergency Regulations by attending a meeting which had been prohibited. He was not tried on this charge because at 7.30 p.m. that day the Provincial Commissioner for the Western Province made a detention order against him. It was in these words:

> "NORTHERN RHODESIA
> THE EMERGENCY POWERS REGULATIONS, 1956.
>
> DETENTION ORDER
>
> "WHEREAS it is provided by reg. 16 of the Emergency Powers Regulations, 1956, that whenever the governor is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, he may make an order against such person directing that such person be detained;
>
> "And Whereas it is further provided by the said regulation that any person detained in pursuance of the said regulation shall be detained in such place as may be authorised by the governor;
>
> "And Whereas the powers conferred upon the governor by the said regulation have been delegated under the provisions of reg. 47 of the said regulations to the officer for the time being carrying out the duties of the Provincial Commissioner, Western Province;
>
> "And Whereas I am satisfied that for the purpose of maintaining public order it is necessary to exercise control over one EDWARD MUNGONI LISO
>
> "Now, therefore, I, GLYN SMALLWOOD JONES, Member of the Most Excellent Order of the British Empire, Provincial Commissioner, Western Province, do hereby order that the said EDWARD MUNGONI LISO be detained and do hereby authorise the Local Prison, MUMBWA, as the place where the said EDWARD MUNGONI LISO shall be detained.
>
> "Given under my hand at NDOLA this 16th day of September, 1956.
>
> (SIGNED) G. S. JONES,
> Provincial Commissioner."

Their Lordships draw particular attention to the fact that it was the provincial A commissioner who made the detention order—it was he who said he was satisfied that it was necessary to exercise control over the appellant—and not the governor himself.

In pursuance of the detention order, the appellant was taken to the detention camp at Mumbwa. Fifty-three others were taken as well. On Nov. 2, 1956, Mr. Stewart, on behalf of the fifty-four detained persons, applied to the Chief Justice B of Northern Rhodesia (BELL, C.J.) for a writ of habeas corpus ad subjiciendum. On Nov. 28, 1956, the chief justice held that the fifty-four orders of detention were invalid and ordered that the detainees should be discharged forthwith (see *Stewart* v. *Chief Secretary of Northern Rhodesia* (1)). They were so discharged but the Governor of Northern Rhodesia himself immediately made restriction orders against them. The restriction order against the appellant was dated C Nov. 28, 1956, and prohibited him from being in the Western Province except under written permit. It was signed by the governor himself. This order was subsequently continued by further orders, all signed by the governor himself. Then, in 1959, one of the restricted persons named Mwenya applied to the High Court in London for leave to issue a writ of habeas corpus ad subjiciendum. The High Court (LORD PARKER, C.J., SLADE and WINN, JJ.) held that the D courts of England had no jurisdiction to issue the writ (see *Re Mwenya* (2)), but the Court of Appeal (LORD EVERSHED, M.R., ROMER and SELLERS, L.JJ.), on Oct. 13, 1959, held that the courts had jurisdiction, though they did not determine whether it was proper to exercise it (2). A week later, on Oct. 20, 1959, the Governor of Northern Rhodesia revoked the restrictive orders. The appellant thereupon became free. E

This appeal only concerns the period during which the appellant was detained under the detention order made by the provincial commissioner, that is to say, from 7.30 p.m. on Sept. 16, 1956, to the time of his discharge on Nov. 29, 1956. The appellant contends that his detention during that period was unlawful and claims damages for false imprisonment. He has in his favour the ruling of BELL, C.J., in the habeas corpus proceedings, holding that the detention order was F invalid, but he, through his counsel, admits that that ruling is not conclusive in his favour. The validity of the detention order can be investigated afresh in this civil action: see *Budd* v. *Anderson* (3). And, indeed, it has been investigated afresh by each of the courts. MOSDELL, J., who tried the case at the first instance, thought that the decision of BELL, C.J., was a proper one and held that the detention order was invalid. Accordingly, he awarded damages for wrongful detention. G The Federal Supreme Court thought the decision of BELL, C.J., was wrong, and that likewise the decision of MOSDELL, J., was wrong also. They held that the detention order was valid and reversed the award of damages. The difference of opinion between the judges arises on this: BELL, C.J. (and MOSDELL, J., following him), held that, in order for the detention order to be valid, it was the duty of the *Governor* of Northern Rhodesia *himself* to be satisfied that it was necessary to H exercise control over the appellant. It was his personal duty to be satisfied. He could not delegate it. The governor had not himself performed this duty and the detention order was, therefore, invalid. But the Federal Supreme Court held that it was not necessary for the governor himself to be satisfied. He could delegate this task to the Provincial Commissioner of the Western Province. He had so delegated it and, inasmuch as the provincial commissioner was satisfied, that was I enough, and the detention order was valid.

The point at issue is, therefore, to what extent, if any, the Governor of Northern Rhodesia can delegate his functions in respect of detention orders to the provincial commissioner. In order to enable him to delegate, it is necessary to find some express authority in that behalf. Their Lordships recall that, in England, the

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(1) [1956] R. & N. 617.

(2) [1959] 3 All E.R. 525.

(3) [1943] 2 All E.R. 452; [1943] K.B. 642.

A powers of the Secretary of State under reg. 18B were personal and could not be delegated. As LORD WRIGHT said in *Liversidge* v. *Anderson* (4):

> " The regulation places on the Secretary a public duty and trust of the gravest national importance. As I understand the regulation, it is a duty which he must discharge on his own responsibility to the utmost of his ability, B weighing on the one hand the suspect's right to personal liberty and on the other hand the safety of the state in the dire national peril in which during this war it has stood and stands."

But in Northern Rhodesia, the Emergency Regulations contain an express provision enabling the governor to delegate his powers. And the question is how far that enables him to delegate his power to make detention orders. The C authority to make detention orders is given by emergency reg. 16 (1) which is in these terms:

> " Whenever the governor is satisfied that for the purpose of maintaining public order it is necessary to exercise control over any person, he may make an order (hereinafter called a detention order) against such person directing that such person be detained, and thereupon that person shall be arrested D and detained."

Their Lordships would pause for a moment to notice that, under the regulation, the governor cannot make a detention order unless he is first " satisfied " of what is there stated. In a sense that puts a *duty* on him to be " satisfied " before he makes an order. Can this duty be delegated by the governor to someone else? Counsel for the appellant argues that it cannot. The authority of the E governor to delegate applies, he said, only to *powers* and not to *duties*. He bases this on the words of emergency reg. 47, which defines the governor's authority to delegate:

> " The governor may, by writing under his hand, and either generally or specially, depute any person or persons, either by name or by office, to exer-F cise all or any of the *powers* conferred upon the governor by these regulations, subject to such conditions, if any, as he may specify, and thereupon any person so deputed shall have and exercise such powers accordingly, but no such delegation shall affect or impair the power of the governor to act himself under these regulations."

Turning back now to reg. 16 (1), counsel for the appellant said that it contained G a duty and also a power. The *duty* laid on the governor was to be " satisfied " that it was necessary to exercise control over any person. The *power* was to make an order directing that such person be detained. The effect of reg. 47, said counsel, was to authorise the governor to delegate his *power* to make an order, but it did not authorise him to delegate his *duty* to be satisfied. He was bound to fulfil this duty himself personally. This would not give rise to any practical difficulty, said H counsel, because reg. 16 (6) enables a police inspector to detain a suspect for twenty-eight days pending a decision whether a detention order should be made against him.

Counsel said that this restriction of the governor's authority to delegate (limiting it to powers and not extending it to duties) must have been deliberate. He said that reg. 47 was in striking contrast to s. 28 of the Interpretation I Ordinance, which empowers the governor (in the cases to which it applies) to depute both powers and duties. It reads as follows:

> " Where by any law the governor is empowered to exercise any *powers* or perform any *duties*, he may, unless by law expressly prohibited from so doing, depute any person or persons by name, or the person or persons for the time being holding the office or offices designated by him, to exercise such powers or perform such duties on his behalf, subject to such conditions,

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(4) [1941] 3 All E.R. 338 at p. 375; [1942] A.C. 206 at p. 265.

> exceptions and qualifications as the governor may prescribe, and thereupon, or from the date specified by the governor, the person or persons so deputed shall have and exercise such powers and perform such duties, subject as aforesaid: Provided that nothing herein contained shall authorise the governor to depute any person to make rules under the power in that behalf conferred upon him by any law."

Their Lordships appreciate the significance of this point so made by counsel for the appellant. It is clear that s. 28 does not apply to the Emergency Regulations. Regulation 47 was inserted instead. And reg. 47—in contrast to s. 28—only authorises the governor to delegate powers, not duties. This was the determining factor which influenced Bell, C.J., in the habeas corpus proceedings. He said (5):

> " The wording of reg. 47 follows so closely the wording of s. 28 that when the two stand side by side the omission from reg. 47 of the delegation of the performance of *duties* imposed by law is very apparent."

Their Lordships can now turn to the instrument of delegation itself. It followed the words of reg. 47 very closely. It spoke of powers and not of duties. It was in these terms:

> " Government Notice No. 221 of 1956.
>
> The Emergency Powers Orders in Council 1939 and 1956.
>
> ---
>
> The Emergency Powers Regulations 1956.
>
> ---
>
> Delegation of Powers.
>
> " In exercise of the powers conferred by reg. 47 of the Emergency Powers Regulations, 1956, all the *powers* conferred upon the governor by the provisions of the said regulation, other than the powers conferred by regs. 10, 16 (7), 16 (9) and 20, are hereby delegated to the officer for the time being carrying out the duties of the Provincial Commissioner, Western Province.
>
> " Given under my hand at Lusaka this eleventh day of September, 1956.
>
> A. T. Williams,
> Acting Governor."

Bell, C.J., regarded that instrument as a valid delegation to the provincial commissioner of the *power* to make a detention order but no delegation at all of the *duty* of the governor to be satisfied. That duty remained with the governor himself and was, he thought, a " very proper limitation "; and, as the governor had never fulfilled this duty in regard to the fifty-four detained persons, they must be released. In the key passage of his judgment he said (5):

> " The delegation set out in Government Notice 221/56 is good as far as it goes. The provincial commissioner can make a detention order—but only when the governor is satisfied that it is necessary in terms of reg. 16 (1); and no delegation of the duty of *satisfying* himself has been made by the governor. Without the step of ' satisfying ' being taken, a detention order is ultra vires. In the result the fifty-four orders of detention, the subject-matter of this application, are, in my opinion, invalid and I have no option but to order the release of the detained persons, which I accordingly do."

While their Lordships share with the chief justice his concern for the liberty of the subject, they cannot agree with this line of reasoning. The power and the duty under reg. 16 (1) are so interwoven that it is not possible to split the one from the other—so as to put the duty on one person and the power in another. Whosoever exercises the power, he it must be who has to carry out the duty. It seems clear to their Lordships that, if the governor has any authority at all to delegate his functions under reg. 16 (1), he must be able to delegate both the power and duty together to one and the same person. He cannot delegate the power to another and keep the duty to himself. Even this did not daunt counsel for the appellant. He said that, if the power cannot be split from the duty, then it means that the governor cannot delegate his functions under reg. 16 (1) at all; for he cannot delegate his duty under it to anyone.

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(5) [1956] R. & N. at p. 629.

It seems to their Lordships that the arguments for the appellant proceed on this fallacy: they assume that the duty under reg. 16 (1) is something separate and distinct from the power therein contained. Their Lordships cannot accept this view. In their opinion, reg. 16 (1) contains not so much a duty, but rather a power coupled with a duty. The power of the governor to make a detention order can only be exercised when he is " satisfied " that it is necessary. The requirement that he is to be satisfied—though in one sense a duty—is, nevertheless, also a condition or limitation on the exercise of the power. And when reg. 47 authorises the governor to delegate the power to any person, it authorises him to delegate to such person the fulfilment of all the conditions and limitations attaching to it, even though they be also duties. There are many powers in the Emergency Regulations to which the like applies. They start off " Whenever the governor is satisfied " or " If it appears to the governor ", or the like. Counsel for the appellant was forced to say that, whenever such a condition or limitation was expressed, the governor had to fulfil it himself and could not delegate it. Their Lordships cannot accept this view. A detailed study of the regulations convinces them that it was intended that, in all these cases, the governor should be able to delegate the power together with the fulfilment of the condition precedent to its exercise.

The reason why reg. 47 refers only to " powers " and not to " duties " became apparent in the course of the argument. The Emergency Regulations impose no duties on the governor simpliciter—nothing, for instance, which a mandamus would issue to command him to perform. The only duties on him are those which are appurtenant to powers conferred on him and are in the nature of conditions or limitations on the exercise of the powers. All these can be delegated under reg. 47 and there was no reason to apply s. 28 of the Interpretation Ordinance.

For these reasons, which are substantially the same as those given by TREDGOLD, C.J., in the Federal Supreme Court, their Lordships are of opinion that the detention order was valid. No question arises, therefore, about damages. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant being in formâ pauperis, there will be no order as to costs.

Appeal dismissed.

Solicitors: *Parke, Tattersall & Co.* (for the appellant); *Charles Russell & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

R. *v.* CHAPMAN AND PIDGLEY.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Ashworth, JJ.), February 2, 1960.]

Criminal Law—Practice—Probation order—Breach—Matters to be put to prisoner—Case committed by magistrates' court to quarter sessions—Certificate by magistrate of probationer's failure to comply with probation order—Certificate admissible but not conclusive evidence—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 58), *s.* 6 (4).

Two probationers were found by magistrates' courts to have failed to comply with a requirement of a probation order and were remanded to quarter sessions. Certificates signed by justices certifying that the probationers had failed to comply with the probation order were sent to quarter sessions. At quarter sessions the probationers were not asked whether they admitted the breach of the probation order. The recorder took the magistrates' certificates as conclusive and sentenced them to twelve months' imprisonment for the original offence. On appeal against conviction for breach of the probation order,

Held: under s. 6 (4) of the Criminal Justice Act, 1948, the certificates were admissible as evidence but were not conclusive; the alleged breach of the probation order should have been put to the probationers in accordance with the procedure laid down in *R.* v. *Devine* ([1956] 1 All E.R. 548n.) but this had not been done, and accordingly the proceeding was a nullity and the sentences would be quashed.

Appeal allowed.

[As to breach of a requirement of probation order, see 10 HALSBURY'S LAWS (3rd Edn.) 502, para. 915; and for cases on the subject, see 14 DIGEST (Repl.) 573, 574, *5738*, *5741*, *5742*.

For the Criminal Justice Act, 1948, s. 6 (3) and (4), see 28 HALSBURY'S STATUTES (2nd Edn.) 356, 357.]

Case referred to:

R. v. *Devine*, [1956] 1 All E.R. 548n.; 120 J.P. 238; 40 Cr. App. Rep. 45; [1956] 1 W.L.R. 236; 3rd Digest Supp.

Appeal.

This was an appeal by Oliver George Chapman and James George Pidgley against their convictions at Andover Quarter Sessions of having failed to comply with a requirement of a probation order. On Feb. 6, 1958, they were convicted at Andover Quarter Sessions of the larceny of a handbag and contents and were put on probation for three years. In July, 1958, they were both convicted of loitering with intent to steal and Pidgley was also convicted of larceny. They were brought before quarter sessions again and a new probation order was made on July 15, 1958, for three years, with a condition that they should not associate with each other. The recorder told them that if they met by chance they were not prohibited from conversing. On Oct. 15, 1959, Chapman was brought before the Ringwood magistrates' court and on Oct. 22, 1959, Pidgley was brought before the Salisbury and Amesbury magistrates' court; and those courts adjudged that each man had been in breach of the last probation order in that they had associated. The probationers were remanded to Andover Quarter Sessions. Certificates in accordance with s. 6 (4) (a) of the Criminal Justice Act, 1948, signed by a justice, that the probationers had failed to comply with the requirement of the probation order that they should not associate were sent to quarter sessions. On Oct. 27, 1959, the recorder sentenced them to twelve months' imprisonment. At quarter sessions the original offences were put to the probationers, which they admitted; and it was also put to them that the magistrates' courts had found they were in breach of the probation order by associating with each other. They admitted

A that the magistrates' courts had so found. They were not asked whether they admitted that they had associated. In fact their case was that they had not associated but had met accidentally and were conversing. The recorder took the view that the findings of the magistrates' courts were conclusive and treated the probationers as having been committed to quarter sessions for sentence.

B *F. H. L. Petre* for the appellants.
H. J. M. Tucker for the Crown.

LORD PARKER, C.J., stated the facts and continued: The question in this case is whether the procedure adopted by the learned recorder was right, and that depends on the true construction of s. 6 of the Criminal Justice Act, 1948. By sub-s. (3) it is provided: C

> " If it is proved to the satisfaction of the court before which a probationer appears or is brought under this section that the probationer has failed to comply with any of the requirements of the probation order, that court may without prejudice to the continuance of the probation order, impose on him a fine not exceeding £10 . . . or may . . . (b) if the probation order was made D by a court of assize or quarter sessions, commit him to custody or release him on bail (with or without sureties) until he can be brought or appear before the court of assize or quarter sessions."

Pausing there, both magistrates' courts in this case had it proved to their satisfaction that each probationer had failed to comply with the requirements of E the probation order. They did not exercise their right to fine the probationers, but they then remanded them to quarter sessions under para. (b). Subsection (4) goes on:

> " Where the court of summary jurisdiction deals with the case as provided in para. (b) of the last foregoing subsection then—(a) the court shall send to the court of assize or quarter sessions a certificate signed by a justice of the F peace, certifying that the probationer has failed to comply with such of the requirements of the probation order as may be specified in the certificate, together with such other particulars of the case as may be desirable; and a certificate purporting to be so signed shall be admissible as evidence of the failure before the court of assize or quarter sessions; and (b) where the probationer is brought or appears before the court of assize or quarter G sessions, and it is proved to the satisfaction of that court that he has failed to comply with any of the requirements of the probation order, that court may deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if he had just been convicted before that court of that offence."

H The real question here is whether the certificate which has to be sent forward by the magistrates' court when this procedure is adopted is conclusive so that quarter sessions cannot go behind it. In the judgment of this court, it is not conclusive. It is not said to be conclusive but merely admissible. Further, by para. (b) of sub-s. (4) it is the court of quarter sessions that has to be satisfied that he has failed to comply with the requirements. It is suggested that they can be I satisfied that the requirements of the probation order have been fulfilled by looking at the certificate and the certificate alone, but as a matter of construction, that is clearly wrong, because para. (b) is in the form " where the probationer is brought or appears before the court of assize or quarter sessions, and it is proved to the satisfaction of that court ". Paragraph (a) has already provided that where the probationer is to appear before quarter sessions there has to be a certificate, and yet the paragraph goes on to say that quarter sessions must be satisfied. It is clear from the framework of sub-s. (4) taken as a whole that Parliament never intended that the certificate of the justices should be final and conclusive.

A Indeed, looking at the matter from a rather broader angle, if that were right, and the certificate is conclusive, then it would follow that there was no machinery in the nature of appeal from a finding of the magistrate that there had been a breach of probation. It seems to this court that under para. (b) while the certificate is admissible, it is for the court of quarter sessions to be satisfied, and for that purpose they can treat the matter as if it was an appeal from the magistrates, hear further evidence and come to their own conclusion in the matter. B

It follows that in such a case as this the procedure laid down in *R.* v. *Devine* (1) is applicable. It is true that *R.* v. *Devine* (1) was a case where a probationer was brought before the court that had originally sentenced him; it was not a case which went first to magistrates, but the court there laid down the proper procedure as follows (2):

> C " Where a prisoner is brought before a court for breach of a probation order, [the breach alleged] should be put to him . . . in the clearest possible terms and he should be asked to say whether he admits it or not. The terms in which the matter should be put to him are: first to say where he was convicted and what happened to him, then to tell him how the breach is alleged to have taken place, and, if it be by a further conviction, then to tell him the time of the conviction and the adjudication of the court. He should D next be asked to say whether he admits those facts. If that is done, there is no further difficulty. If that is not done, then, of course, it being a trial, albeit without a jury, the prisoner will have to be asked whether he desires to give evidence or call witnesses, and the court will have to pronounce on whether they find the breach of the order has been proved. But it is desirable that the proceedings should begin by the matter being put clearly E to the prisoner and for him to be asked whether he admits the allegation with regard to it."

It seems to this court that that procedure is equally applicable to such a case as the present where the matter has been in the first instance before a magistrates' court. It follows that in this case there has been a mis-trial at quarter sessions F from the outset. It is just as if a trial proceeded without prisoners being asked to plead, and in those circumstances it seems to this court that the proceeding was a nullity, and it would be open to this court to send the matter back for a re-trial. It is to be observed, however, that these probationers have already been in prison since Oct. 27 last, and, having regard to the nature of the alleged breach, the court feels that justice would be done in this case if they merely quashed the sentence and did not send the matter back to quarter sessions. G Accordingly, the prisoners are now discharged.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Woodford & Akroyd,* Southampton (for the Crown).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

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(1) [1956] 1 All E.R. 548; 40 Cr. App. Rep. 45.
(2) [1956] 1 All E.R. at p. 548; 40 Cr. App. Rep. at p. 46.

TAYLOR AND OTHERS *v.* MUNROW.

[Queen's Bench Division (Lord Parker, C.J., Cassels and Ashworth, JJ.), January 26, 27, 28, 1960.]

Local Government—Audit—Surcharge—Rent on de-requisition—Council undertaking full cost of any increases under Rent Act, 1957—*Discretion of councillors not properly exercised—Local Government Act*, 1933 (23 & 24 *Geo.* 5 c. 51), *s.* 228—*Requisitioned Houses and Housing* (*Amendment*) *Act*, 1955 (3 & 4 *Eliz.* 2 *c.* 24), *s.* 4 (4).

Requisition—De-requisition—Duty of local authority to review rent recoverable under Requisitioned Houses and Housing (*Amendment*) *Act*, 1955 (3 & 4 *Eliz.* 2 *c.* 24), *s.* 4 (4).

A metropolitan borough council, acting under the Requisitioned Houses and Housing (Amendment) Act, 1955, had de-requisitioned premises from time to time in respect of which the council had subsequently made payments to the landlords pursuant to s. 4 (4)* of the Act. Under s. 4 (4) on de-requisition of premises and on the licensee's becoming statutory tenant the recoverable rent of the premises must not exceed that last payable by the ex-licensee to the local authority " except so far as the local authority may from time to time determine ", and any deficiency from the rent otherwise recoverable must be paid by the local authority to the landlord. The council originally made no determination under s. 4 (4). Rents of de-requisitioned premises increased in consequence either of the Rent Act, 1957, or of the exercise of powers under the Housing Repairs and Rents Act, 1954. By resolutions of October, 1957, and March, 1958, the council resolved, in effect, that the whole of valid increases in rent of de-requisitioned premises consequent on the Rent Act, 1957, should be borne by the council, that is to say, should be paid out of the general rate fund. Payments were made accordingly. The district auditor surcharged certain borough councillors with a sum of £200, as being unlawfully paid, on the ground (among others) that the council had not properly exercised their discretion under s. 4 (4). On appeal under the Local Government Act, 1933, s. 228, by six of the councillors surcharged, the court found that the council's decisions were arbitrary, and that the real reasons were that they would not adopt any test of means of the tenants concerned and that they disliked Parliament's action in passing the Rent Act, 1957.

Held: the surcharge had been rightly made because, in deciding on the payment of money out of the general rate fund, a council must preserve a balance between their duty to the general body of ratepayers and their duty to the particular ratepayers in respect of whom the payment was to be made; in the present case the council were under a duty periodically to review the position relevant for the purposes of s. 4 (4) of the Requisitioned Houses and Housing (Amendment) Act, 1955, but they had not done so and had not fulfilled their duty to the general body of ratepayers in reaching their decision.

Roberts v. *Hopwood* ([1925] All E.R. Rep. 24) applied.

Appeal dismissed.

[As to powers and duties of an auditor, see 24 Halsbury's Laws (3rd Edn.) 586, para. 1078, and as to appeals and surcharge, see ibid., 588-590, paras. 1082 and 1083; and for cases on the subject, see 33 Digest 40, 41, *217-228*.

As to an owner of requisitioned dwelling accepting a licensee as statutory tenant, see 19 Halsbury's Laws (3rd Edn.) 712, para. 1143.

For the Local Government Act, 1933, s. 228, see 14 Halsbury's Statutes (2nd Edn.) 474.]

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* The relevant terms of s. 4 (4) are printed at p. 458, letter E, post.

Cases referred to:

R. v. *Roberts*, [1908] 1 K.B. 407; 77 L.J.K.B. 281; 98 L.T. 154; 72 J.P. 81; 33 Digest 40, *217*.

Roberts v. *Hopwood*, [1925] All E.R. Rep. 24; [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 33 Digest 20, *83*.

Thomas v. *Devonport Corpn.*, [1900] 1 Q.B. 16; 69 L.J.Q.B. 51; 81 L.T. 427; 63 J.P. 740; 33 Digest 90, *597*.

Appeal.

This was an appeal by six members of the St. Pancras Borough Council from a decision of Mr. Munrow, district auditor of the borough, disallowing £200, part of an item debited to the Requisitioned Properties Revenue Account for the year ending Mar. 31, 1958, and surcharging that sum jointly and severally on twenty-three members of the council. The other members of the council did not appeal.

Acting under the Requisitioned Houses and Housing (Amendment) Act, 1955, the council had from time to time de-requisitioned numerous properties and in respect of some of them the council had, in accordance with s. 4 (4) made payments to the owners. The council had been duly notified of and had acceded to rent increases on de-requisitioned dwellings but, apart from a few special cases*, had not made determinations under s. 4 (4) of the Act of 1955 to increase amounts payable by ex-licensees, with the consequence that the council became liable to make substantial additional payments to house owners. The council had in effect undertaken the burden of the Act of 1957 increases since de-requisition. Three circulars† had been issued by the Ministry of Housing and Local Government urging local authorities to review charges to licensees of requisitioned premises and ex-licensees of de-requisitioned premises. The exhortation in the circulars had been brought to the notice of the council by their officers. No comprehensive review, save in the few special instances previously mentioned had been undertaken. The relevant resolutions of the council are stated in the judgment, p. 459, letters D and E, post. The district auditor stated in his statement of reasons for the disallowance and surcharge made under the Local Government Act, 1933, s. 226 (2) that after carefully considering the wording of s. 4 (4) of the Act of 1955 and taking due account of the submissions of counsel he had come to the conclusion that a local authority had no such complete and unchallengeable discretion accorded to them by the provisions of the subsection that they might lawfully refrain from making any determination under the subsection regardless of circumstances. The local authority stood in a fiduciary relationship to the ratepayers similar to that of trustees in regard to the property under their control. Therefore in addition to affording all due and reasonable protection to ex-licensees the local authority must also have regard to the interests of the ratepayers. If it were demonstrable that the local authority's failure to take account of changed circumstances and to make appropriate determination had caused excessive and unreasonable expenditure from rates, which would not have been incurred by any reasonable body of persons, mindful of the ratepayers' interests, then that excessive and unreasonable expenditure would be contrary to law and would fall to be disallowed and surcharged by the district auditor under s. 228 (1) (a) and (b) of the Local Government Act, 1933. Further, money paid out of local authority funds in consequence of a failure to act in a reasonable and lawful manner might also constitute a loss due to negligence necessitating surcharge under s. 228 (1) (d)‡.

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* There had been ten such cases in the year under audit. They were cases where the landlord's normal responsibility for repair had been extended to include internal decorations, and the maximum rent recoverable under the Act of 1957 became two and one-third times the gross value.

† Circular 39/55, dated Aug. 31, 1955; circular 32/57, dated June 6, 1957, and circular 53/57, dated Oct. 30, 1957.

‡ The district auditor referred to *Davies* v. *Cowperthwaite*, [1938] 2 All E.R. 685 at p. 690, and *Pentecost* v. *London District Auditor*, [1951] 2 All E.R. 330.

After careful consideration the district auditor was satisfied that the council by their omission to make determination under s. 4 (4) of the Act of 1955 consequent on the coming into operation of the Act of 1957, or to make such inquiries as might properly and reasonably have justified that omission, acted in a manner which was contrary to law and thereby incurred expenditure which it was his duty to disallow and surcharge. He accordingly disallowed and surcharged, as previously stated, the sum of £200.

R. Millner for the appellants.
R. J. Parker for the respondent.

LORD PARKER, C.J.: The matter comes before this court on appeal under s. 229 of the Local Government Act, 1933, and the duties of the district auditor so far as they are relevant to this case are to be found in paras. (a), (b) and (d) of s. 228 (1). Section 228 (1), so far as it is material, reads as follows:

> " It shall be the duty of the district auditor at every audit held by him—(a) to disallow every item of account which is contrary to law; (b) to surcharge the amount of any expenditure disallowed upon the person responsible for incurring or authorising the expenditure; . . . (d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred . . ."

The district auditor found that sums of not less than £200 ought to be disallowed in the accounts for the year ending Mar. 31, 1958, as being contrary to law. He then went on under para. (b) to surcharge that sum on the persons responsible for incurring or for authorising the expenditure, whom he held to be among others these six councillors, and under para. (d) he held that the loss or deficiency had arisen through the negligence of the appellants.

It is necessary to state the position in a little detail in order to show how this decision came about. Prior to 1955 there was power in the Minister of Health to requisition premises under reg. 51 of the Defence (General) Regulations. In practice that power was delegated to the town clerks and, in particular, to the town clerk of the metropolitan borough of St. Pancras, and houses were thus requisitioned in the borough and used for housing persons. Those persons were not tenants in the strict sense but were licensees, and the payments that they made under the licence, whether you call them rent or not, were, broadly speaking, equivalent to the maximum rents payable under the Rent Acts or, if there was no controlled tenancy, the rent payable for comparable properties. Considerable discretion had to be exercised in fixing the rents to meet the circumstances. It might be, for instance, that some licensees were being housed in rather expensive property whereas the premises which they normally occupied, and they may well have had to leave owing to enemy action, were of quite a different character. In such a case the licensee was only called on to pay the rent which he would have paid for the premises which he normally occupied. Again, it may be that for administrative reasons a very small family would be housed in rather large premises, when again they would not be asked to pay by way of rent under the licence more than they would pay for premises of the type and size that they would normally occupy. In 1955 the position was changed by the Requisitioned Houses and Housing (Amendment) Act of that year. Under that Act the power of the Minister of Health, who had been replaced for this purpose by the Minister of Housing and Local Government, was brought to an end but his rights of occupation were transferred to the local authorities. By s. 1 (1) it was provided:

> " On the commencement of this Act, any power of the Minister to retain possession of requisitioned houses shall be terminated, and the right to possession of every such house shall vest in the appropriate local authority."

The appropriate local authority were permitted by sub-s. (2) to retain the possession of requisitioned premises until Mar. 31, 1960. It was also provided by that Act that the requisitioned premises might be de-requisitioned and handed back to the owner, the landlord, if he was prepared to accord to the sitting licensee, broadly speaking, the status of a statutory tenant. Thus, by s. 4 (1) it was provided:

> " Any local authority may, subject to such directions, if any, as may be given by the Minister, and shall, if so required by the Minister, serve on the owners of such requisitioned dwellings as may be decided by the authority or specified by the Minister, as the case may be (being dwellings of which possession is retained under this Act) a notice inviting those owners to accord to the licensees of the dwellings the status of statutory tenants in consideration of payments to be made by the local authority in accordance with this section by way of compensation for loss of the right to vacant possession on the release of the dwellings."

By sub-s. (2) of s. 4, it was provided (1):

> " If within the period specified in that behalf in any such notice of invitation the owner gives to the local authority notice of acceptance in such form as may be so specified, then—. . . (b) as from the expiration of that period, the Rent Acts shall apply to the dwelling as if the licensee had retained possession by virtue of those Acts after the expiration of a tenancy *at a rent equal to the standard rent specified in sub-s.* (3) *of this section . . .*",

on certain terms. Subsection (3) of s. 4 then sets out what the standard rent should be, and the material provision for the purposes of these proceedings is sub-s. (4) of that section, which is in these terms:

> " Except so far as the local authority may from time to time determine, the rent recoverable by the landlord of any such dwelling in respect of any period before Apr. 1, 1965, from the licensee or any statutory successor of his shall not exceed the rent last payable by the licensee to the local authority under the licence; and where the rent so recoverable in respect of any such period falls short of the rent which would be recoverable apart from this subsection, the local authority shall pay to the landlord an amount equal to the difference."

Accordingly unless and until the local authority otherwise determines, the landlord, while he will get the full standard rent from someone, will only be able to get from the ex-licensee the rent which the ex-licensee had been paying under the licence. The difference between that and the standard rent as fixed by the subsection was to be borne by the local authority. Pausing there, the standard rent as fixed by sub-s. (3) of s. 4 might be lower or might be higher than the rent being paid under the licence. If it was higher than that being paid under the licence, then by sub-s. (4) until the local authority otherwise determined the difference was to be borne by the local authority. On the other hand, in cases where it was lower the landlord was only, of course, entitled to recover that lower rent, and accordingly an ex-licensee whose standard rent was lower than he had been paying would in effect have a reduction in rent and pay less.

The question with which we are concerned in these proceedings is as to the duty of the local authority under s. 4 (4) to review the position and as to the matters which they are entitled to consider on such a review. It is to be observed, first, that these de-requisitioned premises having become subject to the Rent Acts were, amongst other things, subject to the Housing Repairs and Rents Act, 1954, under which provision was made, broadly speaking, for an increase of rent for improvement in the property. These premises also in due course became subject to the Rent Act, 1957, which, quite generally, throughout the country, raised the standard rents which landlords were entitled to get from their tenants.

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(1) The subsection was amended by the Rent Act, 1957, s. 26 and Sch. 8, the words printed in italic type being repealed.

This council made no determination whatsoever under sub-s. (4) of s. 4 of the Act of 1955, and, when the Act of 1957 was passed and the matter was brought to their attention not only by Ministry circular but by the town clerk, they refused to determine otherwise within the meaning of sub-s. (4) and continued to bear the difference, a difference which had been increased in some cases, by the exercise by landlords of their powers under the Housing Repairs and Rents Act, 1954, and also increased by reason of their powers under the Act of 1957.

The following are perhaps the two most relevant resolutions of the council—certainly they are those on which the district auditor relied. On Oct. 9, 1957, the council had before them a report of the Housing Management Committee of Sept. 16. They had various cases before them in which they were told that notices of rent increases had been served by the landlord, and perhaps it is relevant that under the Act of 1957 notices of increase in rent which landlords had to serve on their tenants were required also to be served on the local authority. As a result of that meeting the council adopted and approved the recommendation of the housing committee, which was in these terms:

> " That the council bears the full cost of any increases in rent between the operative date of any valid notices received and the date on which the council is able to make a formal decision."

On Mar. 5, 1958, the position was again reviewed by the housing management committee, and they recommended by 7 to 4, as appears in the council's minute of Mar. 19, 1958:

> " That, having regard to the foregoing observations on the position generally, the whole of the valid rent increases under the Rent Act, 1957, in regard to all tenancies of formerly requisitioned properties released to owners under s. 4 of the Requisitioned Houses and Housing (Amendment) Act, 1955, be borne by the council."

In putting forward that recommendation they put forward a number of reasons for so doing. The matter came before the full council, the motion was put to the vote, a division was taken and by 26 to 20 the recommendation of the housing management committee was adopted.

The district auditor has given his reasons in a long document of some seventeen pages to which are appended various schedules and various extracts from the transcript of the evidence which he took. In my judgment, the district auditor's reasons are most admirably stated and, as will appear later, not only am I not satisfied that they are wrong but for myself I feel very inclined to adopt them as they stand. He came to the conclusion that this council did not have under s. 4 (4) of the Act of 1955 what I may call an absolute discretion, but it was a discretion under which they were bound to act reasonably, preserving a balance between the duty which they owed to the general body of ratepayers and the duty they owed to these particular tenants. He went on to hold that this council had never really faced the problem at all within the ambit of their duty, and that the sums which had been paid under s. 4 (4) were to the extent of £200 at least paid in breach of their duty and, accordingly, were in law unlawful payments. On that, as I have said, he surcharged these six appellants and found them guilty of negligence as well.

The first question that arises is as to the extent of the duty of a council where by statute they are given a discretion. The classic authority on the matter is to be found in *Roberts* v. *Hopwood* (2). It is often referred to as the Poplar case. The Metropolitan Borough of Poplar had power under the Metropolis Management Act of 1855 to " employ . . . such . . . servants as may be necessary, and may allow to such . . . servants . . . such . . . wages as [the council] may think fit." The council in that case had fixed a minimum wage of £4 for every employee regardless of the nature of the work he was to do and regardless of the fact that the cost of living had fallen during the year from 176 per cent. to 82 per cent. above the pre-war level. It was held in the House of Lords (3) that the discretion conferred on the council by the statute must be exercised reasonably, and that the fixing by the council of an arbitrary sum for wages without regard to existing labour conditions was not an exercise of that discretion; it was also held that an expenditure on a lawful object might be so excessive as to be unlawful, and that to the extent by which the amount exceeded legality the auditor was bound to disallow it and surcharge the excess on the persons responsible. For my part, I find it unnecessary, certainly at this stage, to read any passages from the speeches in that case. It is enough to say that the nature of the duty must, of course, be ascertained from the words of the section in question and their context, but it was clearly held there that where the matter is something with which the auditor can deal by way of surcharge, in other words, when it is paying money out of a fund provided by the general body of ratepayers, the council must preserve a balance between the duty owed to that general body of ratepayers and the duty owed to the particular ratepayer in respect of whom the payment is made. Accordingly, whatever the exact wording of the section may be—and it is pointed out by counsel for the appellants in his able argument that the wording here is quite different from the wording under the Housing Act, 1957, (4), where periodical review is provided for—I am quite satisfied that under these words a periodic review is necessary if their duty is to be performed.

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(2) [1925] All E.R. Rep. 24; [1925] A.C. 578.

Counsel for the respondent has indicated a number of different matters which may from time to time arise, all of which, if the duty of the council is to be performed, must necessitate a reconsideration of the matter. It may be that on de-requisition there ought to be a consideration. Certainly the council must keep abreast of what is happening from time to time and collect information to see what is the position. As the subsection provides (5), the benefit thereof devolves on a statutory successor. It is said that the statutory successor may be a son in very affluent circumstances, and that if the duty owed to the general body of ratepayers is properly to be borne in mind, the council must consider at any rate the fact that that statutory successor is in very different financial circumstances. Again, it is said by counsel for the respondent that whenever the controlled rent is raised, whether it be under the Housing Repairs and Rents Act, 1954, or, as in most of these cases, under the Rent Act, 1957, there must be a review. Indeed, it is only right to say that the council themselves realised that the passing of the Act of 1957 and the notices served by landlords as a result did call for a consideration of the matter.

The reasons which the council gave are set out in the minute to which I have referred of Mar. 19, 1958. They said that they felt that they had a moral obligation to treat these tenants in the same way as they treated their council tenants. They drew attention to the fact that the de-requisitioned property was in a very poor condition and provided a relatively low standard of accommodation. They went on to say that the tenants formed a particularly unfortunate section of the population. Finally, they said:

> " We consider that the basis on which the rents of these properties was fixed originally was a fair and reasonable one and we see no reason for raising them; having regard to the fact that seventy-five per cent. of the cost will normally be met by the Exchequer until Mar. 31, 1960, we are satisfied that by meeting the whole of these increases the council will not be placing an unduly heavy burden on the rates."

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(3) [1925] All E.R. Rep. 24; [1925] A.C. 578.

(4) See Housing Act, 1957, s. 113 (4), which requires rents to be reviewed.

(5) See s. 4 (4), p. 458, letter E, ante.

A Those reasons were introduced by this statement:

> "We consider that it is impossible to give consideration to individual cases without investigating the question of the tenants' income, and this we are not prepared to do. In these circumstances we have agreed that the matter should be dealt with as one of principle."

B So far as the reasons are concerned, the district auditor went through each one of them in great particularity and has made it abundantly clear that there is nothing whatsoever in those reasons; in fact the district auditor's criticism of them and the facts he found are barely criticised. Indeed, it is I think admitted that the real reason for the decision arrived at by the council was two-fold, (i) that as a matter of policy they would never adopt what is referred to C as a means test, and (ii) that they thoroughly disliked the action of Parliament in passing the Act of 1957 and raising rents generally throughout the country.

Whatever the council may say as to having taken into consideration the general body of ratepayers, at the end of the day, if I may use that expression, it is a question of what is the true inference behind their determination. There are two passages which I will read, one, if not both, of which created quite clearly D an impression on the district auditor. The first one is in the evidence of Councillor Lawrence:

> "We feel very strongly about it. As far as we are concerned we consider that this is the crux of the whole business. There is definite interference stemming from three borough councillors who, for the purpose, have transformed E themselves into ratepayers; they raised objection at audit and tried to overthrow by this method decisions which they have fought all the time and have been defeated in the council. They do not object merely to the payments in respect of the de-requisitioned tenants, they object to the whole of the council's rent policy. Our attitude towards the de-requisitioned tenants arises from the policy of this council. We do not believe that the F circumstances at the moment justify a local authority imposing rent increases on its tenants. That is our political position, we honestly believe that, we fight for that, and, bearing that in mind, the fact that we have refused to impose or permit to be imposed rent increases on the de-requisitioned tenants follows consequentially."

Finally, almost at the end of his evidence, the district auditor asks:

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> "Were you aware, when you came to the decision, that the basis upon which you were dealing with de-requisitioned premises was not being followed by other borough councils in London? (Councillor Lawrence): No, on the contrary, I discussed the matter with a councillor in South London and he told me they were doing the same, and I congratulated him. H Subsequently I found they had not done the same, it was a case of fifty-fifty and they lost their nerve. I am a member of the Metropolitan Boroughs' Standing Joint Committee, this problem of de-requisitioned rents is constantly coming up, and I only wish that all the Labour controlled bodies in London would take the same action as we, and protect the tenants from the Rent Act."

I If that be so, if that was the real reason behind these decisions of the council, in my judgment they were purely arbitrary decisions. They were not decisions arrived at through the council fulfilling their duty to the general body of ratepayers, amongst others. In many ways the position is rather like that in *Roberts* v. *Hopwood* (6). One could refer to a number of passages which bear out the similarity, but for my part I will only refer to a passage in the speech of LORD SUMNER who, after referring to judgments of LORD RUSSELL, C.J., in

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(6) [1925] All E.R. Rep. 24; [1925] A.C. 578.

Thomas v. *Devonport Corpn.* (7) and Farwell, L.J., in *R.* v. *Roberts* (8), says this (9):

> "One of the ways in which a payment may be illegal, is, as Lord Russell, C.J., says, that it is not within the authority or not in accordance with the duty of the council. By questions of policy I understand Farwell, L.J., to mean such matters as the necessity for a urinal and the choice of its position, provided no public or private nuisance is created [and he refers to certain cases] and similar questions of policy. The word, however, is policy, not politics, and I can find nothing in the Acts empowering bodies, to which the Metropolis Management Act, 1855, applies, which authorises them to be guided by their personal opinions on political, economic or social questions in administering the funds which they derive from levying rates . . . (10). To my mind, a council acts for a collateral purpose, if it fixes by standards of its own on social grounds a minimum wage for all adults, and is not in so doing acting for the benefit of the whole community."

I said that I would refer only to a passage in Lord Sumner's speech, but it is perhaps worth adding a passage from the speech of Lord Atkinson where he was dealing with the view taken by the council, and he says (11):

> "Nobody has contended that the council should be bound by any of these things, [by "these things" he was referring to trade union rates, the cost of living, and so on in fixing wages] but it is only what justice and common sense demand that, when dealing with funds contributed by the whole body of the ratepayers, they should take each and every one of these enumerated things into consideration in order to help them to determine what was a fair, just and reasonable wage to pay their employees for the services the latter rendered. The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy . . ."

Then he says this (12):

> "A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner, with reasonable care, skill, and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others."

I have come to the conclusion that the district auditor's findings were abundantly justified and that it is quite impossible to say that he has gone wrong in law. In deference to the argument of counsel for the appellants I should refer to a number of points that he submitted. He said, first, that the district auditor had misconstrued s. 4 (4) of the Act and the effect of the Act of 1957 on that section. He also said that the various Ministry circulars which had been brought to the attention of the council, to which I find it unnecessary to refer, had themselves misconstrued s. 4 (4) of the Act of 1955. He points out, as I have already said, that the wording here is quite different from the wording under the Housing Act, 1957, which calls specifically for periodic review. If I understand him aright he is saying that the local authority have no duty at all to make any review except in so far as they think that it should be done. That seems to me an absolute discretion which is not to be found there. Indeed, I think he really departs from that argument because he concedes, amongst other things, that the controlled rent from time to time must be a relevant consideration if one is making a determination. If, therefore, what was a relevant consideration, namely, the old controlled rent, has gone up, then one of the matters which was a relevant consideration originally has altered, and it must be necessary for the council then in the performance of their duty to make a review of the matter. In truth and in fact the wording of s. 4 (4) of the Requisitioned Houses and Housing (Amendment) Act, 1955, calls for periodic reviews, as I have already said, although it does not say so in express words.

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(7) [1900] 1 Q.B. 16 at p. 21.
(8) [1908] 1 K.B. 407 at p. 435.
(9) [1925] All E.R. Rep. at p. 38; [1925] A.C. at p. 605.
(10) [1925] All E.R. Rep. at p. 39; [1925] A.C. at p. 606.
(11) [1925] All E.R. Rep. at p. 33; [1925] A.C. at p. 594.
(12) [1925] All E.R. Rep. at p. 33; [1925] A.C. at p. 595.

Counsel then points to the fact that when Parliament passed the Rent Act, 1957, although they amended certain provisions of the Act of 1955, they left sub-s. (4) of s. 4 intact. If I understand his argument, it is that if Parliament had intended that a rise in controlled rents was an occasion on which the local authority should review the matter under s. 4 (4), they would have said so. I do not appreciate that argument. It is quite true that the Act of 1957 does not touch s. 4 (4) at all. All that means is that whatever was the duty of the local authority before the Act of 1957 remained their duty after the passing of the Act of 1957. He then says that the council in this case were not acting unreasonably, that they were performing their duty, and that all they were doing was to put into action their bona fide policy, which was that on no account would they consider the ability to pay of individual tenants and that there was no occasion for increasing the rents. I have already dealt with what I think was the real reason, and whether you call it policy or politics matters not. The whole question is whether the action, be it policy or politics, was consistent with the duty the council owed to the general body of ratepayers.

There has been much talk about the means test. For my part, I find it quite unnecessary to go into that matter. All that is being referred to by the district auditor is a general ability or inability to pay, and it seems to me that that must be a relevant consideration. Indeed, it is not without interest to see that this council, while going out of their way to say that they would not be a party to a consideration of ability to pay, have and do take that into consideration in fixing the rents of their tenants in council houses. I believe that the real reason as disclosed here is that they felt that the action of Parliament was wrong in the Act of 1957, and they were not going to allow landlords of de-requisitioned premises to recover any part of the general increase in rents provided for by that Act.

I think that it is not unfair, in considering whether the council have acted reasonably in the performance of their duty, to consider two matters which have resulted from that action. I have already said that the standard rent fixed under the Act of 1955 might be lower than the rent being paid under the licence, in which case the tenant only paid the standard rent. So determined, however, were this council to consider not individual cases but the matter as one of principle, that they completely omitted to see that they were through the years paying the difference between the two amounts. The standard rent was lower than the rent payable under the licence. When the standard rent went up, they decided to pay the full difference between the old standard rent and the new standard rent. They had no power to do that under sub-s. (4) at all because all that they had power to do was to pay the difference between the new standard and something which had been paid under the licence which in these cases was higher than the old standard rent. To that extent they failed entirely to see that they were making ultra vires payments. Another thing that has resulted is this, that it is found, and the council so stated, that in many cases these properties were in a state of disrepair and were cases in which tenants, if they applied, could get certificates of disrepair. If they got those certificates of disrepair, a landlord would not be able to get the full increase permitted by the Act of 1957 unless he did certain repairs or undertook to do those repairs. This council, however, decided that they would pay the full difference between the old standard rent and the new standard rent, between the licence rent and the new standard rent which the landlord was demanding. That was the standard rent which on one view of the matter he was not entitled to if the tenant took certain steps in the form of getting a certificate of disrepair. To that extent this policy of theirs resulted in what is really a gift to the landlord in that he was getting something he was not entitled to get if the tenant was encouraged to take and did take the appropriate steps. In my judgment, those are quite relevant matters to consider when one is asking oneself the question: Was this council performing its duty as laid down in *Roberts* v. *Hopwood* (13)?

Two other small matters were raised by counsel for the appellants. He said, in the first place, that the district auditor was wrong in finding, as he did, that the tenants of these de-requisitioned premises were a fair cross-section during the year of review of the council tenants generally. That was a matter of the construction of the evidence given, I think, by the housing manager, and I find no reason to say that the district auditor was wrong in making that finding. It is also said that at any rate he was wrong in finding that some of these tenants had the ability to pay more, and therefore was wrong in saying that there were excess payments to the extent of £200. For my part, I think that he had ample evidence on which he could arrive at that conclusion and, as the case emerged, it seemed quite clear that the £200 could be justified in whole or certainly to a large extent by reason of the ultra vires payments to which I have referred and payments made to landlords in cases where this council knew that if the tenants took steps to get certificates of disrepair they would not be entitled to them. Those two matters alone produce a figure in the neighbourhood of £200, and it seems to me quite idle to say that the district auditor could not find that at least £200 was an unlawful payment. Indeed I think that he was being very considerate to the councillors.

Finally, it is said that the district auditor was wrong in finding that these appellants were negligent. For my part, I find it unnecessary to go into that. Under paras. (a) and (b) of s. 228 (1) of the Local Government Act, 1933, he was perfectly entitled to disallow this sum and to surcharge these appellants. It is unnecessary, therefore, to go on and consider the further question whether this can be said to be a case of loss or deficiency through negligence. I do not propose to deal with that matter. Accordingly, in my judgment, the district auditor's reasons were right and this appeal should be dismissed.

CASSELS, J.: I agree.

ASHWORTH, J.: I also agree.

Appeal dismissed. Order of district auditor confirmed.

Solicitors: *Gaster & Turner* (for the appellants); *Sharpe, Pritchard & Co.* (*for* the respondent).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(13) [1925] All E.R. Rep. 24; [1925] A.C. 578.

THE LIVERPOOL (No. 2).

STEAMSHIP ENTERPRISES OF PANAMA, INC., OWNERS OF S.S. LIVERPOOL *v.* OWNERS OF S.S. OUSEL, AND OTHERS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P.), November 17, 18, 19, December 7, 8, 9, 10, 11, 21, 1959.]

Shipping—Limitation of liability—Fund paid into court—Claims—Claim by harbour board for expenses of raising wreck, etc.—Claim by owners of wreck for liability to harbour board for excess of expenses over proceeds of sale of wreck, etc.—Double proof—Duty of harbour board to mitigate loss—Whether owners could claim against fund—Whether harbour board should give credit for amount of owners' claim—Mersey Docks and Harbour Board Act, 1954 (2 & 3 *Eliz.* 2 c. xlv), *s.* 3 (3).

On Jan. 8, 1957, the Ousel and the Liverpool were in collision in the River Mersey, for which collision the owners of the Liverpool admitted liability in negligence and as a result of which the Ousel sank. On the same day the Mersey Docks and Harbour Board gave notice under a private Act, the Mersey Docks and Harbour Board Act, 1954, that, pursuant to s. 3, the board had taken possession of the Ousel, would raise her, would sell any property recovered and would apply the proceeds in payment of the expenses. Any deficiency, viz., amount remaining after deducting the proceeds of sale from the aggregate expenses, was recoverable under s. 3 (3)* from the owners of the Ousel, but so that the amount recoverable by the board from the owners did not exceed the amount of the prescribed limit of liability under the Merchant Shipping Act, 1894, as amended. In an action by the owners of the Liverpool claiming limitation of liability a sum of some £106,226 had been brought into court. Claims against this fund included claims by owners of cargo in the Ousel (amounting to some £170,507), and by the board (amounting to some £128,382) for damages and expenses incurred in connexion with the wreck of the Ousel, in which claim the board gave credit for some £60,359 proceeds of sale of cargo in and equipment of the Ousel. Claims were made also by the owners of the Ousel for the loss of the vessel and other damage (amounting to some £70,765) including a claim (item 22) for liability for wreck-raising expenses, namely, the excess of the board's expenses over the proceeds of sale reduced to the statutory limit of the Ousel under the Merchant Shipping Acts, for which amount (some £10,835)†, the owners of the Ousel were liable to the board under s. 3 (3). The amount of item 22 had not in fact been paid to the board; the owners of the Ousel had been ready and willing to pay it, but the board had not been willing to receive it. It was contended on behalf of cargo owners that item 22 was the same as part of the board's claim and that either item 22 should be disallowed or, if it were allowed, the board should give credit for its amount.

Held: the claim of the Ousel (item 22) would be allowed and the board must give credit in their claim for an amount equal to item 22, for the following reasons—

(i) the rule against double proof applied in relation to a limitation fund paid into court under s. 503 and s. 504 of the Merchant Shipping Act, 1894, and applied in relation to a debt arising by statute (or, *semble*, arising out of a tort), as it did where a debt arose in contract; accordingly the board were debarred from proving for that part of the loss that they could recover from the owners of the Ousel under s. 3 (3) of the Mersey Docks and Harbour Board Act, 1954 (see p. 472, letters I, A and B, p. 473, letter B, and p. 475, letter G, post).

Re Oriental Commercial Bank, Ex p. European Bank ((1871), 7 Ch. App. 99) applied.

(ii) the board could not recover from the limitation fund more than they would have suffered by the Liverpool's wrong-doing if they had taken all reasonable steps to mitigate their loss, and the amount which they could recover from the fund was accordingly reduced by the amount of item 22 which the owners of the Ousel were willing to pay to the board in full.

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* The relevant terms of s. 3 (3) are set out in footnote (5), p. 469, post.

† This was the amount of the statutory limit of the Ousel, see p. 467, letter C, post.

Principle stated by Viscount Haldane, L.C., in *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* ([1912] A.C. at p. 689) applied.

Held further: if there were analogy between the guarantee of a debt and the liability of the owners of the Ousel under s. 3 (3) of the Mersey Docks and Harbour Board Act, 1954, the liability of the owners was for the debt constituted by s. 3 (3) and its proviso combined, and was not a liability for the whole of the board's deficiency (viz., the difference between the total expenses of raising the wreck etc., and the proceeds of sale received) subject to a limitation of the owners' liability to the statutory limit (see p. 471, letter G, post); accordingly, the position was not similar to that where a surety guaranteed the whole of a debt, subject to a limit of maximum liability, and the creditor was allowed to prove for the full amount of the debt without giving credit for what the surety had paid.

Re Sass, Ex p. National Provincial Bank of England, Ltd. ([1896] 2 Q.B. 12) distinguished.

[As to limitation of liability in shipping cases, see 1 Halsbury's Laws (3rd Edn.) 63-65, para. 126; and 104, para. 236; see also for limitation of liability generally, 30 Halsbury's Laws (2nd Edn.) 940, para. 1303; and 943, para. 1305; and for cases on the subject, see 41 Digest 914-926, *8058-8149* and Supplements.

For the rule against double proof, see 2 Halsbury's Laws (3rd Edn.) **464**, para. 914; and for cases on the subject, see 10 Digest (Repl.) 982, *6764*.]

Cases referred to:

British Westinghouse Electric & Manufacturing Co., Ltd. v. *Underground Electric Rys. Co. of London, Ltd.*, [1912] A.C. 673; 81 L.J.K.B. 1132; 107 L.T. 325; 39 Digest 480, *1025*.

Dunkirk Colliery Co. v. *Lever*, (1879), 41 L.T. 633; *on appeal* sub nom. *Ellis Lever & Co.* v. *Dunkirk Colliery Co.*, (1880), 43 L.T. 706; *previous proceedings*, sub nom. *Dunkirk Colliery Co.* v. *Lever*, (1878), 9 Ch.D. 20; 17 Digest (Repl.) 108, *225*.

Ellis v. *Emmanuel*, (1876), 1 Ex.D. 157; 46 L.J.Q.B. 25; 34 L.T. 553; 26 Digest 90, *627*.

Hoey, Re, Ex p. Hoey, (1918), 88 L.J.K.B. 273; 4 Digest (Repl.) 364, *3316*.

Houlder, Re, [1929] All E.R. Rep. 366; [1929] 1 Ch. 205; sub nom. *Houlder, Re, Ex p. Rabbidge* v. *Eagle Star Dominions Insurance Co.*, 98 L.J.Ch. 12; 140 L.T. 325; 4 Digest (Repl.) 295, *2689*.

Mersey Docks & Harbour Board v. *Hay, The Countess*, [1923] A.C. 345, 490; 92 L.J.P. 65; 129 L.T. 325; 16 Asp. M.L.C. 161; 41 Digest 943, *8351*.

Morris (*B. O.*), *Ltd.* v. *Perrott & Bolton*, [1945] 1 All E.R. 567; 172 L.T. 234; 2nd Digest Supp.

Morrison S.S. Co., Ltd. v. *Greystoke Castle* (*Cargo Owners*), [1946] 2 All E.R. 696; [1947] A.C. 265; [1947] L.J.R. 297; 176 L.T. 66; 2nd Digest Supp.

Moss, Re, Ex p. Hallet, [1905] 2 K.B. 307; 74 L.J.K.B. 764; 92 L.T. 777; 4 Digest (Repl.) 299, *2717*.

Oriental Commercial Bank, Re, Ex p. European Bank, (1871), 7 Ch. App. 99; 41 L.J.Ch. 217; 25 L.T. 648; 10 Digest (Repl.) 982, *6764*.

Payzu, Ltd. v. *Saunders*, [1919] 2 K.B. 581; 89 L.J.K.B. 17; 121 L.T. 563; 39 Digest 571, *1765*.

Sass, Re, Ex p. National Provincial Bank of England, Ltd., [1896] 2 Q.B. 12; 65 L.J.Q.B. 481; 74 L.T. 383; 4 Digest (Repl.) 418, *3722*.

Staniforth v. *Lyall*, (1830), 7 Bing. 169; 4 Moo. & P. 829; 9 L.J.O.S.C.P. 23; 131 E.R. 65; 41 Digest 462, *2938*.

Stoomvaart Maatschappij Nederland v. *Peninsular & Oriental Steam Navigation Co.*, (1882), 7 App. Cas. 795; 52 L.J.P. 1; 47 L.T. 198; 4 Asp. M.L.C. 567; 41 Digest 924, *8135*.

See also cases referred to in footnote*, infra, and footnote (11), p. 471, post.

Preliminary points of law.

Preliminary points of law were raised in an action by the owners of the Liverpool for limitation of their liability arising out of a collision on Jan. 8, 1957, between the Liverpool and the Ousel in the River Mersey, as a result of which the Ousel sank. The defendants before the court were (i) the Mersey Docks and Harbour Board (hereinafter referred to as the board), being claimants in respect of expenses of raising the Ousel, etc., and clearing the river of the wreck, (ii) the owners of the Ousel, and (iii) the owners of part of the cargo formerly laden in the Ousel. On May 28, 1958, a decree limiting the liability of the owners of the Liverpool was made and a sum of some £106,226 (with interest £112,000) was in court in the action. The statutory limit of the liability of the Ousel, under s. 503 (1) (ii) of the Merchant Shipping Act, 1894, at the date of the collision was agreed to be £10,835 12s. by the board by letter dated June 23, 1959, and on behalf of the cargo owners by letter dated June 26, 1959. The facts, which have been briefly summarised in the headnote, appear in the judgment. The questions for determination as preliminary points of law, as amended in the course of argument, were:

> (1) Whether item 22 of the claim of the owners of the Ousel should be disallowed on the grounds (a) that in substance it formed part of or the same as part of the claim of the board; (b) that the sum to which item 22 related had not as yet been paid to the board by the owners of the Ousel; and (c) that accordingly unless item 22 is disallowed there would not be rateable distribution of the limitation fund among the several claimants.
>
> (2) Whether, if item 22 were allowed, the board must give credit in their claim for an amount equivalent to the amount of item 22 on the ground that otherwise there would not be rateable distribution of the limitation fund among the several claimants.

The cases noted below* were cited in argument in addition to those to which reference is made in the judgment.

Eustace Roskill, Q.C., and *H. V. Brandon* for the owners of part of the cargo of the Ousel.

J. R. Adams, Q.C., and *R. F. Stone* for the owners of the Ousel.

J. V. Naisby, Q.C., and *G. N. W. Boyes* for the Mersey Docks and Harbour Board.

Cur. adv. vult.

Dec. 21. **LORD MERRIMAN, P.**, read the following judgment: On Jan. 8, 1957, the Panamanian tanker Liverpool and the British coaster Ousel

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* Counsel also referred to the following cases; *Prehn* v. *Bailey, The Ettrick*, (1881), 4 Asp. M.L.C. 465; *Ex p. Cotton*, (1883), 11 Q.B.D. 301; *Castellain* v. *Preston*, (1883), 11 Q.B.D. 380; *The Victoria*, (1888), 6 Asp. M.L.C. 335; *The Emilie Millon*, (1905), 10 Asp. M.L.C. 162; *C. A. Van Eijck and Zoon* v. *Somerville*, [1906] A.C. 489; 10 Asp. M.L.C. 263; *Re Melton, Milk* v. *Towers*, [1918] 1 Ch. 37; *The Disperser*, (1920), 15 Asp. M.L.C. 112; *The Kronprinz Olav*, (1921), 15 Asp. M.L.C. 312; *The Byzantion*, (1922), 16 Asp. M.L.C. 19; *London Rangoon Trading Co.* v. *Ellerman Lines*, (1923), 14 Lloyd's Rep. 497; *Standard Oil Co. of New York* v. *Clan Line Steamers, Ltd.*, [1924] A.C. 100; 16 Asp. M.L.C. 273; *Dee Conservancy Board, etc.* v. *McConnell*, (1928), 17 Asp. M.L.C. 433; *Re Rissik*, [1935] All E.R. Rep. 932; [1936] Ch. 68; *Pilkington* v. *Wood*, [1953] 2 All E.R. 810; *The Stonedale No. 1*, [1955] 2 All E.R. 689; [1956] A.C.1; *The Corchester*, [1956] 3 All E.R. 878; *Ferranti (Owners)* v. *American Jurist (Owners) & Claycarrier (Owners)*, [1958] 2 All E.R. 659; *Cargoships El Yam, Ltd.* v. *Ivoer-En-Transportonderneming Invotra N.V.*, (Dec. 2, 1958), unreported. Reference was also made to ROWLATT ON PRINCIPAL AND SURETY (3rd Edn.), p. 309; SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING (14th Edn.), pp. 456, 461; TEMPERLEY'S MERCHANT SHIPPING ACTS (5th Edn.), pp. 331, 333, 335, 339, 557 and 558. WILLIAMS ON BANKRUPTCY (17th Edn.), pp. 151, 183, and 2 HALSBURY'S LAWS (3rd Edn.) 472-474, paras. 927-930.

were in collision in the port of Liverpool. As a result of the collision the Ousel A
was beached, and on the same day the Mersey Docks and Harbour Board (hereinafter
referred to as "the board") gave notice to the owners of the Ousel that
the Ousel, her cargo, furniture, tackle or apparel were, or were likely to become,
an obstruction or impediment or danger to the safe and convenient navigation
or use of the port of Liverpool or the sea channels leading thereto, and that
pursuant to s. 3 of the Mersey Docks and Harbour Board Act, 1954 (hereinafter B
called "the Private Act") (1), and all other powers in that behalf, the board had
taken possession thereof and would proceed to raise, remove, blow up or destroy
the same as they deemed necessary. The notice also contained the statement
that any property recovered would be sold by the board and the proceeds
applied as a common fund for the payment of the expenses incurred in connexion
with the raising, etc., of the obstruction, and with the detainer and sale C
of the property, the surplus (if any) being returned to the persons entitled
thereto. It added that if the expenses so incurred exceeded the proceeds of
sale or other sum payable to the board the difference up to, but not exceeding
the amount prescribed by the Merchant Shipping Acts as the limit of the liability
to damages of an owner of a ship in respect of loss or damage to vessels, goods,
merchandise or other things, was recoverable by the board from the owner. D

As between herself and the Ousel, the Liverpool has never disputed that she
was wholly to blame for the collision; and by an action proceeding in the
Liverpool district registry, the owners of the Liverpool claimed to limit their
liability in accordance with s. 503 and s. 504 of the Merchant Shipping Act, 1894.
By para. 4 of the statement of claim the plaintiffs admit that the said collision
and the damages resulting therefrom were caused by the improper navigation of E
the Liverpool by their servants.

The plaintiffs offered to pay into court the undisputed sum of £106,226 12s. 10d.,
as being the aggregate amount of £8 per ton on the registered tonnage of the
Liverpool, together with interest thereon at four per cent. I was informed
that the interest brought the amount to be paid into court up to about £112,000,
on payment of which sum into court the usual decree in a limitation action was F
made by the district registrar (2).

The claims made against the fund are as follows: The Decca Navigator Co.,
Ltd.: £750 in respect of certain radar equipment, agreed at that amount:
it will be unnecessary to refer to this claim again. Next there is a claim by the
owners of certain cargo in the Ousel for £142,903 11s. 3d. This group of cargo-owners
are called Messrs. Waltons' clients. There is a further claim for £27,603 G
18s. 11d. by other cargo owners represented by other solicitors, but not separately
represented before me. These have been called, not very politely, the "hangers
on" because in substance their claims stand or fall with those of Messrs. Waltons'
clients. Then there is the claim of the board for £128,382 11s. 7d. for expenses
incurred and damage sustained in connexion with clearing the Mersey of the
wreck of the Ousel. H

It is important to note that this is a common law claim in tort, founded on
the admitted negligence of the Liverpool in causing the wreck of the Ousel.
It is not disputed that to some extent it covers the same ground as the subject-matter
of the board's claim against the Ousel under the Private Act, by virtue
of which they served the notice already mentioned (3), and it is right to point
out that in this claim the board have given credit for £60,359 14s. 3d. in respect I
of the sale of cargo formerly laden in the Ousel and certain of her equipment.

There is also a claim on behalf of the owners of the Ousel for £70,765 5s. 1d.
Of this sum £59,929 13s. 1d., including £58,000 for the estimated value of the
Ousel herself, is the total of loss and damage of which particulars are given

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(1) 2 & 3 Eliz. 2 c. xlv.

(2) By order dated May 28, 1958, as amended by an order dated Jan. 20, 1959, pursuant to the order of KARMINSKI, J. (see [1959] 1 All E.R. 492).

(3) See letters A to D, supra.

A under twenty-one heads (4). Finally, the owners of the Ousel claim £10,835 12s. under the heading "Mersey Docks and Harbour Board Contingent Claim of Board in respect of wreck-raising expenses; namely, Statutory Limit of Ousel". It is this claim (hereinafter called "item 22") which is the subject of the present reference.

Messrs. Waltons' clients attack the inclusion of this item, both in the Ousel's B claim, and, in substance, also in the board's claim. On behalf of the Ousel it is contended that though the money has not actually been paid, in circumstances which I will discuss later, they have no escape from their liability to pay this sum to the board as being the deficiency referred to in s. 3 (3) of the Private Act, reduced to the amount of the limitation under the Merchant Shipping Acts (5).

The board, on the other hand, claim (6) that they are entitled to recover in full C the amount due under the Private Act, if and when it suits them to do so and also to claim a dividend, if I may so call it, from the fund on the full amount of their claim, with the proviso that the sum recovered from these two sources does not exceed the total amount of the board's claim against the Liverpool. At the outset of his argument counsel for the board stated emphatically that he stood by this claim (6), and the board have never receded from this position.

D It was ordered that this dispute should be tried as an issue in the reference, and two questions were agreed before KARMINSKI, J., in chambers for submission to the court, as follows (7):

> "It is ordered that the following two agreed questions be tried as separate issues by a judge alone:
>
> "1. Whether item 22 of the claim of the owners of the Ousel should be E allowed notwithstanding that the liability to the Mersey Docks and Harbour Board to which such item relates is contingent only.
>
> "2. Whether, if the said item 22 of the claim of the owners of the Ousel is allowed the Mersey Docks and Harbour Board must give credit in their claim for an amount equivalent to the amount of the said item on the ground that otherwise there will not be a rateable distribution of the Limitation F Fund among the several claimants."

During the hearing, as there appeared to be doubt whether the first question was wide enough to ensure that the question of double proof was raised, I allowed that question to be amended in the following terms:

> "(1) Whether item 22 of the claim of the claimants the owners of the Ousel should be disallowed on the grounds:—(a) that in substance it forms G part of or is the same as part of the claim of the Mersey Docks and Harbour Board; (b) that the sum to which the said item relates has not yet been paid to the board by the claimants the owners of the Ousel; and (c) that accordingly unless such item is disallowed there will not be a rateable distribution of the limitation fund among the several claimants."

H (4) Item 20, for the sum of £26 5s. was deleted by agreement, Jan. 14, 1959.

(5) Section 3 (3) of the Private Act reads as follows: "If the proceeds of sale of the vessel or of the wreck of the vessel and the cargo furniture tackle and apparel thereof so raised removed blown up or destroyed are insufficient after paying the said duties and purchase tax to reimburse the board for the said expenses the board may recover the deficiency from the person who was the owner of the vessel at the time of the sinking stranding or abandonment thereof . . . as a debt in any court of competent jurisdiction.

"Provided that if the owner of the vessel so raised removed blown up or destroyed I is not under the provisions of the Merchant Shipping Acts, 1894 to 1952 as amended by any enactment for the time being in force, entitled to limit his liability in respect of the said deficiency that owner shall not be liable to pay the board in respect thereof a sum exceeding the amount prescribed in . . . the Merchant Shipping Act, 1894, as amended by any enactment for the time being in force, as the limit of liability to damages of the owner of the ship in respect of loss or damage to vessels goods merchandise or other things." The statutory limits of the Ousel and of the Liverpool are stated at p. 467, letter C, and p. 468, letter E, ante. Item 22 was the amount of the statutory limit of the Ousel.

(6) I.e., in a letter from the solicitor to the board to the solicitors of the owners of the Ousel, dated Jan. 26, 1959.

(7) The order was dated June 22, 1959.

I allowed this amendment by virtue of R.S.C., Ord. 28, r. 12, so as to ensure the A determination of the real issue raised by this proceeding.

Counsel for the owners of the Ousel stated that he was specifically instructed not to raise question 2 as against the board. Counsel for the board also disclaimed any intention of arguing question 1 against the Ousel unless he was driven to do so, if question 2 was answered against the board. This mutual abstention from attack on each other by the rival claimants to the fund seemed B to me to justify counsel for the cargo owners' observation that this looked like an agreement that the Ousel should be treated as having paid the board the amount of item 22, but that the board should be treated as not having received that amount. It is only fair to say, however, that the rigidity of this attitude was somewhat modified in the answers to counsel for the cargo owners' cogent reply, and after question 1 was amended. C

On behalf of Messrs. Waltons' clients it was argued by counsel for the cargo owners that the inclusion of item 22 both in the Ousel's claim and in substance in the board's claim, gave rise to the issue of double proof, so that either the contingent claim of the Ousel should be disallowed, or, if allowed, that the board should be compelled to give credit against their claim for the same amount. Alternatively, it was contended that the board should deduct item 22 from their D claim against the Liverpool, on the principle that they ought, as reasonable persons, to mitigate their loss; or, alternatively, on the ground that their failure to take the reasonable step of recovering the amount of item 22 prevented that part of their loss from flowing from the wrong-doing of the Liverpool.

The rule against double proof is very clearly stated in *Re Oriental Commercial Bank, Ex p. European Bank* (8), by MELLISH, L.J.: after saying that the rule E applies in the Court of Chancery as well as in the Court of Bankruptcy, and therefore would apply equally where companies are being wound up, he says (9): " It seems to me that the principle is a perfectly sound one ". Then, after an immaterial reference to the application of the rule to joint and separate estates, he continues (9):

F

> "But the principle itself—that an insolvent estate, whether wound up in Chancery or in Bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt G paid in full. I apprehend that is what the law does not allow; the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts."

This statement of the principle was followed by HORRIDGE and ROCHE, JJ., in *Re Hoey, Ex p. Hoey* (10), a case in which the bankrupt had charged his property direct to mortgagees and had conveyed to his wife and another the H equity of redemption of the property, with a covenant that he would discharge the mortgage liability within a certain period. This was held to raise the principle of double proof on the ground that he had entered into covenants both with the mortgagee and with his wife, but that they were both to pay the same debt, and if they were both allowed to prove in respect of that debt higher dividends would be paid in respect of that debt than in respect of the debts I of other creditors.

There has been a very full and exhaustive examination by counsel for the board of the bankruptcy law relating to contracts of guarantee, the suggestion being that as several of the cases relating to double proof were cases dealing with suretyship, the law relating to such cases could conveniently be applied to any case in which the question of double proof arises (11). One such rule is that where the surety guarantees the whole debt with a limit of the amount for which he is to be liable under his guarantee, the principal creditor even though the surety has already paid the limited amount due from him can prove in the bankruptcy of the debtor for the whole of his debt without taking into account that which he has received from the surety; see, for example, *Re Sass, Ex p. National Provincial Bank of England, Ltd.* (12), and *Re Houlder* (13). On the other hand, if the surety guarantees part of the debt only the creditor must give credit, in proving against the bankrupt's estate, for that which he has received from the surety; or, if he is able to prove for the whole amount because he has not yet recovered from the surety, he must account for the proportionate part of the dividend to the surety on payment being made subsequently by the latter. From this it was argued by analogy that the effect of the Private Act in the present case is that the deficiency mentioned in s. 3 (3) is the whole debt, while a limit is imposed on the recovery by the proviso; thus leading to the conclusion that the board, as creditor, can prove in full against the limitation fund, without giving credit for the amount of item 22. It is true that some of the cases of double proof arise out of contracts of guarantee; but it does not seem to me to follow from this that all cases of double proof are governed by the law relating to cases of guarantee.

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(8) (1871), 7 Ch. App. 99.

(9) (1871), 7 Ch. App. at p. 103.

(10) (1918), 88 L.J.K.B. 273.

In *Ellis* v. *Emmanuel* (14) BLACKBURN, J., delivering the judgment of LORD CAIRNS, L.C., BRETT, J., and himself, after a full review of all the cases on the subject, said (15):

> "I think in such a case it is a question of construction on which the court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only."

The present case is not one of suretyship at all, but if it is to be treated as such by analogy, and if the construction of the Private Act is to decide whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only, my opinion is that the latter is the correct view.

The debt which the Ousel in the supposed capacity of surety is to pay under the Private Act is, in my opinion, the debt constituted by s. 3 (3) and the proviso combined; that is to say, the portion of the deficiency calculated with reference to sub-para. (ii) of s. 503 (1) of the Merchant Shipping Act, 1894, (16). In my opinion the suggestion that the Ousel as the supposed surety guarantees the whole deficiency under s. 3 (3) subject to a limit by the proviso arises from the failure to distribute the two senses in which the word "limitation" is used in connexion with the principle of limitation of liability in Admiralty and in the analysis of the suretyship cases by BLACKBURN, J., to which I have referred (17).

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(11) I.e., *Ex p. Rushforth*, (1805), 10 Ves. 409; 32 E.R. 903; *Ex p. Kendall*, (1811), 17 Ves. 514; 34 E.R. 199; *Morris* v. *Robinson*, (1824), 3 B. & C. 196; 107 E.R. 706; *Re Plummer & Wilson, Ex p. Shepherd*, (1841), 1 Ph. 66; 41 E.R. 552; *Re Houghton, Ex p. Tayler*, (1857), 1 De G. & J. 302; 44 E.R. 740; *Midland Banking Co.* v. *Chambers*, (1869), 4 Ch. App. 398; *Hobson* v. *Bass*, (1871), 6 Ch. App. 792; *Ex p. West Riding Union Banking Co., Re Turner*, (1881), 19 Ch.D. 105; *Re Blackburne, Ex p. Strouts*, (1892), 9 Morr. 249; *Commercial Bank of Australia* v. *Wilson & Co.'s Estate (Official Assignee)*, [1893] A.C. 181; *Re Rowe, Ex p. Derenburg & Co.*, [1904] 2 K.B. 483; *Re Reis, Ex p. Clough*, [1904] 2 K.B. 769; *Re Fenton (No. 1), Ex p. Fenton Textile Assocn., Ltd.*, [1930] All E.R. Rep. 15; [1931] 1 Ch. 85.

(12) [1896] 2 Q.B. 12.

(13) [1929] All E.R. Rep. 366; [1929] 1 Ch. 205.

(14) (1876), 1 Ex.D. 157.

(15) (1876), 1 Ex.D. at p. 169.

(16) Section 503 (1) of the Merchant Shipping Act, 1894, reads as follows: "The owners of a ship . . . shall not . . . be liable to damages beyond the following amounts; (that is to say) . . .

"(ii) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding £8 for each ton of their ship's tonnage."

(17) See (1876), 1 Ex.D. at pp. 163-168.

A On behalf of the board it was argued that nearly all the reported cases of double proof were cases in which what was held to be in substance the same debt arose out of contract, though not necessarily out of the same contract. Nevertheless, the object of the principle being to avoid the payment of two dividends in respect of what is in substance the same debt, I do not see why the principle should not apply to a debt arising out of a tort—see PROFESSOR GLANVILLE WILLIAMS on JOINT TORTS AND CONTRIBUTORY NEGLIGENCE, p. 173, para. 49. B Nor, on the other hand, does it seem to me to matter that the subject of the rival proof arises out of the Private Act. The point is that item 22 is in effect co-extensive with part of the board's claim against the fund, and that both arise directly out of the same subject-matter; namely, the wreck of the Ousel in the Mersey and the expense incurred by the board in clearing the Mersey of obstruction by the wreck. C

The fact that the board's claim against the Liverpool is a common law claim in tort, while the board's claim against the Ousel results from the Private Act, seems to me to be immaterial. It is true that in *Re Oriental Commercial Bank*, MELLISH, L.J., used the words (18), " although there may be two separate contracts " in respect of what he held to be in substance the same debt, but that was a case of two separate contracts. D On the other hand, in *Re Moss, Ex p. Hallet* (19), BIGHAM, J., quoting with approval the judgment of the county court judge whose decision was under appeal, said:

> " . . . there clearly would be a double proof in respect of the same sum in substance, although the nature of the liability in each case assumes a different form."

E These words are wide enough to cover the present case.

In my opinion there is no obligation to reject one claimant rather than the other in applying the rule of double proof. I think that as LORD UTHWATT said in *Morrison S.S. Co., Ltd.* v. *Greystoke Castle* (*Cargo Owners*) (20) when considering the rival claims of cargo and the carrying ship against the colliding ship in respect of general average expenses, " The reality of the situation dictates F the choice to be made ". Here the owners of the Ousel, once the board had served the notice and taken possession under the Private Act, had no escape from the obligation to pay the board the amount of item 22. To debar them, therefore, from proving against the limitation fund the item of loss which plainly results from the Liverpool's wrong-doing would be harsh indeed. On the other hand, the board, quite rightly and properly, have decided to put in train the G enforcement of their rights under the Private Act, and can at any moment receive the fruits of doing so.

In *B. O. Morris, Ltd.* v. *Perrott & Bolton* (21), LORD GODDARD, delivering the judgment of the Court of Appeal, says:

> " If the causes of action are different, judgment without satisfaction against one is no bar to an action against the other, and this is so even H if the plaintiff deliberately refrains from proceeding to execution on the first judgment."

In my opinion, however, this is not a case of deliberately refraining from proceeding to execution. On the contrary, it is a case of avowed intention to collect item 22, the fruits of the steps that the board has taken under the Private Act, but to postpone collection, if possible, until the limitation fund has been distributed. I

I can see no reason why the principle of double proof should not apply to a limitation action, as well as to bankruptcy and winding-up. The desirability of avoiding the payment of two dividends in respect of what is in substance the same debt applies equally to a limitation fund. In this context it is, perhaps, worth noting that in *Stoomvaart Maatschappij Nederland* v. *Peninsular & Oriental Steam Navigation Co.*, LORD SELBORNE, L.C. (22), treated bankruptcy and the statutory limitation of liability in Admiralty as being on the same footing in equity.

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(18) (1871), 7 Ch. App. at pp. 103, 104.
(19) [1905] 2 K.B. 307 at p. 312.
(20) [1946] 2 All E.R. 696 at p. 717; [1947] A.C. 265 at p. 309.
(21) [1945] 1 All E.R. 567 at p. 569.

If the rule against double proof applies at all, it seems to me that the reality of the situation indicates that the board should be debarred from proving for a dividend for that part of their loss in respect of which they can recover in full from the Ousel; that is to say, the answer to question 1, both in its original and its amended form, is that item 22 of the claim of the Ousel should be allowed; and the answer to question 2 is that the board must give credit in their claim for an amount equivalent to the amount of item 22.

At one stage of the argument it was suggested that to make this order would be to confiscate the sum legitimately due to the board as the result of the Private Act. This suggestion of confiscation is taken from the opinion of VISCOUNT FINLAY in *Mersey Docks & Harbour Board* v. *Hay, The Countess* (23). But that was a case where the particular claimant had a possessory lien, notwithstanding which it was argued that he must prove as an unsecured claimant. Seeing that it was decided that rateable distribution does not affect priorities and that the respective rights must be considered qualitatively as well as quantitatively, (24) to deprive the claimant of his priority and reduce him to the level of an unsecured claimant against the fund would truly have been to confiscate his priority. Reduced from rhetoric to hard fact, it now appears that the so-called confiscation means that the board will get about £1,200 less than the full amount, after taking into account that the amount of item 22 is deducted from the board's claim on the basis that the board has received, or must be taken to have received, that amount, and that the Ousel is entitled to prove for the amount of item 22. This no doubt is very unfortunate, but so is the fact that there are other innocent victims of the Liverpool's ability to limit her liability for her admitted wrong-doing. I do not think that I can decide this case solely on an assessment of the comparative merits of innocent victims.

However the matter may stand in connexion with the rule against double proof, there is, in my opinion, a simpler solution to the problem; namely, the obligation which rests on the board to mitigate the loss which they have sustained by the wrongful act of the Liverpool. I was myself responsible for introducing this aspect of the matter into the discussion, but counsel for cargo owners adopted it, and the topic has been fully argued. Let me say at once that this is not a question of one tortfeasor making the hopeless attempt to insist that another tortfeasor shall be sued first, or at all, as a condition of determining his own liability; or, indeed, of the tortfeasor dictating to the board whom else they shall sue, or in what order.

In this case notice under the Private Act was served by the board on the owners of the Ousel on the very day on which, as the result of the collision for which the Liverpool has accepted the sole blame, the Ousel was driven ashore in such a way as to block the Mersey channel, for the upkeep of which the board are responsible. The notice under document 1 was given in pursuance of the rights of the board under the Private Act (25). It has been suggested, indeed it has almost been assumed in the course of the argument, that the Act not merely gives the board the right but imposes the duty to act as they have done. I am not so sure about that; nor in my opinion does it matter. Plainly they have the right, and whether there is also the duty or not the board must at least have an option about the time when the steps laid down in the Act are taken. In this case they acted at once, and in doing so they plainly acted of their own volition. From the giving of the notice everything proceeded through the prescribed stages; from the board taking possession of the Ousel, the sale of the cargo, the blowing up of the ship, down to the calculation of the " deficiency ", and, finally, to the reduction of the amount of the " deficiency ", to the amount for which alone the Ousel was liable under the limitation provided by s. 3 (3) and the proviso combined. On Jan. 26, 1959, the board stated explicitly that it was their intention to enforce liability under the Private Act against the Ousel. About the amount there has been complete certainty since the exchange of documents 78 and 82, and 77 and 83 respectively in June, 1959, (26). So far, I repeat, the actions of the board were at their own volition and were in no way dictated by any third party. All that is lacking, therefore, is the actual payment of the money.

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(22) (1882), 7 App. Cas. 795 at p. 801; 4 Asp. M.L.C. 567 at p. 569.

(23) [1923] A.C. 345 at p. 363; 16 Asp. M.L.C. 161 at pp. 166, 167.

(24) Per EARL OF BIRKENHEAD, [1923] A.C. at p. 356; 16 Asp. M.L.C. at p. 164.

(25) Document 1 was a letter from the secretary to the board to the owners of the Ousel, the British and Continental Steamship Co., dated Jan. 8, 1957, sent pursuant to s. 3 of the Private Act, see p. 468, letters A to D, ante.

I find as a fact that from the moment when the amount was ascertained the owners of the Ousel have been ready and willing to pay the money due, but the board have persistently maintained what I regard as the farce of refraining from taking the money. This action also is entirely of their own volition, and the refusal was emphatically repeated in the course of the argument, when counsel for the owners of the Ousel, on behalf of his clients, was instructed to offer immediate payment, or to pay the money into court. Accordingly, as I was advised that there was no machinery for payment into court by a defendant in the course of a reference arising out of a limitation action, it was arranged that Messrs. Waltons would act as stake-holders of the amount of item 22 for whom it might concern.

In these circumstances, the question how the matter stands is one of law.

It has been common ground in this case that the classic statement about mitigation of loss by VISCOUNT HALDANE, L.C., in his speech in *British Westinghouse Electric & Manufacturing Co., Ltd.* v. *Underground Electric Rys. Co. of London, Ltd.* (27), hereinafter referred to as the *Westinghouse* case, although made in an action arising out of a breach of contract, applies equally, mutatis mutandis, to tort. I will preface the citation from the *Westinghouse* case (27) by a short passage from the judgment of SCRUTTON, L.J., in *Payzu, Ltd.* v. *Saunders*, when he said (28):

> " Whether it be more correct to say that a plaintiff must minimise his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take [quoting LORD HALDANE in the *Westinghouse* case (29)] ' all reasonable steps to mitigate the loss consequent on the breach ', and this principle ' debars him from claiming any part of the damage which is due to his neglect to take such steps '."

After this passage, VISCOUNT HALDANE, L.C. (29), quoted JAMES, L.J., in *Dunkirk Colliery Co.* v. *Lever* (30) as follows:

> " The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."

LORD HALDANE continued (29):

> " As JAMES, L.J., indicates, this second principle does not impose on the

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(26) Documents 77 and 78 were identical letters dated June 19, 1959, from the solicitors to the owners of the Ousel to the solicitors to the owners of part of the cargo and the solicitor to the board respectively, that the statutory limit of the liability of the Ousel under s. 503 (1) (ii) of the Merchant Shipping Act, 1894, was £10,835 12s. (see ante p. 467, letter C). Document 82 was the reply of the board to document 78 and document 83 the reply from the solicitor to the owners of part of the cargo to document 77.

(27) [1912] A.C. 673 at pp. 688-690.

(28) [1919] 2 K.B. 581 at p. 589.

(29) [1912] A.C. at p. 689.

(30) (1878), 9 Ch.D. at p. 25.

plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."

Then, after citing *Staniforth* v. *Lyall* (31), as an illustration of this rule, LORD HALDANE continued (32):

> "I think that this decision illustrates a principle which has been recognised in other cases, that, provided the course taken to protect himself by the plaintiff in such an action was one which a reasonable and prudent person might in the ordinary conduct of business properly have taken, and in fact did take whether bound to or not, a jury or an arbitrator may properly look at the whole of the facts and ascertain the result in estimating the quantum of damage."

Both BANKES and SCRUTTON, L.JJ., in *Payzu, Ltd.* v. *Saunders* (33) emphasised that the duty imposed on the plaintiff involved a conclusion of fact, to be arrived at on a consideration of all the circumstances of the case.

Applying these observations, the "transaction" is the grounding of the Ousel in the Mersey Channel. The action taken by the board, whether bound to take it or not, under their Private Act was reasonable and prudent, and one which they would ordinarily take in the course of their business. This action has diminished their loss inasmuch as item 22 is receivable by the board in full and is not the subject of proof on which a mere dividend out of the fund is recoverable. If the fact that the board have chosen not to receive the amount of item 22 makes any difference, and they are not to be treated as having received it, or are not estopped from saying that they have not received it, I regard their refusal to receive payment as unreasonable. They are deliberately refraining from accepting the money so as not to be prevented from alleging, for what it is worth, that they have not received it. Accordingly, to the extent that the amount of item 22 is included in the board's claim against the fund I do not consider that the fact that they have not actually received it follows reasonably from the wrong-doing of the Liverpool. On the contrary, it flows, in my opinion, from the unreasonable refusal of the board to receive the amount of item 22 from the Ousel. Putting it the other way, they have been able to minimise the damage in that respect at any moment since the precise amount was ascertained and agreed.

For these reasons, also, as well as on the issue of double proof I think that question 2 must be answered against the board.

Order accordingly.

[The terms of the order were, so far as relevant, as follows:—

It is ordered that item 22 of the claim of the owners of the Ousel amounting to the sum of £10,835 12s., against the limitation fund of the Liverpool be allowed.

It is also ordered that [the board] give credit in their claim against the said limitation fund for an amount equivalent to the amount of the said item 22 of the claim of the owners of the Ousel.

It is further ordered that the costs of the owners of part of the cargo on board the Ousel (Messrs. Waltons' clients) also the costs of the owners of the Ousel be paid by [the board].]

Solicitors: *Waltons & Co.* (for the owners of part of the cargo of the Ousel); *Weightman, Pedder & Co.*, Liverpool (for the owners of the Ousel); *R. H. Bransbury*, Liverpool (for the board).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(31) (1830), 7 Bing. 169. (32) [1912] A.C. at p. 690. (33) [1919] 2 K.B. at p. 589.

McKINLEY *v.* McKINLEY.

[Leeds Assizes (Wrangham, J.), December 14, 15, 1959.]

Evidence—Witness—Competency—Clerk to justices—Matrimonial proceedings—Subpoena—Production of notes of evidence—Whether privileged.

In 1955 a wife unsuccessfully took proceedings against her husband before a stipendiary magistrate and the assistant to the magistrates' clerk took a shorthand note of the evidence in those proceedings. The husband now petitioned against her for divorce in the High Court and the wife wished to adduce in the divorce proceedings evidence of what had occurred in the former proceedings before the magistrate and issued subpoenas against both the clerk and his assistant to attend and bring with them a transcript of those proceedings and the relevant notebooks. On the application of the clerk the district registrar ordered that the subpoenas be set aside on the grounds that the clerk was a privileged person and that the notes of evidence were privileged documents. It was conceded that the clerk would be able to give relevant and admissible evidence. From this order the wife appealed.

Held: there is no rule which prevents a magistrates' clerk from being compelled to attend and give evidence in a divorce proceeding if there is any relevant and admissible evidence which he can give; accordingly, the subpoena to the assistant of the magistrates' clerk should stand, but only to order him to bring and produce his note.

[As to the compellability of witnesses in civil proceedings, see 15 Halsbury's Laws (3rd Edn.) 419, para. 752; and as to the privilege of judges not to give evidence concerning judicial proceedings before them, see ibid., p. 420, para. 754.

For cases on the subject, see 22 Digest (Repl.) 398, *4261-4267*.]

Cases referred to:

Ainsworth v. *Wilding*, [1900] 2 Ch. 315; 69 L.J.Ch. 695; 18 Digest (Repl.) 118, *1004*.

Buccleuch (*Duke*) v. *Metropolitan Board of Works*, (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724; 2 Digest (Repl.) 663, *1817*.

Dawson v. *Dawson*, (Court of Appeal, May 20, 1955), unreported.

Padley v. *Padley*, [1953] 2 All E.R. 1197, n.; [1954] P. 302; 117 J.P. 550, n.; [1953] 3 W.L.R. 834; 3rd Digest Supp.

R. v. *Baines*, [1909] 1 K.B. 258; 78 L.J.K.B. 119; 100 L.T. 78; sub nom. *R.* v. *Baines, Ex p. Asquith*, 72 J.P. 524; 22 Digest (Repl.) 415, *4468*.

R. v. *Gazard*, (1838), 8 C. & P. 595; 173 E.R. 633; 22 Digest (Repl.) 398, *4265*.

R. v. *Harvey*, (1858), 8 Cox, C.C. 99; 22 Digest (Repl.) 398, *4263*.

R. v. *Morgan*, (1844), 4 L.T.O.S. 233; 1 Cox, C.C. 109; 15 Digest (Repl.) 837, *7998*.

R. v. *Morgan*, (1852), 6 Cox, C.C. 107; 22 Digest (Repl.) 403, *4323*.

Ramlochan v. *R.*, [1956] 2 All E.R. 577; [1956] A.C. 475; [1956] 3 W.L.R. 117; 3rd Digest Supp.

Rawstone v. *Preston Corpn.*, (1885), 30 Ch.D. 116; 54 L.J.Ch. 1102; 52 L.T. 922; 18 Digest (Repl.) 117, *1000*.

J. S. (*an infant*), *Re*, [1959] 3 All E.R. 856; [1959] 1 W.L.R. 1218.

Ward v. *Shell-Mex & B.P., Ltd.*, [1951] 2 All E.R. 904; 22 Digest (Repl.) 413, *4450*.

Interlocutory Appeal.

In 1955 the appellant wife, Lily McKinley, took proceedings against her husband, Alfred McKinley, before the stipendiary magistrate at Kingston-upon-Hull on the grounds of cruelty and desertion which proceedings, after a three days' hearing, were dismissed. The assistant to the magistrates' clerk took a shorthand note of those proceedings. The appellant's husband subsequently instituted divorce proceedings against her in the Kingston-upon-Hull District Registry of the High Court on the ground of her desertion. The appellant was defending these proceedings and was herself asking for relief on the grounds of her husband's cruelty and desertion. She wished to be able to adduce in the divorce suit evidence of what had occurred before the stipendiary magistrate. She therefore issued against the magistrates' clerk, Thomas Arthur Doubleday, and his assistant, Charles Phillips, subpoenas ad testificandum et duces tecum requiring them to bring to the hearing of the divorce suit a certified transcript of the 1955 proceedings with five copies for the court and the relevant shorthand notebooks. The clerk and his assistant applied to have the subpoenas set aside and by their affidavits claimed (inter alia) that the documents were privileged documents. On Nov. 20, 1959, the district registrar ordered the subpoenas to be set aside and from this order the wife now appealed. The appeal was argued in open court.

R. Lyons, Q.C., and *H. H. Ognall* (*A. M. Hurwitz* with them) for the appellant.

John McLusky for the magistrates' clerk and his assistant.

WRANGHAM, J.: This is an appeal against the decision of the district registrar at Kingston-upon-Hull setting aside two subpoenas issued to the clerk to the Kingston-upon-Hull justices and his assistant. It raises an important question of general interest and has therefore, on the application of the parties, been argued in open court.

The relevant facts are not really in dispute. They are not, however, very clearly set out in the affidavits—I think because until the hearing the nature of the real issues between the parties was not completely apprehended—and the basis on which this appeal should be decided has been agreed between the parties here. The relevant facts are these: The appellant is the respondent in divorce proceedings in which her husband is petitioning on the ground of her desertion. In 1955 there were proceedings before the stipendiary magistrate for Kingston-upon-Hull against her husband on the grounds of his cruelty and desertion. After a three-day hearing, those proceedings were dismissed. She now wishes to be able to adduce, in the divorce proceedings, evidence of what occurred in the magistrates' court. There is no doubt that she would herself be able to give evidence of what her husband said before the magistrate and of any other matters that occurred there, provided that they were admissible in the divorce proceedings, if, of course, she could remember them. But far more reliable evidence on the same lines of what took place before the magistrate could be procured from the magistrates' clerk, not because he has a better memory but because he has got a note from which his memory can be refreshed. The note is one which he is under duty to take for use in connexion with appeals (see the Matrimonial Causes Rules, 1957 (S.I. 1957 No. 619), r. 73 (3)), so it is bound to be in existence. The note is not directed by any rule to be supplied to parties in divorce proceedings, and parties in divorce proceedings have, in my judgment, no right to have that note produced to them; but the fact that the note must exist because for another purpose it is directed to be taken, is nevertheless a fact of prime importance in this particular appeal. Otherwise, the appeal, which might be equally good in law, would be of less value in practice. In those circumstances there can be no doubt that the clerk would be competent to give, on behalf of the appellant, evidence which would be relevant and admissible, and which could not be excluded on any ground of state privilege or legal professional privilege.

With certain exceptions, such as those of the Sovereign and of some other persons (1), whom it is not necessary to mention, all competent witnesses are compellable; and all compellable witnesses can be ordered to attend court by a subpoena issued under Ord. 37, r. 20 of the Rules of the Supreme Court. It appears from *R.* v. *Baines* (2) which has not actually been cited to me, but of which I have A some recollection, that a subpoena issued to a potential witness can be set aside on the ground that it is oppressive because the witness has not in fact any admissible evidence which he is in a position to give; but it cannot be set aside on the ground of the status of the witness, even though that status may be very high, unless he is within the category of the specific exceptions, none of which, save perhaps one which I am going to discuss in a moment, applies to this case. B

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(1) See, for the exceptions, 15 HALSBURY'S LAWS (3rd Edn.) 419, para. 752.

The contention on behalf of the magistrates' clerk, the respondent to this appeal, is that it would be oppressive to compel him to attend court for a variety of reasons. He does not give as a reason that he would be unable to give relevant or admissible evidence; on the contrary, it is and it must be conceded that he would be able to give relevant and admissible evidence. It might turn out to be valuable, it might turn out not to be valuable. As to that, I have no means C of judging. It is sufficient that it would be admissible and relevant. The first reason on which he relies in his affidavit is that attendance at court would be a serious interruption of his public duty as clerk to the magistrates. That may very well be true, but the law does not recognise it as an excuse for failure to attend as a witness. Attendance as a witness commonly involves serious interruption of private or public business. Nevertheless, the law requires D such attendance unless there is some other reason for exemption. The second and more substantial reason is, it is contended, that he is a privileged person and that his notes are privileged documents. There is some authority that judges of the superior courts should not be compelled to give evidence of what takes place in cases tried before them. In *R.* v. *Gazard* (3) in 1838, PATTESON, J., before whom a question had been raised whether the chairman of quarter sessions E should be examined by a grand jury as a witness on a matter into which the grand jury were inquiring, said (4):

> " It is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." F

Later in the case, in reference to another case that was cited before him in which it was stated that this same thing had been done, he said (4): " I think it is wrong, and that it ought not to be done ". It is clear, therefore, that in 1838, PATTESON, J., took the view that the judges of England ought not to be compelled to give evidence of what had taken place before them in court. G

In 1844, in *R.* v. *Morgan* (5), GURNEY, B., was clearly contemplating, as a proper possibility, the calling of a magistrate as a witness to testify to what had happened before the magistrates in a judicial or semi-judicial proceeding. In another case, also called *R.* v. *Morgan* (6), in 1852, the matter was carried a little further by MARTIN, B., who said in terms that if a county court judge had been served with a subpoena to attend a trial as a witness in order to prove, H apparently, the evidence given by somebody before him in a case that he had tried, he could have been compelled to go; adding that there was in that particular case no necessity to subpoena him.

In 1858, in *R.* v. *Harvey* (7) the distinction implicit in the difference between what PATTESON, J., had said in 1838, and what had been said by GURNEY, B., and MARTIN, B., in the two cases called *R.* v. *Morgan* (8) became more obvious I for in that case BYLES, J., said that judges of the superior courts ought not to be called on to produce their notes, and added that if he were to be subpoenaed for such a purpose he would certainly refuse to appear. One must assume that what BYLES, J., meant by that was that he would in such a case advise that an application to set aside the subpoena should be made, and that in his view such an application would, or ought to, succeed. In other words that he would be perhaps a competent, but certainly not a compellable, witness. He went on to say that the same objection was not applicable to the judges of the inferior courts; the inferior court in question in this case being the county court. He saw no reason why they should not be called and especially where as in this case the judge was willing to appear. It seemed therefore that in the middle of the nineteenth century, at any rate, the general view was that the judges of superior courts—that is to say the courts which now have become the High Court—were competent no doubt, but not compellable; but that all other judges, except presumably chairmen of quarter sessions, were both competent and compellable.

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(2) [1909] 1 K.B. 258. (3) (1838), 8 C. & P. 595. (4) (1838), 8 C. & P. at p. 595.
(5) (1844), 1 Cox, C.C. 109. (6) (1852), 6 Cox, C.C. 107. (7) (1858), 8 Cox, C.C. 99.
(8) (1844), 1 Cox, C.C. 109; (1852), 6 Cox, C.C. 107.

In *Ramlochan* v. *R.* (9) in 1956, the Privy Council, on an appeal from the Court of Criminal Appeal of Trinidad and Tobago, held that on his second trial for the offence, the accused person could not as of right demand to see the judge's notes of evidence of the first trial; and that perhaps implied that he could not have caused a subpoena to be issued to the judge to testify with the aid of those notes. The position as it existed in the middle of the nineteenth century is, therefore, consistent with the latest decision in 1956 and is also, I think, consistent with the decision in *Duke of Buccleuch* v. *Metropolitan Board of Works* (10), where the matter is discussed by CLEASBY, B. (11).

The only other authority on this that I know of is the unreported case, the name of which I believe to be *Dawson* v. *Dawson* (12); but I have not had the advantage of seeing any report of the case which does not, I understand, appear in any of the official law reports. I was given some information about the case from which it appears, assuming as I do that the information is correct, that the Master of the Rolls, in holding that the magistrates' clerk's notes of proceedings before the magistrates cannot be admitted in divorce proceedings under the Evidence Act, 1938, pointed out that other proper proceedings could be taken to prove that which it was being sought to prove by such production. The inference seems to be, if not irresistible at least very tempting, that what the Master of the Rolls was contemplating, although he did not say so in terms, was evidence from the magistrates' clerk; and if he had thought that it was undesirable that magistrates' clerks should come to give evidence with the aid of their notes as to what had taken place before the magistrates it seems to me to be highly probable that in that case he would have said so.

The conclusion at which I have arrived after consideration of the authorities, is that there is no rule which prevents a magistrates' clerk from being compelled to attend and give evidence in a divorce proceeding if there is any relevant and admissible evidence which he can give; and that where he has evidence which he can give with the aid of his notes as to the proceedings which have taken place between the same parties on the same or very similar issues, there is no reason why he should not be compelled to come and give such evidence. That I think disposes of the point which is really at issue between these parties in this appeal.

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(9) [1956] 2 All E.R. 577; [1956] A.C. 475.

(10) (1872), L.R. 5 H.L. 418.

(11) (1872), L.R. 5 H.L. at p. 433.

(12) *Dawson* v. *Dawson* was heard before LORD EVERSHED, M.R., HODSON and PARKER, L.JJ., on May 20, 1955. It was an appeal from a decision of Mr. Commissioner SIR HARRY TRUSTED at Cambridge on Mar. 3, 1955, in a suit for divorce based on desertion. The leading judgment was delivered by HODSON, L.J., and that of LORD EVERSHED, M.R., was as follows: " I agree. I would like only to add one word, in repetition of what I have already said, in regard to proving in cases of this kind what may have occurred in magistrates' courts, because, unless the rules of evidence are properly observed, serious trouble may be created for the parties. It is elementary that, if it is desired to prove what occurred in a magistrates' court, one cannot, in an undefended suit, claim to put in notes, or what are said to be notes, taken by the clerk to the justices, of what may have occurred. If the petitioner were present himself or herself at the hearing, he or she can give evidence of what occurred and, if the other spouse were also present, can state what was then said or admitted; but if the petitioner were not present or cannot remember what occurred, then, if it is desired to prove what did occur, proper steps (in accordance with the rules applicable under our law) must be taken in order that the matters may be properly proved. However, I do not think that in this case the paucity of evidence about what occurred in the magistrates' court has had a material influence on the decision in this court, which must depend on the reasons which my Lord has given and which I do not desire to repeat." PARKER, L.J., said: " I agree with both judgments ".

Two matters remain to be disposed of. First, it is highly likely that the magistrates' clerk, in order to avoid the necessity of coming to give evidence on subpoena in the circumstances which I have described, will provide the parties with his note, or a transcript of his note if it was in shorthand, before the divorce proceedings actually come on, in the hope that the note will be agreed between the parties to be an accurate record of what took place so that his attendance at the Divorce Court can be dispensed with. That is a practice which has been widespread and well recognised, and of fairly long standing. Whether it is desirable that rules should be made to define more clearly the position of the magistrates' clerks, the rights of parties in divorce proceedings, and the production of the magistrates' clerk's notes before the proceedings are actually heard or at any particular stage, is a matter which falls to be considered not by me, but by those who are in charge of such matters, and about that I express no opinion. It may be also that the burden on magistrates' clerks of supplying notes or attendance at court is so heavy that some form of administrative re-adjustment will be necessary. That again is not a matter for me.

The second matter that has to be disposed of is the form of the subpoena which in my judgment should be allowed in these proceedings. For reasons into which it is not now necessary to enter into detail, the appellant in these proceedings issued the subpoenas both to the magistrates' clerk at Kingston-upon-Hull and to his assistant. It was his assistant who in fact acted as clerk to the stipendiary magistrate on the occasion on which the relevant proceedings were heard. If the clerk to the magistrates had thought fit to reveal to the appellant that a note of the proceedings existed in his possession, but that it would be handed to the assistant if the assistant were to be compelled to come to court I do not think that the appellant ever would have issued any subpoena to the clerk to the magistrates. As it is, it is now plain that the subpoenas to the clerk to the magistrates have become unnecessary—although I do not say they were unnecessary at the beginning. The subpoenas should therefore be set aside. The subpoenas to the assistant, that is to say Mr. Phillips, should stand and should stand subject to any argument about their form.

[HIS LORDSHIP stated that in his opinion the assistant could not be compelled to bring five copies of his notes to court but only the notes which existed. The subpoena duces tecum against the assistant should be amended to order him to bring with him and produce his note of the proceedings.]

Order accordingly.

Solicitors: *Pearlman & Rosen*, Hull (for the appellant); *Williamsons*, Hull (for the magistrates' clerk and his assistant).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

AKERIB *v.* BOOTH & OTHERS, LTD.

[MANCHESTER ASSIZES (Jones, J.), December 11, 18, 1959.]

Contract—Exception clause—Tenancy agreement including agreement for certain services to be performed exclusively by landlord—Landlord not "in any circumstances" to be responsible for damage caused by water—Tenant's goods damaged by escape of water from cistern in water closet—Water closet in landlord's possession—Whether landlord exempted from liability for negligence.

By an agreement in writing dated Dec. 1, 1954, the defendants let to the plaintiff four offices on the third floor of premises which they owned, a wareroom on the second floor, and a wareroom on the third floor. They retained in their possession a water closet on the fourth floor. Under the terms of the agreement, the defendants agreed to pack the plaintiff's goods, at rates agreed on between the parties, in a workmanlike and efficient manner, on and subject to the terms and conditions set out in the schedule to the agreement; and the plaintiff undertook to employ the defendants exclusively in packing his goods, which were defined, for the purposes of the agreement, as all goods bought by or belonging to the plaintiff, or in which he might be interested, or which might come under his control in connexion with his business as carried on on the premises. By para. 1 of the schedule to the agreement the defendants accepted no liability for any loss or damage to the plaintiff's goods in transit to their premises or after the goods had left their premises. Paragraph 2 of the schedule provided that the defendants "shall not in any circumstances be responsible for damage caused by . . . water . . . to any goods whether in the possession of the [defendants] or not . . ." Between Apr. 3 and 5, 1958, water escaped from a cistern in the water closet, owing to the negligence of the defendants or their servants, and caused damage to the plaintiff's goods in the part of the premises let to him. In an action by the plaintiff for damages for negligence, the defendants claimed that they were protected from liability by para. 2 of the schedule to the agreement.

Held: the defendants were not liable to the plaintiff in damages, as the words in para. 2 of the schedule to the agreement were wide enough to protect them from liability.

A. E. Farr, Ltd. v. *The Admiralty* ([1953] 2 All E.R. 512), and dictum of PHILLIMORE, L.J., in *Joseph Travers & Sons, Ltd.* v. *Cooper* ([1915] 1 K.B. at p. 101) applied.

[**Editorial Note.** The exemption clause in the present case contained the words "in any circumstances" in regard to the exemption from responsibility, but did not contain a reference to causation, e.g., "however caused" or "arising from any cause whatsoever", such as had been held to extend exemption to negligent omissions.

As to agreements excluding or limiting liability, see 28 HALSBURY'S LAWS (3rd Edn.) 86, para. 91, and 8 HALSBURY'S LAWS (3rd Edn.) 84, para. 144.]

Cases referred to:

Alderslade v. *Hendon Laundry, Ltd.*, [1945] 1 All E.R. 244; [1945] K.B. 189; 114 L.J.K.B. 196; 172 L.T. 153; 2nd Digest Supp.

Canada Steamship Lines, Ltd. v. *R.*, [1952] 1 All E.R. 305; [1952] A.C. 192; 11 Digest (Repl.) 594, *165*.

Farr (A. E.), Ltd. v. *The Admiralty*, [1953] 2 All E.R. 512; [1953] 1 W.L.R. 965; 3rd Digest Supp.

Manchester, Sheffield & Lincolnshire Ry. Co. v. *Brown*, (1883), 8 App. Cas. 703; 53 L.J.Q.B. 124; 50 L.T. 281; 48 J.P. 388; 8 Digest (Repl.) 66, *441*.

Rutter v. *Palmer*, [1922] 2 K.B. 87; 91 L.J.K.B. 657; 127 L.T. 419; Digest Supp.

Rylands v. *Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, *334*.

Travers (Joseph) & Sons, Ltd. v. *Cooper*, [1915] 1 K.B. 73; 83 L.J.K.B. 1787; 111 L.T. 1088; 12 Asp. M.L.C. 561; 8 Digest (Repl.) 46, *278*.

Action.

Under the terms of an agreement dated Dec. 1, 1954, the plaintiff was the tenant of rooms on the second and third floors of premises belonging to the defendants, Booth & Others, Ltd. Four of the rooms were offices and two were warerooms. The agreement further provided that all the plaintiff's goods in connexion with the business carried on by him on the premises should be packed by the defendants exclusively. The defendants retained in their own possession a water closet on the fourth floor of the premises. Owing to the escape of water from a cistern in the water closet, the plaintiff's goods were damaged. The plaintiff brought an action against the defendants for damages for negligence. The defendants relied on a clause in the agreement which provided that they should not " in any circumstances " be responsible for damage caused by water.

J. R. D. Crichton, Q.C., and *C. N. Glidewell* for the plaintiff.

Fenton Atkinson, Q.C., and *A. K. Hollings* for the defendants.

Cur. adv. vult.

Dec. 18. **JONES, J.:** The plaintiff in this action is named Jack Akerib, and the defendants are Booth & Others, Ltd. The defendants are the owners of premises at 21, Chorlton Street, Manchester, and by an agreement in writing dated Dec. 1, 1954, they let some rooms in the premises to the plaintiff: four offices and one wareroom on the third floor, and one wareroom on the second floor. They retained in their possession a water closet on the fourth floor. There was a cistern in this water closet, and between Apr. 3 and 5, 1958, water escaped from this cistern owing to the negligence of the defendants or their servants and caused damage to the goods of the plaintiff in the part of the premises let to him. The defendants now admit the negligence alleged in para. (b) and para. (d) of the particulars of negligence, which read:

> " (b) The overflow pipe from the said cistern was blocked [and was inadequate to take the normal volume or pressure of water coming into the cistern].
>
> " (d) The defendants' servants failed to turn off the water supply at the said control tap in the basement on the night or nights preceding the said escape although it was their duty so to do."

The point which the defendants take is that they are protected by an exemption clause in the agreement between the parties.

By cl. 1 of the agreement the defendants agree to let and the plaintiff agrees to take four offices and one wareroom on the third floor and one wareroom on the second floor. Sub-paragraphs (a) and (b) of cl. 2 are not of great consequence. They provide that the defendants agree to pay all rates and taxes and to supply water and electric current. Clause 2 (c) is important, because it says that the defendants agree to make-up and/or to pack the plaintiff's goods at the rates from time to time agreed on between the parties in a workmanlike and efficient manner and with all reasonable dispatch, having regard to the defendants' obligations of a similar nature to other customers and otherwise on and subject to the terms and conditions set out in the schedule to the agreement. That is an important provision, and it makes it clear that this agreement is not only a tenancy agreement but an agreement which provides for other matters. Clause 3 (t) is referred to. The plaintiff thereby agrees that he will at all times during the tenancy duly perform and observe the conditions set out in the schedule to the agreement. Clause 4 is important. It reads:

> " The terms of this tenancy are based upon the undertaking of the [plaintiff] (hereby expressly given) to employ the [defendants] exclusively

> in the making-up and/or packing (including the supply of all materials therefor) of all goods bought by or belonging to the [plaintiff] or in which the [plaintiff] may be interested or which may come under his control in connexion with the business of the [plaintiff] as carried on upon the premises all which goods are included in the expression 'the tenant's goods' as used in this agreement."

There are then two paragraphs in the schedule which are important. Paragraph 1 is as follows:

> "No liability is accepted by the [defendants] for any loss or damage to any goods (which word where used in the schedule includes 'the tenant's goods' as hereinbefore defined) where such loss or damage occurs whilst the goods are in transit to any premises of the [defendants] or at any time after the same have left such premises."

Then there comes para. 2, which is the exemption clause. That is the most material clause for the purposes of this case. It reads:

> "The [defendants] shall not in any circumstances be responsible for damage caused by fire water [and other matters] to any goods whether in the possession of the [defendants] or not . . ."

There are other provisions which I need not read. Counsel for the defendants has taken the point that para. 2 of the schedule protects the defendants against liability for negligence, because the defendants could not possibly be liable to the plaintiff for any damage caused by water unless it was caused by the negligence of the defendants or their servants, and that, consequently, no other liability could arise. Apart from that, this exemption clause is a particularly powerful one, because of the presence in it of the words "shall not in any circumstances".

The rule as to exemption clauses has been laid down comparatively recently in *Alderslade* v. *Hendon Laundry, Ltd.* (1). In that case, articles were sent by the plaintiff to the defendants' laundry to be washed and were lost. In an action by the plaintiff against the defendants for damages the defendants relied on the following condition to limit their liability: "The maximum amount allowed for lost or damaged articles is twenty times the charge made for laundering". It was held that, as no liability could arise for loss of articles except through the defendants' negligence, the condition applied to limit their liability in cases of negligence and applied, therefore, to limit the plaintiff's damages; in a case where loss might arise from causes other than negligence, such a condition would not apply to limit liability for loss through negligence, unless it was expressly made applicable in clear terms.

In his judgment, LORD GREENE, M.R., said (2):

> "It was argued before us for the laundry company, the appellants, that the clause did apply and was effective to limit liability for lost articles; and reliance was placed on a well-known line of authority dealing with clauses of this description. The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject-matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the

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(1) [1945] 1 All E.R. 244; [1945] K.B. 189.

(2) [1945] 1 All E.R. at p. 245; [1945] K.B. at p. 191.

> clause is to be construed as relating to a different kind of liability and not to liability based on negligence."

Lord Greene, M.R., then gave some illustrations, which I need not read. There was a short judgment by MacKinnon, L.J., in which he referred to a passage from the judgment of Scrutton, L.J., in *Rutter* v. *Palmer* (3). MacKinnon, L.J., said (4):

> "The rule or principle is very admirably stated by Scrutton, L.J., . . . in a short passage in *Rutter* v. *Palmer* (5), where he said: 'In construing an exemption clause certain general rules may be applied: First, the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him'."

Some difficulty has been occasioned by the decision in *Canada Steamship Lines, Ltd.* v. *R.* (6), a case which came before the Privy Council after the decision in *Alderslade* v. *Hendon Laundry, Ltd.* (7). Delivering the judgment of the Board, Lord Morton of Henryton read part of the passage which I read from the judgment of Lord Greene, M.R., in *Alderslade* v. *Hendon Laundry, Ltd.* (8), and said (9):

> "It appears to their Lordships that none of the learned judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada . . ."

Summarising the duty of a court in approaching the consideration of such clauses, Lord Morton of Henryton said (10):

> "(ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with art. 1019 of the Civil Code of Lower Canada: 'In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation.' (iii) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence' to quote again Lord Greene, M.R., in the *Alderslade* case (7). The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it, but, subject to this qualification, which is, no doubt, to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are, prima facie, wide enough to cover negligence on the part of his servants."

Counsel for the defendants submitted that there was no possible ground of liability in the present case except negligence; that, if water had percolated through the cistern, that would not be liability that came within the principle of *Rylands* v. *Fletcher* (11), because it has been so held in a number of cases which are summarised in Salmond on Torts (12th Edn.) at p. 566, in these words:

> "The rule in *Rylands* v. *Fletcher* (11) is not applicable to the escape of

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(3) [1922] 2 K.B. 87. (4) [1945] 1 All E.R. at p. 247; [1945] K.B. at p. 195.
(5) [1922] 2 K.B. at p. 92. (6) [1952] 1 All E.R. 305; [1952] A.C. 192.
(7) [1945] 1 All E.R. 244; [1945] K.B. 189.
(8) [1945] 1 All E.R. at p. 245; [1945] K.B. at p. 192.
(9) [1952] 1 All E.R. at p. 309; [1952] A.C. at p. 208.
(10) [1952] 1 All E.R. at p. 310; [1952] A.C. at p. 208.
(11) (1868), L.R. 3 H.L. 330.

> A things brought or kept upon his premises by the defendant with the consent of the plaintiff. In such cases the defendant is not liable except for negligence. Although not so limited, this principle finds its chief application in those cases in which the different storeys of a building are in the occupation of different persons, and the occupant of a lower storey complains of the damage done by the escape of water from an upper storey. Whether this B water is rain-water collected from the roof, or water supplied ab extra in pipes, it is settled law that there is no liability for any such escape in the absence of proved negligence on the part of the upper occupant. For in such cases the water has been collected or brought there for the mutual benefit and with the express or implied consent of both parties; there is therefore no sufficient reason why the risk of accident should lie upon the upper rather C than upon the lower occupant, and the only duty is one of reasonable care."

Counsel for the plaintiff, on the other hand, suggested as other grounds of possible liability, first, the case of a claim by the plaintiff against the defendants if the defendants had packed the plaintiff's goods badly, in breach of cl. 2 (c) of the agreement, and if, in consequence of them being packed badly, they were damaged by water. I am not very clear whether that would be a claim for damage D caused by water, or whether it would not really be a claim for damage caused by bad packing. But counsel suggested as another ground of possible liability if the defendants collected water in their upper premises, not of the character which I have just referred to, as being for the use of all the tenants for domestic purposes, but for some other purpose, and then allowed it to escape. In the case of that happening, he suggested that there would be a possible liability for E nuisance, or the question of liability under the rule in *Rylands* v. *Fletcher* (12). It seems to me that it is possible that some such liability might arise. I am more impressed with the second point which counsel took than I am with the first point, but, even so, I have to consider what is the effect of these very wide words: "The [defendants] shall not in any circumstances be responsible for damage . . ." In relation to that, I was referred to *Joseph Travers & Sons, Ltd.* v. *Cooper* (13). F The summary of the judgment, as set out in the headnote, is:

> "Held, (1) by the whole court, that the onus lay on the defendant, who was in possession of the goods as bailee, of showing that the negligence of his servant in leaving the barge unattended did not cause the loss, and that he had failed to discharge that onus; (2) by KENNEDY and PHILLIMORE, L.JJ., G BUCKLEY, L.J., dissenting, that the term in the contract exempting the defendant from liability for damage 'however caused' relieved him from liability for damage caused by the negligence of his servant, and that therefore he was entitled to judgment."

In his judgment, KENNEDY, L.J., said (14):

> "The general principle was laid down by LORD BLACKBURN in *Manchester,* H *Sheffield & Lincolnshire Ry. Co.* v. *Brown* (15): 'When an exception is made, the question is, What is excepted? Custom and ordinary usage says, in bills of lading when the goods are going by sea, "perils of the seas excepted". Well, the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship I would not be entitled to say, "I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage." And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage however caused, that is to be cut down and

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(12) (1868), L.R. 3 H.L. 330.

(13) [1915] 1 K.B. 73; 12 Asp. M.L.C. 561.

(14) [1915] 1 K.B. at p. 93; 12 Asp. M.L.C. at p. 567.

(15) (1883), 8 App. Cas. at p. 709.

> made, contrary to the intention of the parties, not to include the negligence of his servants '." A

KENNEDY, L.J., went on to say (16):

> " In the present case, the condition which we have to consider uses the very words of exemption referred to by LORD BLACKBURN in *Manchester, Sheffield & Lincolnshire Ry. Co.* v. *Brown* (17), ' damage however caused '; B and I see no sufficient reason not to treat them as sufficient to protect the defendant from liability for the negligence of his servant in regard to the carriage of the plaintiff's goods. On this ground, therefore, whilst, for the reasons which I have stated, I respectfully differ from my brother PICKFORD in regard to the view which he has taken as to the burden of proof upon the question of negligence, I think that in the result the defendant is entitled to C retain the judgment in his favour, and that this appeal should be dismissed."

There is then a passage from the judgment of PHILLIMORE, L.J., which has been quoted on many occasions. He put the matter in this way (18):

> " This then is the distinction. It is a fine one, and I am sorry to think that it is so fine; but it seems to be this. If you say ' any loss ' you are directing D attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean ' any and every loss ' irrespective of the cause, and therefore you have not brought home to the person who is entrusting the goods to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or possibly even for your own personal want of care. But if you direct E attention to the causes of any loss, if you say ' any loss,' ' however caused ' or ' under any circumstances ', you give sufficient warning, and it is not necessary to say in express terms ' whether caused by my servants' negligence ', or in the bill of lading phrase, ' neglect or default or otherwise '."

That passage was considered comparatively recently by the Lord Chief Justice F when he was PARKER, J., in *A. E. Farr, Ltd.* v. *The Admiralty* (19). That was a case where the plaintiffs entered into a contract for the construction of a destroyer jetty, and the contract incorporated certain conditions. The work was proceeding under the contract when an Admiralty vessel, due to admittedly negligent navigation by an Admiralty servant, collided with certain parts of the jetty. The plaintiffs were instructed, by the superintending officer under the G contract, to repair the damage, which amounted to a certain sum. They claimed that sum from the Admiralty under the contract, which provided that the contractors would recover any expenses properly incurred in complying with the superintending officer's instructions, or, alternatively, as damages for breach of contract. But the Admiralty relied on the general conditions which provided that

> " . . . the contractor shall be responsible for . . . any loss or damage [to the H works] arising from any cause whatsoever . . ."

It was held by PARKER, J., that the words " any cause whatsoever " were as wide as they could be and should be read as including negligent navigation of a ship by an Admiralty servant; that, once that construction was applied to the condition, there was no room for any implied term which would limit the effect of I those words; and that the plaintiffs were, accordingly, not entitled to recover the sum claimed. In his judgment he said (20):

> " A number of cases have been cited to me. I do not propose to refer to any of them, because they all depend on their own particular wording, except

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(16) [1915] 1 K.B. at p. 94; 12 Asp. M.L.C. at p. 567.
(17) (1883), 8 App. Cas. at p. 710.
(18) [1915] 1 K.B. at p. 101; 12 Asp. M.L.C. at p. 569.
(19) [1953] 2 All E.R. 512.
(20) [1953] 2 All E.R. at p. 513.

Joseph Travers & Sons, Ltd. v. *Cooper* (21), a decision of the Court of Appeal which has often been quoted and approved."

After referring to the facts of that case and to the passage from the judgment of PHILLIMORE, L.J., which I have just read, PARKER, J., said (22):

> " It seems to me that the words in the present case are about as wide as they can be and that I must read ' any cause whatsoever ' as if it included and expressly said ' including damage caused by the negligent navigation by an Admiralty servant of a ship '."

It seems to me that the words of the exemption clause in the present case are as wide as they could possibly be, and that they are wide enough, having regard to the decisions to which I have referred, to entitle the defendants to be protected by the exemption clause, and consequently to resist liability for the damage that was done to the plaintiff's goods. In those circumstances, therefore, there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Linder, Myers & Pariser*, Manchester (for the plaintiff); *A. W. Mawer & Co.*, Manchester (for the defendants).

[*Reported by* M. DENISE CHORLTON, *Barrister-at-Law.*]

Re STEED'S WILL TRUSTS.
SANDFORD *v.* STEVENSON AND OTHERS.

[COURT OF APPEAL (Lord Evershed, M.R., Willmer and Upjohn, L.JJ.), January 22, 25, 26, 1960.]

Trust and Trustee—Variation of trusts by the court—Overriding trustees' discretion—" Arrangement " substituting absolute beneficial interest for discretionary interest—Approval sought by beneficiary on behalf of possible future husband—Matters to be considered by the court—Arrangement need not be inter partes nor approved on behalf of proposer or trustees—Regard had to views of trustees—Variation of Trusts Act, 1958 (6 & 7 *Eliz.* 2 *c.* 53), *s.* 1.

A testator by his will devised a farm on trust for sale and gave the proceeds of sale on protective trusts for the plaintiff for her life and after her death on trust for such persons as she should by deed or will appoint, with a gift over in default of appointment; and he empowered his trustees to apply capital money for the plaintiff's benefit, it being his wish that she should have the capital during her life if she needed it. He also bequeathed a legacy of £4,000 to his trustees to use in their discretion for providing a residence for the plaintiff, the residence, if provided, or the legacy to be on the like protective trusts and subject to the like general power of appointment and other powers as the farm. After the testator's death in 1954 the trustees bought a café for the plaintiff to live in and run, but subsequently the plaintiff wanted the café to be sold and a house to be provided for her on the farm, which was let at a rent to her brother, it being, however, in question whether he in fact paid any rent. The trustees proposed to sell the farm to a stranger and the plaintiff, who had exercised her general power of appointment in her own favour, issued a writ against the trustees for administration of the trusts and an injunction restraining the trustees from selling the farm. She applied in the action, under the Variation of Trusts Act, 1958, s. 1, for approval of an " arrangement ", which she proposed, whereby the trustees would hold the farm and the property representing the legacy of £4,000 on trust for her absolutely. The trustees were not party to the arrangement, and did not approve it.

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(21) [1915] 1 K.B. 73; 12 Asp. M.L.C. 561.

(22) [1953] 2 All E.R. at p. 514.

Held: (i) the court ought not, in the exercise of its general equitable A jurisdiction, to interfere with the discretion of trustees in the absence of mala fides or some other special circumstance showing grave misdirection; in the present case the trustees had done their utmost to discharge the duty placed on them by the testator and there was no reason why the court, out of sympathy with the plaintiff, should disregard the wishes of the testator and overrule the trustees (see p. 492, letters B to D, post). B

Re Mayo, Mayo v. *Mayo* ([1943] 2 All E.R. 440) applied.

(ii) in deciding whether to approve under the Variation of Trusts Act, 1958, an arrangement on behalf of a possible future husband of the plaintiff the court should regard the proposed arrangement as a whole in the light of the purpose of the trust as shown by the will and any relevant evidence (see p. 493, letter H, post); so regarded the proposed arrangement ought not C to be approved since the will manifested an intention that trust property should be available to the plaintiff as a provision for her throughout her life and that she should not be exposed to the risk that she might part with the property if it were handed over to her (see p. 494, letter D, post).

Per Curiam: it was not necessary that an "arrangement" within s. 1 of the Act of 1958 should be inter partes (see p. 492, letter G, post); and in D the present case the court did not have to approve it on behalf either of the plaintiff or of the trustees (see p. 492, letter I, to p. 493, letter A, post), but the court would, in exercising its discretion, have regard to the views of trustees (see p. 493, letter A, and p. 494, letter G, post).

Decision of Harman, J. ([1959] 1 All E.R. 609) affirmed, but dicta not adopted on the matters stated in the per curiam above. E

[As to the right of trustees to decide on the exercise of their discretionary powers, see 33 Halsbury's Laws (2nd Edn.) 245, para. 433; and for cases on the subject, see 43 Digest 876-881, *3202-3239*.

As to the exercise of trustees' discretionary powers in an administration action, see 33 Halsbury's Laws (2nd Edn.) 268, para. 474; and for cases on F the subject, see 43 Digest 881, 882, *3240-3247*.

For the Variation of Trusts Act, 1958, s. 1, see 38 Halsbury's Statutes (2nd Edn.) 1130.]

Case referred to:

Mayo, Re, Mayo v. *Mayo*, [1943] 2 All E.R. 440; [1943] Ch. 302; sub nom. *Re Mayo's Will Trusts*, 112 L.J.Ch. 257; 169 L.T. 205; 2nd Digest G Supp.

Appeal.

This was an appeal by the plaintiff from an order of Harman, J., dated Feb. 25, 1959, and reported [1959] 1 All E.R. 609.

By a writ issued on May 9, 1958, the plaintiff claimed against the trustees of H the will of Joshua Owen Steed, deceased, administration of the trusts of the testator's will and an injunction to restrain the defendants from selling Loft Farm, Cockfield. She applied in the action by summons dated May 15, 1958 (subsequently amended in view of the commencement of the Variation of Trusts Act, 1958, on July 23, 1958) for an order directing the defendants, as trustees of the testator's will, to abstain from selling Loft Farm, Cockfield, except with I the previous consent of the plaintiff, and that an arrangement specified in the schedule to the summons might be approved in pursuance of powers conferred by the Variation of Trusts Act, 1958, and alternatively that the defendants might be empowered and directed pursuant to s. 57 of the Trustee Act, 1925, to deal with Loft Farm and the property, investments and cash representing a sum of £4,000 (viz., the legacy given by cl. 10 of the testator's will) in accordance with the provisions set forth in the schedule. The schedule provided (by para. 1) that the defendants should stand possessed of Loft Farm on trust

A for the plaintiff absolutely subject only to any rights or liabilities of the defendants arising under or by virtue of any contract for the sale thereof which might have become binding on them prior to the date of the order; and that the defendants should stand possessed of a property known as Melkreme Café, Long Melford in the County of Suffolk and all other property, investments and cash representing the legacy of £4,000 on trust for the plaintiff absolutely.

B HARMAN, J., dismissed the application. The relevant facts appear in the judgment of LORD EVERSHED, M.R.

G. H. Newsom, Q.C., and *E. W. Griffith* for the plaintiff.
L. H. L. Cohen for the defendants.

LORD EVERSHED, M.R.: This is in more ways than one, including C matters of procedure, a somewhat unusual case, as counsel for the plaintiff observed. It is also in many respects an unhappy case, and I cannot refrain from expressing my own sympathy for the plaintiff on the one side, and for the three defendant trustees on the other.

I propose in this judgment to forbear from entering, except where absolutely necessary, into matters of fact which might only serve to rub salt into existing D wounds. Suffice it to say that the plaintiff was one who served loyally and most skilfully for a long period of time the testator and the testator's wife. In consideration for those services the testator included in his will provisions for her benefit, contained in cl. 9 and cl. 10. It is quite plain on the evidence that the testator, while anxious to show his gratitude to the plaintiff was no less anxious that she should be well provided for and not exposed to the temptation, which E he thought was real, of being, to use a common phrase, sponged on by one of her brothers. I fully realise that the plaintiff's natural affection for that brother is not a matter which one can in any sense condemn. Blood is, after all, thicker than water, and the happiness of the plaintiff, according to her own view at any rate, is very much linked up with the association with that brother and the brother's daughter and wife. On the other side, however, are these trustees F on whom has been placed an obligation, a duty to give effect to the intentions of the man who provided the money. Counsel for the plaintiff pointed out (and it is an unfortunate aspect of this case) that during the years since the testator died, that is, a little over five years, relations between the plaintiff and these trustees have become somewhat strained because the trustees took a view which the plaintiff thought unkind to her.

G The duty of a trustee is not always an easy one. Indeed, I may recall the famous saying of Professor MAITLAND: "Equity evolved one novel and fertile institution, namely the trust" the effects of which have become internationally famous. Though trustees may sometimes take the easy line, on other occasions trustees may feel that they must try to do, to the best of their ability, the duty cast on them, however distasteful.

H I will now state the procedural anomaly in this case. In May, 1958, the present appellant issued a writ against the trustees in which she sought to restrain them from giving effect to a sale of a certain farm which was part of the property, the subject of the trusts I have mentioned. The farm is known as Loft Farm, Cockfield. In extent we were informed it was fifty acres, or perhaps a little over; but since the proceedings were started an added trouble has arisen. The I farmhouse appears to have been substantially destroyed by fire. We understand, however, that to nothing with which we are concerned is that really relevant. The writ was issued because the trustees in the exercise of their powers and discretions, to which I will allude more fully in a moment, were on the point of giving effect to a bargain which they had made for the sale of the farm. I have used rather loose phrases deliberately because there is a question whether the trustees are in law bound in any case to the proposing purchaser. It will suffice for me to say, because counsel for the plaintiff conceded so much, that it may be that if the proposing purchaser took the appropriate steps he could bring proceedings in respect of the bargain if the trustees did not fulfil it; but he has not done so. He seems to have been a most amiable purchaser.

The proceedings having started, a summons was then taken out in the action in which the equitable jurisdiction of the court to control trustees was invoked. Later still, when the matter came before the court, the summons was by leave and by consent amended so that it now is also entitled " In the matter of the Variation of Trusts Act, 1958 " in order to invite the court to exercise the powers under that Act to approve the " arrangement " (according to the word used in s. 1 of that Act) which Miss Sandford, the plaintiff, has put forward. It is by way of appeal from the learned judge's refusal to grant any relief on that summons that the present matter now has come before the court. Nothing now turns on the procedural aspect of the matter, as I conceive, but I have thought it right to refer to it.

I now must make some reference to the trusts, already briefly alluded to, of Mr. Joshua Owen Steed's will. By cl. 9 he gave and devised to his trustees (the defendants)

> " my farm known as the Loft Farm Cockfield upon trust to sell the same with power to postpone such sale for so long as they in their absolute discretion shall consider desirable and until any sale shall be effected to hold such property and on sale the proceeds of sale thereof upon protective trusts as defined by s. 33 of the Trustee Act, 1925, for the benefit of the said Gladys Louise Sandford [the plaintiff] during her life and from and after the death of the said Gladys Louise Sandford upon trust to hold the said properties or the proceeds of sale thereof in trust for such person or persons as the said Gladys Louise Sandford may by deed revocable or irrevocable or by will or codicil appoint . . ."

Then there are trusts in default of appointment. The clause continues:

> " Provided nevertheless and I hereby Declare that the settlement of this property upon the said Gladys Louise Sandford is made for the purpose of providing for her during her life but it is my wish that she shall have the use and enjoyment of the capital value thereof if she needs it during her life And I direct that if and when such property shall be sold my trustees may apply capital moneys from such sale to or for her benefit at such times and in such proportions as they may consider to be most to her advantage . . . provided that they shall consider the necessity for retaining sufficient capital to prevent her from being without adequate means at any time during her life . . ."

There followed a clause in which the testator gave a sum of £4,000 to his trustees to be held on trusts similar to those elaborated in the previous clause. That second clause ended with this expression:

> " The amount of this legacy is intended as a recognition of the interest which I feel sure the said Gladys Louise Sandford will take in the welfare "

of a named brother, not being the brother whom I have previously mentioned.

The relevant facts can be very briefly stated. The testator died in December, 1954, the plaintiff then being forty-eight years old and unmarried. Some little time after the testator's death, out of the capital fund, a sum of a little under £2,000 was applied in buying for the plaintiff a café in Long Melford. Unfortunately the plaintiff's conduct of that business has not been very successful, and she feels she would like to be relieved of it. That may happen, but it is not one of the issues before us. So far as the farm is concerned, at all relevant times, including the time before the testator's death, her brother, to whom I earlier alluded, was the tenant. So far as this farming enterprise is concerned, the evidence seems to show he has done quite a lot of work on it and may well have improved it. His own financial position, however, appears to be, at times at any rate, precarious (to say the least). There is a question whether he has in fact paid any rent, though the evidence indicated that the plaintiff, who would be in effect entitled under the trusts to receive it, has given him receipts.

The trustees came to the conclusion more than two years ago that this farm was not a desirable asset from the point of view of the trusts which they were under a duty to administer. There is a problem about the rent. In addition, and bearing in mind the financial standing of the brother, the trustees were more than a little concerned about the liabilities that might fall on them for capital expenditure in the way of repairs and otherwise to the premises. They took the best advice they could get. They were informed by qualified experts that the value of the farm with the sitting tenant there was something not much above the figure named for probate, £1,300 odd. But the trustees cast about and eventually obtained an offer of £2,500 from the proposing purchaser, which on the evidence before the court, I have no hesitation whatever in saying is shown to be a very good offer indeed, on the footing that the purchaser takes with the sitting tenant in occupation.

Counsel for the plaintiff put forward an argument that the proposed sale was an improvident exercise of the discretion on any footing. He said that if they wanted to get rid of the farm, the thing for the trustees to do was to get rid of the tenant and then sell with vacant possession, when they would get very much more. There is no reliable evidence that they would get very much more if they took that step, and we all know that to get rid of a sitting tenant in these days, particularly where the evidence shows what he has done to his farm, would be no easy matter at all, nor does it come very naturally so to suggest from the advocate for the plaintiff. I cannot, I am afraid, pay much regard to that view.

I think that the matter—and I am not so far saying anything about the Variation of Trusts Act jurisdiction—is really capable of being put in the smallest compass. In what circumstances are the trustees to be overridden in exercising their discretion as they propose by selling, notwithstanding the very firm opposition of the plaintiff? Her interest in the property is not now confined to that of a life interest, for about the time when these proceedings started she exercised her power under cl. 9 irrevocably to appoint to herself, so that on her death her estate becomes entitled to the corpus of the trust property. She is at the moment still unmarried, so that there is no other living person who can be ascertained, at any rate, who has any interest in the property. I put it in that form because, of course, the plaintiff may marry. She may marry more than once. So long as the protective trusts survive and are not displaced by an exercise of the jurisdiction under the Act of 1958, the plaintiff is incapable of putting an end to the trusts and requiring that the property be handed over to her.

So, I repeat, the problem seems to be: ought the trustees to exercise their discretion as they propose by a sale, or should they succumb to the plaintiff's wishes, she being the person who has such an overwhelmingly preponderant interest in the trust property? I put it in that form. It may well be that other trustees might have been, as I earlier indicated, submissive and said: "Well, in all the circumstances, money, as the plaintiff said, is not everything, and we will let the matter stand as it is. If the plaintiff chooses to part with her money, that is her affair," but they have not taken that line. The line which they have taken has been a deliberate exercise of the discretion and a deliberate discharge of the duty. There is no ground whatever for suggesting that they have done any wrong thing, as that word is ordinarily understood. How, then, can the court now be asked to override the discretion which the testator conferred on them, particularly in the circumstances which, as is proved clearly by the evidence, were in his mind, and for the purposes of preventing which the trusts were imposed?

The learned judge in the course of his judgment (1) may perhaps have based himself on the view that the court had no power to interfere with the trustees' exercise of their discretion unless the case was one in which a decree for administration or execution of the trusts, if not asked for, at any rate would have been granted on the material before the court if it had been asked for. A

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(1) [1959] 1 All E.R. at p. 611; [1959] Ch. at p. 360.

Counsel for the defendants has not founded himself on so broad a proposition. He said that in the absence of mala fides or some other special circumstances which would show at least grave misdirection of themselves by the trustees, the court will not interfere, particularly in a case where there is an express trust for sale and where the trusts as declared clearly impose, and are intended to impose, a duty in the discharge of which, as the evidence shows, the trustees have reached their conclusion. Counsel for the defendants cited the language of SIMONDS, J., in *Re Mayo, Mayo* v. *Mayo* (2) which, I think, supports the general proposition as counsel put it. I, therefore, would not desire to base myself on the suggestion which appears to underlie the language of the learned judge (3). On the other hand, I am quite satisfied on the general principles which are applicable to these matters, that this court ought not to interfere, and will not interfere here with the exercise of the trustees' discretion. Why, after all, one may ask, when the testator who has given this bounty, has made plain what his purpose is, if the trustees have established that they have done their utmost to give effect to the duty which is imposed on them, should the court disregard the testator and overrule the trustees out of a natural sympathy for the plaintiff? I think the answer to that is, there is no reason whatever. That is all I propose to say on that part of the case. B C D

I now come to what has caused me greater difficulty, viz., the effect of the Variation of Trusts Act, 1958. The relevant language of s. 1 is that where property is held on trusts, the court E

> " may if it thinks fit by order approve on behalf of . . . (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts . . . F
>
> " Provided that except by virtue of para. (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

There was some discussion of the use of the word " arrangement ". Again, if I may respectfully say so, the language used by the learned judge seems to indicate that an arrangement must be in some sense inter partes, some kind of scheme which two or more people have worked out. I do not myself accept that. I think that the word " arrangement " is deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts. G

In the present case, the proposed variation (i.e., the " arrangement ") which the plaintiff puts forward may be most briefly and accurately stated as involving this: in cl. 9 of the will the words: " upon protective trusts as defined by s. 33 of the Trustee Act, 1925 " should be omitted, and similarly in the next clause the word " protective " should be omitted. If those words were omitted, the result would be that the plaintiff would become absolutely entitled to the property, because she would then be the life tenant, having appointed by irrevocable deed to herself the reversion; and that is what she seeks. H I

The trustees have taken the view that it is not an arrangement which, having regard to their conception of their duties and the wishes of their testator, they should approve. For my part, I do not think that approval on behalf of the trustees is the court's function in this case, though the court in exercising its general discretion will certainly pay regard to what the trustees say and the grounds for their saying it. Nor can I see, if this was the learned judge's view, that the court is called on by the language of this section to approve the arrangement or proposal on behalf of the proposer; that is to say, whether they think she was wise or unwise to put her idea forward. The duty of the court, as I read the section, on the facts of this case, is, that they must approve it on behalf of the only person or persons who might have an interest under the discretionary trusts and whose presence under the trusts now prevents the plaintiff saying that she can put an end to the settlement.

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(2) [1943] 2 All E.R. 440; [1943] Ch. 302.
(3) [1959] 1 All E.R. at p. 611; [1959] Ch. at p. 360.

Having regard to the plaintiff's age, no doubt it is true to say that she will not and cannot now have children, but she might marry, and marry more than once. She says, with some reason, that having lived for fifty-three years unmarried she does not feel in the least likely to marry now. Well, that may well be right, though many have said that before and subsequent events have proved them wrong. That, however, is neither here nor there. There does exist a discretionary trust, and a future husband of the plaintiff is a person interested under those trusts, on whose behalf the court must now approve the proposal. Having regard to what has happened between the plaintiff and her brother, it is possible that strictly speaking there has been a forfeiture and if so, the future husband or husbands would be within para. (b) of the subsection, but if not he or they would be within para. (d). Again, I think that does not, for present purposes, matter.

I repeat that the duty of the court is now to consider whether in the exercise of its discretion, which is framed in the widest possible language, it should approve the arrangement on behalf of what has been described in argument as the spectral spouse of the plaintiff. In doing that, what must the court consider? Not, I conceive, merely the material benefit or detriment of such spouse. Certainly not if he is to be regarded as being a person under para. (d), though if he is to be regarded as falling under para. (b) it is expressly enjoined that the court shall not approve the arrangement unless it is for his benefit. As I have said, I do not so read this Act as to mean that the court's duty in the exercise of this very wide and, indeed, revolutionary discretion is confined to saying: " Would it really much harm this spectral spouse if we approve the proposal? " Bearing in mind, of course, the admitted possibility that the spouse might cease to be spectral and become a reality, I think what the court is bound to do is to see whether, looked at on behalf of the person indicated, it approves the arrangement. It is the arrangement which has to be approved, not just the limited interest of the person on whose behalf the court's duty is to consider it. If that is right, it then follows that the court must regard the proposal as a whole, and, so regarding it, then ask itself whether in the exercise of its jurisdiction it should approve that proposal on behalf of the person who cannot give a consent, because he is not in a position to do so. If that is a right premise, then it follows that the court is bound to look at the scheme as a whole, and when it does so, to consider, as surely it must, what really was the intention of the benefactor. That such is a proper approach is at least supported by the provisions of R.S.C., Ord. 55, r. 14A (3A) (ANNUAL PRACTICE, 1960, p. 1525), which provides that in the case of an application under this Act, where there is a living settlor the living settlor is to be a party before the court. That rule seems to me to reinforce what I conceive to underly this provision, viz., that the court must, albeit that it is performing its duty on behalf of some person who cannot consent on his or her own part, regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself, and of any other relevant evidence available.

Having so formulated the duty, I have, for my part, come to the conclusion that it would not be right for the court in the exercise of its discretion to approve this variation or arrangement. I am not uninfluenced in coming to that conclusion by any means by the circumstance that the learned judge obviously did not think it was a proposal which should be approved, though it is quite true that, for reasons which I have indicated, it may be said that he was looking at it and basing his jurisdiction on an interpretation of the section which I have not been altogether able to share, i.e., that it was his duty to approve it on behalf of the proposer, the plaintiff, and also that the scheme must be regarded as intended to be in some sense inter partes and, therefore, that he had to approve it on behalf of the trustees. Disagreeing, if that is a fair view of his judgment, with that premise, nevertheless it is quite clear, I think, that the judge was by no means unsympathetic to the feelings and views of the plaintiff, but on the other hand was no less clear in his mind that the arrangement was one which so cut at the root of the testator's wishes and intentions that it was not one the court should approve. After all, if one is asked to approve this proposal on behalf of a spectral spouse (if I may revert to that phrase), one must ask why is the spectral spouse there at all under the trust? If one asks that question, nearly everything else, as it seems to me, follows. There is no doubt why the spectral spouse is there. It was part of the testator's scheme, made as I think manifest by the language which I have read from the will, that it was the intention and the desire of the testator that this trust should be available for the plaintiff so that she would have proper provision made for her throughout her life, and would not be exposed to the risk that she might, if she had been handed the money, part with it in favour of another individual about whom the testator felt apprehension, which apprehension is plainly shared by the trustees.

For those reasons, therefore, I also conclude adversely to the plaintiff that we should not exercise jurisdiction under the Act of 1958 to approve the arrangement which has been put forward, and which I have tried to define. That is the end of the case. I only repeat the sympathy I have felt in a distressing matter of this kind, both with the plaintiff and with the trustees, whose difficulties in discharging their duty are obvious. I should like to express the hope that perhaps time, the healer, will do much to put an end to these troubles.

WILLMER, L.J.: I entirely agree, and I do not find it necessary to add any words of my own.

UPJOHN, L.J.: I also agree. When considering applications under the Variation of Trusts Act, 1958, I agree that this court is not confined to the narrow duty of inquiring into the effect of a proposed scheme on those on whose behalf approval by the court is sought. The court must be satisfied that the scheme, looked at as a whole, is proper to be sanctioned by the court. On that matter, the views of the trustees are entitled to respect, but are not conclusive.

In the circumstances, and for the reasons stated by my Lord, I agree that this is not a scheme that is proper to be approved by the court.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Pretty, Dawson & Butters*, Ipswich (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *Barr & Co.*, Cambridge (for the defendants).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

CARR AND ANOTHER *v.* BOXALL.

[CHANCERY DIVISION (Cross, J.), January 12, February 3, 1960.]

Interest—Damages—Unliquidated damages—Interest awarded on damages during period of assessment—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5 *c.* 41).

Damages—Legal aid—Costs—Cross orders as to costs between successful assisted defendant and plaintiffs—Set-off—Money paid into court by plaintiffs partly retained there until costs of assisted defendant satisfied—" Means "—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6 *c.* 51), *s.* 2 (2) (*e*), *s.* 3 (4)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950 *No.* 1359), *reg.* 16, *reg.* 17, *as amended by S.I.* 1954 *No.* 166.

Two plaintiffs, C. and F., brought an action against B. in which C. claimed damages for assault and both plaintiffs claimed a declaration that B. was not their tenant and an injunction; B. counterclaimed, against C., damages for assault and, against both plaintiffs, for a declaration that he was their tenant and for damages for preventing his having access to the premises in question. B. was an assisted person. The plaintiffs paid £600 into court against B.'s claim for damages. The action was tried on July 23 and 24, 1958. C. recovered 40s. damages for assault. B. recovered 40s. damages against C. for assault, and obtained against both plaintiffs a declaration that he was tenant and an inquiry as to damages, which was referred to an official referee who, in his report dated Nov. 6, 1959, assessed them at £1,301 14s. 3d. The order on further consideration would have to provide for taxation and payment (a) of certain costs by both plaintiffs to B., (b) of other costs by B. to both plaintiffs, (c) of certain costs by C. to B. and (d) of other costs by B. to C. By virtue of the Legal Aid and Advice Act, 1949, s. 2 (2) (e), s. 3 (4), and the Legal Aid (General) Regulations, 1950, reg. 16, reg. 17, as amended, B.'s liability for costs was not to exceed an amount reasonable for him to pay, and damages and costs awarded to B. would have to be paid to the Law Society and would become subject to a charge for so much of B.'s solicitor and client costs as was not covered by his contribution.

Held: (i) a set-off of costs (b) above against costs (a) above, and of costs (d) above against costs (c) above, would be directed; and in order to protect the plaintiffs in relation to any balance that might remain due from B. (which it was reasonable that he should pay, as the damages recovered formed part of his means within s. 2 (2) (e) of the Legal Aid and Advice Act, 1949) one-half of the £600 paid into court by the plaintiffs would not be paid out except on an affidavit of B.'s solicitor that costs to be taxed under the order and paid by the defendant to the plaintiffs or C. had been satisfied.

(ii) under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, interest on the damages at four per cent. from Aug. 1, 1958, to the date of judgment would be awarded.

[As to directing the taxation of costs of an assisted person, see 30 HALSBURY'S LAWS (3rd Edn.) 505, 506, para. 939; as to the discretion of the court over costs, see ibid., 502, para. 932; and as to disposal of moneys received by the Law Society on behalf of an assisted person, see ibid., 509, para. 946.

As to the statutory power to award interest on a debt or damages, see 27 HALSBURY'S LAWS (3rd Edn.) 10, para. 10; 11 ibid., 304, para. 493.

For the Legal Aid and Advice Act, 1949, s. 2, s. 3, see 18 HALSBURY'S STATUTES (2nd Edn.) 535, 537; and for the Law Reform (Miscellaneous Provisions) Act, 1934, see ibid., 525.

For the Legal Aid (General) Regulations, 1950, reg. 16, reg. 17, and amendments, see 5 HALSBURY'S STATUTORY INSTRUMENTS 216-218, and SUPPLEMENT.]

Further Consideration.

This was the further consideration of an action tried by DANCKWERTS, J., on July 23 and 24, 1958. In March, 1957, the plaintiffs, Mr. Carr and Mr. Farrell bought a property at Hayling Island from a Mr. Brimmer. On part of the property there was a kiosk, of which the defendant, Mr. Boxall, claimed that Mr. Brimmer had granted him a yearly tenancy for the purpose of carrying on a grocery and greengrocery business. The plaintiffs refused to recognise that the defendant had any rights as against them to occupy the kiosk and on Apr. 10, 1957, they removed from it certain chattels belonging to the defendant. In the course of that operation the plaintiff, Mr. Carr, and the defendant came to blows. The writ in the action was issued on May 20, 1957. By the statement of claim the plaintiffs claimed a declaration that the defendant was not a tenant of the kiosk and an injunction to prevent him from entering it and the plaintiff, Mr. Carr, claimed damages for assault. The defendant by his defence set up his tenancy and denied the assault and by a counterclaim claimed damages himself against Mr. Carr for assault and against both plaintiffs a declaration that he had a tenancy of the kiosk, and an injunction to restrain the plaintiffs from interfering with his use of it and damages for breach of his tenancy agreement and for trespass. The plaintiffs then brought in Mr. Brimmer as a third party, claiming that he had sold them the property with vacant possession and that if the defendant's claim to a tenancy succeeded they were entitled to be indemnified by him. Shortly before the case came on for trial the plaintiffs and Brimmer conceded that the defendant was entitled to the tenancy which he claimed. The trial was confined to the issues of assault. The order in the action, which was not drawn up until Mar. 3, 1959, provided that in the claim the plaintiff, Mr. Carr, should recover 40s. damages for assault against the defendant and that on the counterclaim the defendant should recover 40s. damages for assault against the plaintiff, Carr. It further granted the defendant a declaration that he had the tenancy of the kiosk which he claimed and directed an inquiry before an official referee to ascertain the damages which the defendant had suffered by being prevented from carrying on his business in the kiosk. All questions of costs between the plaintiffs and defendant were adjourned for further consideration, but as the defendant was an assisted person, the order contained a provision for taxation of his costs as between solicitor and client, as required by reg. 18 (3) of the Legal Aid (General) Regulations, 1950, as substituted by S.I. 1954 No. 166. In his report dated Nov. 6, 1959, the official referee assessed the damages which the defendant had sustained by having been prevented from carrying on his business at the kiosk from April, 1957, until Aug. 1, 1958, when he re-occupied the kiosk, at £1,301 14s. 3d. All questions of costs were adjourned for further consideration.

I. McCulloch for the plaintiffs.

A. J. Balcombe for the defendant.

M. J. Anwyl-Davies for the third party.

Cur. adv. vult.

Feb. 3. **CROSS, J.**, read a judgment in which he recited the facts and continued: The parties are agreed that the order on further consideration must provide for the payment by the plaintiffs to the defendant of £1,301 14s. 3d., and also a further sum of £50, being agreed damages in tort for the conversion of certain property of the defendant with which the official referee did not deal. The parties are further agreed that in the circumstances and having regard to a payment into court by the plaintiff, Mr. Carr, and the fact that the plaintiffs conceded before the trial that the defendant was entitled to a tenancy, the order will have to provide for the taxation and payment (a) of certain costs by both plaintiffs to the defendant, (b) of certain other costs by the defendant to both plaintiffs, (c) of certain costs by the plaintiff, Mr. Carr, to the defendant, (d) of certain other costs by the defendant to the plaintiff, Mr. Carr. All this would give rise to no difficulty whatever if the defendant was not in receipt of legal aid. As it is, however, this matter is slightly complicated by two provisions contained in the Legal Aid and Advice Act, 1949, and the regulations made thereunder. First, there are the provisions contained in s. 2 (2) (e) of the Act, and in reg. 17 of the Legal Aid (General) Regulations, 1950, as substituted by S.I. 1954 No. 166, to the effect that the liability of an assisted person by virtue of an order for costs made against him is not to exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including the means of all parties and their conduct in connexion with the dispute, and, secondly, there is the provision contained in s. 3 of the Act and reg. 16 of the Legal Aid (General) Regulations, 1950, as amended, under which any damages payable to and costs awarded to the defendant will have to be paid to the Law Society and will become subject to a charge in favour of the Law Society to recoup so much of the solicitor and client costs of the defendant as is not covered by his contribution. I can, of course, direct a set-off of the costs payable by the plaintiff, Mr. Carr, to the defendant against the costs payable by the defendant to the plaintiff, Mr. Carr, and of the costs payable by both plaintiffs to the defendant against the costs payable by the defendant to both plaintiffs (see s. 3 (6) of the Act), and this I propose to do. But there may, of course, still be a balance of costs payable by the defendant. The sum of £1,351 odd payable to the defendant by way of damages must, I think, be regarded as part of his " means " within the meaning of s. 2 (2) (e), and, as this sum must obviously far exceed any balance of costs which may become payable by him to the plaintiffs or the plaintiff, Mr. Carr, I have no difficulty in saying that it is reasonable that he should pay such balances (if any). Indeed, the defendant's counsel did not contend to the contrary; but counsel for the plaintiffs has argued that they ought not to have to pay the damages until after the various sets of costs have been taxed since the solicitor and client costs of the defendant may amount to a substantial sum and the balance of the damages ultimately received by the defendant if they are paid over now might be insufficient to cover the balances of costs payable by him. I should not think that this would be at all likely to happen. But plaintiffs suing a legally aided defendant are entitled to every reasonable protection, and in the circumstances I propose to direct that one-half of the sum of £600 which was paid into court by the plaintiffs against the defendant's claim for damages, and the whole of which would normally be paid out to the defendant in part satisfaction of the damages awarded, shall not be paid to the defendant except on production of an affidavit by the defendant's solicitor to the effect that the costs to be taxed under the order and paid by the defendant to the plaintiffs or to the plaintiff, Mr. Carr, have been satisfied either by set-off or payment. The order will also give liberty to both plaintiffs and defendant to apply, so that if any difficulty arises hereafter in connexion with any balance of costs payable by the defendant, the matter can be mentioned to the court again.

Another point which was argued before me relates to interest on the sum of £1,301 14s. 3d. payable by the plaintiffs to the defendant. Under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3, the court is given power in any proceedings for the recovery of any debt or damages to award interest on the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. Counsel for the defendant has asked me to exercise my discretion by giving his client interest at the rate of four per cent. from Aug. 1, 1958, to judgment. Counsel for the plaintiffs and for the third party, on the other hand, while not denying that I have power to award such interest, submit that such interest should not normally be awarded on unliquidated damages, and that in any event it should not begin to run until the date of the report of the official referee which assessed the damages. I cannot accept these submissions. If at the trial on July 24, 1958, Danckwerts, J., had been able to assess the damages suffered by the defendant up to date, and to make an order for their payment, the defendant would have received interest on the judgment so long as the plaintiffs did not satisfy it, while as soon as it was satisfied he would have had the use of the £1,301 odd and the plaintiffs would have ceased to have had the use of it. The fact that the order was not drawn up until March, 1959, and the award of the official referee was not made until November, 1959, will result, if I do not award interest, in the defendant losing the interest which he would, in one form or another, have received if the damages could have been assessed at the trial. I have no reason to think that the plaintiffs were in any way to blame for the delay which took place in drawing up the order or in presenting the inquiry as to damages; but I see no reason why they should reap any benefit from this delay. I therefore propose to direct payment of interest of four per cent. on the sum of £1,301 14s. 3d. from Aug. 1, 1958, down to judgment.

Order accordingly.

Solicitors: *Bernard W. Main*, agent for *Bliss, Sons & Covell*, High Wycombe (for the plaintiffs); *Arthur S. Joseph & Cates*, agents for *MacDonald, Jacobs & Oates*, Portsmouth (for the defendant); *Taylor, Willcocks & Co.* (for the third party).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

VICTORY (EX-SERVICES) ASSOCIATION, LTD. *v.* PADDINGTON BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Ashworth, JJ.), January 19, 20, 1960.]

Rates—Limitation of rates chargeable—Ex-services association—Main object to promote comradeship between and improve conditions and welfare of all ranks of H.M. Forces—Organisation for the advancement of social welfare—Ascertainment of main object of organisation having written constitution—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 *&* 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

The main object of an Ex-Services Association, which was a company limited by guarantee with no share capital incorporated in 1947, was "to promote comradeship between and improve the condition and welfare of all ranks, both past and present, of the Navy, Army and Air Forces of the United Kingdom, British Dominions, Colonies, India, and such allied nations as the council shall from time to time determine . . ." With a view to the furtherance of this object, the association maintained a residential club, in premises which it had acquired from a fund of £300,000 raised by voluntary subscriptions. Membership of the club entailed a payment of 10s. and a member of the club was also a member of the association. Membership was restricted, with a few exceptions, to ex-service men and women, and the total membership was about 23,000. The association also provided on the club premises a welfare advice bureau and employment agency for ex-service men and women whether members of the club or not. On the question whether the club was occupied for "the purposes of an organisation . . . whose main objects are . . . otherwise concerned with the advancement of . . . social welfare", so that the association would be entitled to limitation of rates under s. 8 (1), (2) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955,

Held: (i) the association was entitled to limitation of rates under s. 8 of the Act of 1955, because the words of the main object of the association, "to promote comradeship between and improve the condition and welfare

A of all ranks ", described an object which was for the advancement of social welfare, the purpose of such advancement not being confined to helping those who were in financial need; moreover the necessary element of altruism was present and the class of persons intended to be benefited was sufficiently wide.

B (ii) in order to ascertain what were the main objects of an organisation which had a written constitution, the proper approach was to look at the written constitution and only to consider the organisation's activities if the written objects were ambiguous.

National Deposit Friendly Society Trustees v. *Skegness U.D.C.* ([1958] 2 All E.R. 601) explained.

Appeal allowed.

C [**Editorial Note.** On the distinction between objects in the true sense and clauses directed to the means by which they may be carried out, to which LORD PARKER, C.J., refers at p. 501, letter F, post, this case should be considered with *North of England Zoological Society* v. *Chester R.D.C.* ([1958] 3 All E.R. 535; [1959] 3 All E.R. 116). The approach approved in the present case (see (ii) D above) to the determination of which of numerous objects is the main object is the same approach as was adopted by LORD EVERSHED, M.R., in the case cited (see [1959] 3 All E.R. at p. 117).

For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1), see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

E *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.*, [1958] 2 All E.R. 601; [1959] A.C. 293; 122 J.P. 399; [1958] 3 W.L.R. 172; 3rd Digest Supp.

Working Men's Club and Institute Union, Ltd. v. *Swansea Corpn.*, [1959] 3 All E.R. 769; [1959] 1 W.L.R. 1197.

Appeal.

F This was an appeal by the Victory (Ex-Services) Association, Ltd., by way of Case Stated by the Justices for the County of London sitting as an Appeals Committee of Quarter Sessions. On May 21, 1957, the justices found that the appellants were not entitled to limitation of rates under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, and dismissed their appeal against a rate made and demanded by the respondents, Paddington Borough G Council, in respect of the premises of the Victory Ex-Services Club at 73/79, Seymour Street, W.1. The justices found that the appellants were not established or conducted for profit. The facts appear in the judgment of LORD PARKER, C.J.

J. R. Willis, Q.C., *G. N. Eyre* and *A. P. Fletcher* for the appellants, the ratepayers.

H *J. T. Molony, Q.C.*, and *F. A. Amies* for the respondents, the rating authority.

LORD PARKER, C.J.: The appellants are a company limited by guarantee with no share capital, and were incorporated on Feb. 7, 1947. In 1944 there had been a public appeal for money to form a fund to commemorate members of H.M. Forces who had died in the last war, " such memorial to take the form of a I residential club in London which would be open to all ex-service members of such forces ". A sum of over £300,000 was raised and the appellants, with that money, acquired premises at 73/79, Seymour Street, Marylebone, and opened the premises under the style of the Victory Ex-Services Club in 1948. Those are the premises with which this appeal is concerned. The club, as I have said, was known as the Victory Ex-Services Club, and, with a few minor exceptions, the membership of the club was restricted to ex-service men and ex-service women. The membership of the club entailed a payment of 10s. per head and a member of the club thereupon also became a member of the association. There are approximately 23,000 such members. Apart from that part of the premises occupied as a club there is a part where the appellants provide a Welfare Advice Bureau and Employment Agency. That part of the premises is open to all ex-service men and women without charge whether or not they are members of the club or members of the association. The area of the premises made available for the club is, according to the findings in the Case, considerably larger than that part used for the advice bureau and the employment agency. The justices, as I have said, found that the appellants were not entitled to relief. Their opinion is given in para. 6 of the Case, which states:

> " We were of opinion that the main objects of the appellants were not concerned with the advancement of social welfare within the meaning of the said s. 8 (1) (a) and accordingly dismissed the appeal."

This is yet another of the many cases that have come before the courts of recent years under this section (s. 8). The relevant words for the purposes of the present appeal are as follows (sub-s. (1)):

> " This section applies to the following hereditaments, that is to say— (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects [and the relevant words] are charitable or are otherwise concerned with the advancement of . . . social welfare."

Certain matters are quite clear and are agreed in this case. The appellants were the occupiers of the hereditament. The hereditament was occupied for the purposes of the appellants. The appellants are a corporate organisation and they are not established or conducted for profit. Accordingly, the sole question in this case is whether they are an organisation whose main objects are the advancement of social welfare. Their activities, to many of which I have referred, though not in detail, are fully set out in the case, but before one ever comes to a consideration of their activities, it seems to me that one must look at their objects. Prima facie where an association has a written constitution setting out its objects, it is to the written constitution that one looks to see what are the objects and what are the main objects. If there were any ambiguity it would be right to look to see what in practice the society concerned was doing, what their activities were in fact. It is true that in the first case which came before the courts and went to the House of Lords, namely, *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1), LORD DENNING in the course of his speech said this (2):

> " But, in order to ascertain the ' main objects ' of an organisation, you are entitled, I think, to look not only at its rules but also to consider the way in which it has conducted its affairs."

That is a very wide and general statement, but as far as I know that has never been the approach except in the case of an ambiguity or in a case such as arose in *Working Men's Club and Institute Union, Ltd.* v. *Swansea Corpn.* (3). There the position was that an organisation, formed a very long time ago, I think in 1862, had by the time when the rating authority sought to levy rates changed its activities very considerably, and it is to be observed that MORRIS, L.J., said (4):

> " The objects of the union are set out in r. 2, which I have read. Those objects are numerous and diverse. In considering the applicability of s. 8 it becomes necessary to ascertain which are the ' main objects '. In my judgment this cannot be discovered merely by reading r. 2 or by construing r. 2. It was legitimate therefore to consider the way in which the union has conducted its affairs. It may be that an organisation will have numerous

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(1) [1958] 2 All E.R. 601; [1959] A.C. 293.
(2) [1958] 2 All E.R. at p. 612; [1959] A.C. at p. 320.
(3) [1959] 3 All E.R. 769.
(4) [1959] 3 All E.R. at p. 772.

> declared objects which over many years will remain its objects, but that in one period one or more of such objects will be the main ones while in another period other objects will be the main ones."

In the present case, however, as I have said, this company was incorporated in 1947, and there is no suggestion in the Case that its original objects have in practice changed. Accordingly, for my part, I think that the proper approach to this matter is to look, at any rate in the first instance, at the written constitution and only to look at the activities if there is any ambiguity in the objects expressed in the constitution. Under the memorandum of association by para. 3 it is provided: " The objects for which the association is established are ", and then a number (A) to (I) are set out. I think that it is necessary for me to read only (A) and (B). They are in these terms:

> " (A) To promote comradeship between and improve the condition and welfare of all ranks, both past and present, of the Navy, Army and Air Forces of the United Kingdom, British Dominions, Colonies, India, and such allied nations as the council shall from time to time determine, together with all ranks, both past and present, of the W.R.N.S., A.T.S. and W.A.A.F., and the corresponding services of the British Dominions, Colonies, India and allied nations.
>
> " (B) With a view to the furtherance of the last-mentioned object, to undertake all or any of the following activities, namely:—(i) to conduct a welfare and advice bureau; (ii) to conduct an employment agency; (iii) to establish, own, maintain and conduct a residential club or clubs for such persons as are mentioned in object (A), and for the wives or husbands of such persons as the case may be, and to provide a club-house or club-houses and all suitable conveniences and amenities in connexion therewith."

I do not read the so-called objects set out in (C) to (I) because I think that it is clear, and indeed I think that counsel admitted, that those are not objects in the true sense but are merely means by which the objects shall be carried out. It also seems to me that 3 (B) which I have read is a means of carrying out the object expressed in (A) because it begins with the words " With a view to the furtherance of the last-mentioned object ". Though the words that follow may be of relevance in construing (A), they are not in themselves in my judgment an object. The main object or objects are to be found in para. 3 (A), and they are in these words: " To promote comradeship between and improve the condition and welfare of all ranks, both past and present ", broadly speaking of the past and present members of the forces of the Crown throughout the Commonwealth. It seems to me that the class of persons whom it is intended to benefit are clearly of a sufficiently large and of sufficient public character to enable it to be said that the words " advancement of social welfare ", if otherwise applicable, apply. It is also clear that in so far as it is necessary there is here an element of altruism since the funds of the association were raised by voluntary gifts. The sole question is whether it is proper to say that the words " to promote comradeship between and improve the condition and welfare of all ranks both past and present " of members of the forces can properly be said to be the advancement of social welfare.

Counsel for the respondents has said that the object in para. 3 (A) is not a single object but that there are two objects, first to promote comradeship between the members of the forces, and second to improve the condition and welfare of those members. He says that whereas it may be that an object to improve the condition and welfare of members of the forces may be capable of coming within the words " advancement of social welfare ", an object which exists solely to promote comradeship between those members cannot be said to be the advancement of social welfare. He says that however praiseworthy such an object may be, it is not an advancement of social welfare within the meaning of the section.

One must be careful in these cases to apply, as indeed one always should, a strict construction. It would be quite wrong to say that the appellants' objects were very worthy objects and to try to stretch the words to give them relief, because in so far as they were relieved the burden would fall on others, namely, the ratepayers in Paddington. It is purely a question of construction whether those words can be brought within the words of the statute, " the advancement of social welfare ". A B

For my part, I think that there is only one object and a composite object in para. 3 (A). It is not divided up. It is framed in a composite form, " to promote comradeship between and improve the condition and welfare of " all ranks of the forces. Read as a composite whole, I can see no reason why those words do not aptly describe the concept of the advancement of social welfare, and I think that some help is to be gained from the activities which it is envisaged C will be used for the furtherance of the object contained in that composite phrase. Under para. 3 (B), which I have already read, the activities contemplated are the conducting of a welfare and advice bureau, an employment agency, a residential club and amenities, and it seems to me that read as a whole those words in para. 3 (A) can perfectly properly be construed as having the object of the advancement of social welfare. D

It has been said in some of the cases that the conception is that it should be an activity which benefits the needy but, in my judgment, the reference to the needy in such a concept does not necessarily mean those in need financially. It seems to me that in dealing with the vast number of people who as the result of the many wars are now ex-servicemen and those who are at present serving in the forces there is a need for the sort of activities which this association propose E to carry out and in fact have carried out with the object of promoting comradeship and improving the condition and welfare of all ranks. In my opinion, this association fully qualifies for the relief provided by s. 8 of the Act. Accordingly, I find it unnecessary to go to a further stage and consider the activities of the association or to consider what are the main or subsidiary activities of the association. It is sufficient to say that they are activities which were contem- F plated by the memorandum of association as a means whereby the objects expressed in para. 3 (A) should be carried out.

So far as the Case is concerned, there is no finding of fact which is binding on this court and would force me to come to a different conclusion. The justices very properly set out the facts of the case. They do not find affirmatively what they consider is the main object. That, as I said, I think at any rate in this case G is a pure question of the construction of the memorandum of association, and all they hold is that as a matter of opinion the objects, whatever they are, are not concerned with the advancement of social welfare. In my judgment, the justices came to a wrong decision; the main objects of the association were concerned with the advancement of social welfare, and accordingly this appeal should be allowed. H

CASSELS, J.: I agree.

ASHWORTH, J.: I also agree.

Appeal allowed.

Solicitors: *Speechly, Mumford & Soames* (for the appellants); *Town clerk*, Paddington (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

A

HORTON v. HORTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 22, 25, 1960.]

B *Magistrates—Husband and wife—No case to answer—Appeal—Re-hearing ordered by Divisional Court—Right to call evidence at re-hearing notwithstanding election at former hearing.*

Where a complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, is dismissed by a magistrates' court after a submission by the husband that there is no case to answer and an election C by him to call no evidence, the husband is not precluded in the event of a re-hearing being ordered by the Divisional Court from giving evidence at the re-hearing.

[As to powers of the Divisional Court in matrimonial appeals, see 12 HALSBURY'S LAWS (3rd Edn.) 510, para. 1120; and for cases on the subject, see 27 D DIGEST (Repl.) 732, 733, *6983-7000*.

As to submitting no case to answer, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852, note (e); and for cases on the subject, see 27 DIGEST (Repl.) 544, *4921*, and 3rd DIGEST Supp.]

Cases referred to:

E *Preston-Jones* v. *Preston-Jones*, [1951] 1 All E.R. 124; [1951] A.C. 391; 27 Digest (Repl.) 320, *2670*.

Storey v. *Storey*, (Jan. 20, 1960), unreported.

Appeal.

The wife appealed against a decision of the Bristol magistrates dismissing F her complaint under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, that the husband had committed adultery.

The wife's complaint was that in about June or July, 1959, the husband committed adultery with a woman unknown at a place unknown. At the hearing before the magistrates the husband's legal representative submitted that there G was no case for the husband to answer, and he elected to stand on his submission and to call no evidence. The magistrates ruled that there was no case for the husband to answer and dismissed the complaint. The wife appealed.

Bruce Holroyd Pearce for the wife.

J. A. Cox for the husband.

H **LORD MERRIMAN, P.:** I have come to the conclusion that the decision was wrong. In circumstances like the present it would be open to us to find, not only that the submission and the ruling that there was no prima facie case were wrong, but also that the magistrates ought to have made an order on the evidence before them and that we, therefore, ought to make an order on it. I Although that would be a possible conclusion I for my part think that it is better that the case should be sent back for a re-hearing, and I think that the reason for that will become apparent as I discuss the details.

In particular I am influenced by the fact that only last week we resisted a submission (1) that where an election and a decision to stand on it had been made, we could not send the case back, but must deal with it ourselves because, if we sent it back, the election to give no evidence would still stand and the husband would be barred from giving any evidence at all. I do not take that view, and, indeed, we expressly declined to take it in that particular case, because the overriding consideration in these matrimonial matters is that we are dealing with status. I do not need to refer to authority about it, but in one of the cases that has been cited to us, *Preston-Jones* v. *Preston-Jones* (2) concerning the onus of proof, LORD MACDERMOTT (3), with whom LORD SIMONDS agreed (4), emphasised the point that these cases deal with questions of status in which the public—the unseen third party, as the public has sometimes been called—has a very great interest. For that reason alone I should be against any attempt to shut out the husband who made this submission and elected to stand on it from giving any of the explanations which may be open to him to give on the re-hearing. I realise that when one orders a re-hearing in these cases it does give both sides a chance to improve their case, and there may be (though I am not going to point them out) places in which the wife could dot the i's and cross the t's in the evidence which she produced, and there would be nothing to stop her from doing so. Similarly, it may be open to the husband to give such explanation as he can of the circumstances. [HIS LORDSHIP then found that on the evidence the wife had established a case which the husband should have been called on to answer. COLLINGWOOD, J., agreed and their Lordships ordered a re-hearing.]

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(1) In *Storey* v. *Storey*, (Jan. 20, 1960), unreported.

Order accordingly.

Solicitors: *Mowll & Mowll*, agents for *Lawrence Williams & Co.*, Bristol (for the wife); *Edward Heal & Smith*, Bristol (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(2) [1951] 1 All E.R. 124; [1951] A.C. 391.
(3) [1951] 1 All E.R. at p. 138; [1951] A.C. at p. 417.
(4) [1951] 1 All E.R. at p. 127; [1951] A.C. at p. 401.

INLAND REVENUE COMMISSIONERS *v.* HINCHY.

[House of Lords (Viscount Kilmuir, L.C., Lord Reid, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), January 11, 12, 14, February 18, 1960.]

Income Tax—Return—Incorrect return—Penalty—Treble the tax which he ought to be charged—Whether treble the total amount of tax payable for year of assessment or only treble the amount of tax evaded—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 25 (3) (*a*).

The interest on the respondent's Post Office Savings Bank account for the year ending with Apr. 5, 1952, was £51 5s. 9d. In the return of his income for the purposes of assessing him to income tax for the year 1952-53, which he signed on Apr. 19, 1952, and delivered to the Commissioners of Inland Revenue, he stated that his income from this source for the year was £18 6s. The commissioners made no assessment on the respondent on the basis of his understatement but, after discovering the understatement from sources other than the respondent, they made an assessment on him in November, 1955, under Sch. D for £14 5s. In June, 1956, the commissioners brought an action claiming from the respondent under s. 25 (3) (a) of the Income Tax Act, 1952, the £20 fixed penalty and also " treble the tax which he ought to be charged under this Act ", which sum they computed at £418 14s. 6d., being three times his income tax (viz., £125 6s. 6d., Sch. E, together with the £14 5s., Sch. D) for the year 1952-53.

Held: the Crown was entitled under s. 25 (3) (a) to the full amount claimed, viz., the £20 and £418 14s. 6d., as fixed penalties, because, giving the words of s. 25 (3) (a) their ordinary meaning, the phrase " treble the tax which he ought to be charged " meant " treble the whole tax which the taxpayer ought to be charged for the relevant year ".

A.-G. v. *Till* ([1910] A.C. 50) considered.

Quaere whether (a) surtax and (b) income tax at the standard rate deducted at source from dividends or interest were excluded from a computation of treble tax for the purposes of the penalty under s. 25 (3) (a) (see p. 511, letter A, p. 517, letter D and p. 521, letters D and E, post).

Decision of the Court of Appeal ([1959] 2 All E.R. 512) reversed.

[As to the recovery of income tax penalties, see 20 Halsbury's Laws (3rd Edn.) 717, para. 1441; as to their recovery before the General Commissioners, see ibid., p. 718, para. 1444; and as to proceedings for penalties in the county court, see ibid., para. 1442; and for cases on the subject, see 28 Digest (Repl.) 405, 406, *1802-1812*.

For the Income Tax Act, 1952, s. 25, see 31 Halsbury's Statutes (2nd Edn.) 37.]

Cases referred to:

A.-G. v. *Johnstone*, (1926), 136 L.T. 31; 10 Tax Cas. 758; 28 Digest (Repl.) 406, *1809*.

A.-G. v. *Till*, [1909] 1 K.B. 694; 78 L.J.K.B. 708; 100 L.T. 275; *revsd.* H.L., [1910] A.C. 50; 79 L.J.K.B. 141; 101 L.T. 819; 5 Tax Cas. 440; 28 Digest (Repl.) 405, *1804*.

A.-G. v. *White*, (Mar. 3, 1931), unreported.

Lord Advocate v. *McLaren*, (1905), 5 Tax Cas. 110; 28 Digest (Repl.) 407, *931*.

Appeal.

Appeal by the Crown from an order of the Court of Appeal (Lord Evershed, M.R., Ormerod and Harman, L.JJ.), dated May 11, 1959, and reported [1959] 2 All E.R. 512, reversing in part an order of Diplock, J., dated Dec. 2, 1958, and reported [1958] 3 All E.R. 682, in an action by the Crown for penalties against the respondent, Albert Edward Hinchy, under the Income Tax Act,

1952. The facts are set out in the opinion of Lord Keith of Avonholm, p. 518, letter F, post.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *John Pennycuick, Q.C.*, and *A. S. Orr* for the Crown.

The respondent did not appear and was not represented.

Their Lordships took time for consideration.

Feb. 18. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, this is an appeal from an order of the Court of Appeal (Lord Evershed, M.R., Ormerod and Harman, L.JJ.) in England, allowing in part an appeal by the Crown from a judgment of Diplock, J., on the trial of an action for penalties under the Income Tax Act, 1952. Diplock, J., held that judgment should be entered for the Crown for the sum of £20 without costs, while the Court of Appeal substituted a judgment in favour of the Crown for £62 15s. The Court of Appeal thus added to the sum of £20 treble the tax on the amount which would have escaped taxation had a return made by the respondent formed the basis of assessment. The facts are that, on Apr. 19, 1952, the respondent filled up the prescribed form containing a return of income and claim for allowances for the income tax year 1952-53. In that return he set out the figures of £18 6s. as the bank interest. In fact, the correct amount of his income from that source in the year ending Apr. 5, 1952, was £51 5s. 9d. In order to appreciate the basis of the judgments of the courts below, it is material to observe that no assessment was ever made on the respondent on the basis of his incorrect return, that the only assessment made on him for the relevant year was made after the correct amount had been discovered, and that this assessment in respect of all the tax for which he was liable for that year was made before the issue of the writ on June 13, 1956.

These facts raise the question of the construction of sub-s. (3) of s. 25 of the Income Tax Act, 1952, which provides:

> " A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

The argument for the Crown which was developed before Diplock, J., and, later before the Court of Appeal, may be summarised as follows. The penalty imposed by the said s. 25 (3), in the case of proceedings by action in a court, is a fixed penalty which the court (unlike the General Commissioners, in proceedings brought before those commissioners) has been given by the legislature no power to mitigate but which the Commissioners of Inland Revenue or the Treasury may mitigate under s. 500 of the Act. The said penalty has been applied by the legislature to a very wide variety of defaults. It embraces cases in which no return has been delivered at all, cases in which an incorrect return has been delivered, and cases (as under s. 27, requiring the delivery by employers of lists of their employees) where a duty is cast on one person to deliver a document relating to the tax liability of another, and where default in performing such duty can have no bearing on the ascertainment of the defaulter's own liability to tax. It applies irrespective of whether there has been fraud on the part of the defaulter and to cases in which there has been a serious, trivial, or

A even no direct, loss of tax to the Revenue. But the penalty applied to all these cases is a single penalty, and, on the true construction of the relevant words in s. 25 (3) (which must, it was submitted, be given the same construction as the corresponding words applied to proceedings before General Commissioners in s. 55 of the Income Tax Act, 1842), such penalty is a penalty of £20 and treble the total tax to which the defaulter is chargeable by direct assessment for the B year of assessment in question; the words " ought to be charged " limiting the ambit of the penalty to such tax as could be directly assessed on the defaulter, and there being in this respect a material difference in the wording of s. 25 (3) and the wording " treble the tax chargeable in respect of all the sources of his income " of para. 4 (1) of Sch. 6 to the Income Tax Act, 1952. It was further contended that the penalty could not be made to work in all the cases to which C it is made applicable if it were construed as limited to treble the tax avoided by the default; and that, if the legislature had intended the subsection to bear this meaning, it would have used the phraseology to be found in s. 48 of the Act. The Crown's construction of the words had not, so far as was known, ever been challenged in the period of over a century which had elapsed since the enactment of the Income Tax Act, 1842.

D DIPLOCK, J., took the view that the consequence of the construction of s. 25 (3) contended for by the Crown seemed to him to be absurd and unjust, and if there was some other possible construction, consistent with the words, which led to results less absurd and unjust, he would be inclined to adopt it. In his view, there was such an alternative construction, for it seemed to him that a reasonable meaning of the words " the tax which he ought to be charged under E this Act " was the tax to which the taxpayer ought to be duly assessed but to which he had not been duly assessed by reason of the default; that is to say, the increased tax which, when one looked at the latter part of the subsection, was to be added to the assessment. In this respect, he thought that s. 48 of the Income Tax Act, 1952 (dealing with penalties for fraud), expressed in clearer and lengthier language what was intended to be conveyed by the elliptical F expression in s. 25 (3). This construction raised the question of determining at what point of time one must ascertain the amount of tax which the taxpayer ought to be charged, and DIPLOCK, J., gave the answer of the date at which the proceedings, whether before the court or the General Commissioners, are brought. As, therefore, in the present case the proceedings had been commenced after the respondent had been charged with all the tax for which he was liable, G there was at the date of the commencement of the action no tax with which he ought to be charged under the Act and the only amount recoverable was the fixed penalty of £20. Like the Court of Appeal, I regret that I am unable to accept this view as to the point of time. Its result would be that, if the error were discovered before the assessment was made, the making of the correct assessment would eradicate that portion of the penalty arrived at by multiply- H ing the tax. I cannot accept this. The liability to the penalty must, in my view, arise when the offence is committed, that is, when no return is made, when the time for making a return has expired, or, where an incorrect return has been made, when such a return has been received by the commissioners.

The Court of Appeal did, however, approve of the antecedent reasoning of I DIPLOCK, J., and the gist of their view is expressed in the following quotation (1):

> " So as a matter of English it seems to us at least a legitimate interpretation of the phrase ' tax which he ought to be charged ' to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return; in other words, the tax appropriate to the undisclosed income."

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(1) [1959] 2 All E.R. at p. 522; [1959] 2 Q.B. at p. 378.

The difficulty of the view of the Court of Appeal is that this expression appears to predicate that there has been an assessment by which the taxpayer has been charged with the lesser amount by reason of his defective return, and that this forms the basis of the penalty under s. 25. It is unfortunate that the Court of Appeal do not seem to have appreciated that there had been no assessment on the respondent on the basis of the incorrect return which could play its part in the quantification of the penalty. In this case, as in many others, there is not, to use the language of the Court of Appeal (2), " tax with which . . . he [the taxpayer] has not been charged by reason of his defective return ". He has not been charged because the time for charging him has not yet arrived. When that time does come, non constat that the return will have any causative effect on his assessment. The latter may be based on other information and in the case of income under Sch. E must be based on his income in the current and not the past year. It is an essential constituent of this problem that, at the time of the commission of an offence under s. 25, assessment may be in the future, whereas under s. 48 (the fraud section) assessment must be in the past.

Nevertheless, although the concluding reasoning of the Court of Appeal does not, in my opinion, fit the facts of this case or the general procedure of taxation, it would be wrong to ignore what the Attorney-General termed the " underlying thought of that judgment ". They considered that the penalty provisions produced minimum penalties wholly unrelated to the extent of the default, so extravagant as to be shocking in a final provision, and at least one anomaly which might well be thought to run quite contrary to ordinary justice. They considered that the penalties were so unfair and unjust and contained variations so numerous and illogical as to produce, in their view, the result that no safe view could be got, from other sections of the Act, in the attempt to construe s. 25. Although they did not use the words of LORD LOREBURN, L.C., in *A.-G.* v. *Till* (3), that the penalties were unreasonable or oppressive, yet they clearly considered these to be of that nature. I asked Mr. Pennycuick what was his submission as to the law which should guide the court in construing provisions which appeared to be oppressive and unreasonable. His answer was that, if there were any ambiguity, the court would prefer that construction which did not lead to an oppressive and unreasonable conclusion, but if the words were clear then they had to be given full effect, whether or not that effect was unreasonable or oppressive. He submitted that there was no ambiguity in this case.

Bearing this in mind, and also the fact that the respondent was not represented, I have tried to formulate an argument implicit in the words of the section. I remind myself that the effect of the decision of this House in *A.-G.* v. *Till* (4) was to rewrite this section in the sense: " A person who neglects to deliver any return or who delivers a return which is not correct is liable to the penalty." As the section can look to the future, can the words creating the penalty be extended distributively and respectively so that the penalty becomes the sum of £20 and treble the whole tax which he ought to be charged under this Act where he neglects to deliver a return, and, in the case of an incorrect return, the sum of £20 and treble the tax on the amount which would have escaped taxation if the incorrect return made by the respondent had formed the basis of assessment? I cannot give this meaning to the words. So to do would entail the making of an artificial assessment on the basis of the return, the making of the true assessment and the subtracting of the one from the other. I do not pause to speculate on the hypothetical difficulties of policy and procedure which might arise. I am content to say that to add the necessary words would, in my opinion, be legislation and not construction. I also tried to consider whether, on the assumption of an ambiguity, I could gain assistance from the fact that the element of treble tax was attached to penalties after proceedings in court by s. 23 (2) of the Finance Act, 1923, which also changed the penalty for abettors of fraud in what is now s. 48 of the Income Tax Act, 1952. Again, I could find nothing to drive me to a recondite secondary meaning. I cannot ignore the fact that a multiplier of the tax with which he ought to be charged was made a constituent of the penalty for the equivalent of this offence by s. 118 of the Income Tax Act, 1805. I cannot believe that, in the year of Trafalgar and Austerlitz, Parliament was considering such a refinement as the present argument entails. The more, however, I consider the piece-meal additions of the last 150 years, the more glad I am of the assurance of the Attorney-General that the penalties are being reconsidered.

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(2) [1959] 2 All E.R. at p. 522; [1959] 2 Q.B. at p. 378.

(3) 5 Tax Cas. 440 at p. 452.

(4) 5 Tax Cas. 440.

Moreover, although the present point was not argued, it was assumed that "treble the tax to be charged under this Act" meant treble the whole tax for the relevant year by two members of the Court of Appeal and by LORD ATKINSON in *A.-G.* v. *Till* (5), by ROWLATT, J., in *A.-G.* v. *Johnstone* (6), inferentially by the Court of Session in *Lord Advocate* v. *McLaren* (7) and by the High Court and Supreme Court of what was then the Soarstat Eireann in the unreported case of *A.-G.* v. *White* (8). It is impossible, in my view, to give the words a different meaning in that part of the subsection which applies to proceedings before the commissioners from that which applies to proceedings in court, although in the case of the commissioners it is a maximum and not a fixed penalty.

I have, therefore, come to the conclusion that the words must bear their ordinary meaning and that this appeal must be allowed. At the request of the Revenue there will be no order for costs.

LORD REID: My Lords, if the appellants, the Commissioners of Inland Revenue, are right in their main contention, any taxpayer who makes a mistake in his annual income tax return and has not discovered and rectified it must, if he is sued, be subjected by the court to a penalty of £20 and treble the whole tax which he ought to be charged for the year; that penalty is in addition to the tax which he normally has to pay. It does not matter how innocent the mistake may have been or how large the penalty may be, the court has no power to modify or reduce the penalty, although such a penalty, with the modern rates of income tax, would be ruinous to most taxpayers with moderate or large incomes. The Crown maintains that the only remedy lies with it, and that it is for it in its sole and unfettered discretion (unless the Treasury choose to interfere) to determine what it thinks would be a proper penalty in each case and to reduce the penalty imposed by the court accordingly. The Crown has, in fact, exercised this power for a long time and it is no doubt a tribute to the way in which it has exercised its discretion that this appears to be the first time that the extent of its power has been challenged in court and that it has been possible to delay for so long the revision of the penalty provisions in the Income Tax Acts, although the need for such revision had long been evident. The incongruities and anomalies in these penalty provisions have a very long history. Some had their origins in the Income Tax Acts of 1799, 1803 and 1806, and even in the Act of 1842 there were already serious anomalies. But in those days the rate of tax was low, and penalties based on the total amount of tax payable were probably not oppressive. And this is not the only chapter of the law in which ill-conceived provisions introduced by temporary Acts with limited application have long survived without any radical revision and have to be applied in circumstances very different from those which existed at their origin.

This case turns on the proper construction of s. 25 (3) of the Income Tax Act, 1952:

> "A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the

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(5) 5 Tax Cas. 440. (6) 10 Tax Cas. 758 at p. 762. (7) 5 Tax Cas. 110. (8) Unreported, Mar. 3, 1931.

> preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment."

In a somewhat similar provision in the Act of 1799 the penalty was simply £20. Then, after some amendments, the Act of 1842, s. 55, provided:

> " And be it enacted, that if any person who ought by this Act to deliver any list, declaration, or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice, or shall under any pretence wilfully delay the delivery thereof, and if information thereof shall be given, and the proceedings thereupon shall be had, before the commissioners acting in the execution of this Act, every such person shall forfeit any sum not exceeding £20, and treble the duty at which such person ought to be charged by virtue of this Act, such penalty to be recovered as any penalty contained in this Act is by law recoverable, and the increased duty to be added to the assessment . . . ; and every person who shall be prosecuted for any such offence by action or information in any of Her Majesty's courts, and who shall not have been assessed in treble the duty as aforesaid, shall forfeit the sum of £50."

In the Act as printed by the Queen's Printer there is a comma after £20 in the passage " shall forfeit any sum not exceeding £20, and treble the duty . . ." An argument was submitted that this comma showed that " not exceeding " only governed " £20 " and did not apply to " and treble the duty ", so that the General Commissioners only had power to reduce the £20 and had no power to reduce that part of the penalty which consisted of treble duty. But before 1850 there was no punctuation in the manuscript copy of an Act which received the royal assent, and it does not appear that the printers had any statutory authority to insert punctuation thereafter. So even if punctuation in more modern Acts can be looked at (which is very doubtful), I do not think that one can have any regard to punctuation in older Acts. And, omitting the comma, I would hold that the whole of the penalty was subject to modification under the Act of 1842. There is now no comma in s. 25 (3) (b) and, in my view, if proceedings are now taken before the General Commissioners they are entitled to reduce the penalty of treble tax. In 1842, if the matter was taken before a court, there was a fixed penalty of £50; with the low rates of tax then in force £50 was presumably thought at least comparable with £20 plus treble tax. Under the Act of 1918, s. 107, as originally enacted, the penalty which a court could impose was still only £50, but the rise in the rates of income tax made that an inadequate penalty in many cases and the provision which now appears in s. 25 (3) (a) was introduced by the Finance Act, 1923, s. 23 (2).

Before dealing with the crucial question in this case, the proper construction of s. 25 (3) (a), there are several matters which it may be convenient to deal with at this stage. The Crown submitted that this subsection is governed by s. 25 (2), so that it only applies if the return or other statement was not true and correct to the best of the judgment and belief of the person making it. We were informed that the Crown never takes action under this section unless it thinks that the declaration required by sub-s. (2) was not truly made, but I can find no basis in law for it being a defence to an action to prove that the return or statement was made to the best of the judgment and belief of the defendant. The offence is not delivering a true and correct return, and if, in fact, it is not true and correct the penalty follows as a matter of course. Then it was said that, whatever be the true meaning of " the tax which he ought to

A be charged under this Act ", it cannot include either surtax or tax deducted at source by those who pay dividends, etc. It is not necessary to decide those matters in this case, and I will only say, particularly with regard to surtax, that I am not convinced that these are excluded and that, in any revision of this and other provisions, they ought to be made clear.

In determining the proper construction of s. 25 (3), one must bear in mind B that the subsection applies to other things, as well as a return of the taxpayer's own income; it applies to any list, etc., which he is required to deliver under a number of other sections. Under s. 21, he may be required in certain cases to make a return of another person's income and to submit to being charged to tax in respect of it. Under s. 22, he must render a statement of money received by him on behalf of another person. Under s. 23, he must deliver a list of lodgers C and inmates of his dwelling-house. And s. 30 applies the provisions of s. 25 to lists of employees (s. 27) and commissions (s. 28) and interest paid to others without deduction of tax (s. 29).

I do not propose to examine the other penalty provisions in the Act of 1952. It is, no doubt, true that every Act should be read as a whole but that is, I think, because one assumes that, in drafting one clause of a bill, the draftsman D had in mind the language and substance of other clauses and attributes to Parliament a comprehension of the whole Act. But where, as here, quite incongruous provisions are lumped together and it is impossible to suppose that anyone, draftsman or Parliament, ever considered one of these sections in the light of another, I think that it would be just as misleading to base conclusions on the different language of different sections as it is to base conclusions on the different E language of sections in different Acts. As an example of incongruity, I need only refer to the admitted fact that the penalty in sections dealing expressly with fraud is less than the penalty under s. 25 (if the Crown's construction of s. 25 is right) for errors which may only be due to mistake.

I can now state what I understand to be the rival contentions as to the meaning of s. 25 (3). The Crown contends that " treble the tax which he ought to F be charged under this Act " means treble his whole liability to income tax for the year in question (less surtax and tax deducted at source as I have already explained). It is not so easy to state the contrary contention briefly and accurately. Unfortunately the respondent was not represented in this House. That was due to no fault of the Crown, and the Attorney-General very properly drew your Lordships' attention to points on which counsel for the respondent might have G relied, but that is not altogether an adequate substitute for an argument for the respondent. Broadly, the contention is that it cannot have been intended that that which would have been chargeable in any event on the inaccurate return which was sent in should enter into the computation of the penalty, that the penalty must have been intended to have some relation to the offence, and that the tax which he ought to be charged must be the additional tax which he ought H to be charged by reason of the discovery of the true state of affairs. Otherwise the penalty will often be grossly and extravagantly disproportionate to the offences. A man might be properly chargeable to £5,000 tax on his actual return and properly chargeable to £5,100 tax on the correct return. If the Crown is right, the penalty would be £15,320 ; if the other view is right, it would only be £320. And even more extravagant cases could arise when the taxpayer's I omission was not in respect of his own income. If he fails to return a correct list of lodgers or employees or money collected for or interest paid to others, the penalty would have no relation to that failure—it would be treble his own income tax although he had made a correct return of his own income and paid the full tax due on it. And an even more difficult case might arise under s. 21; under that section, he is chargeable both in respect of his own income and in respect of income belonging to another. If one of the returns which he makes is inaccurate, is the penalty treble the whole tax which he ought to be charged, i.e., the tax on both his own and the other income, or can something be read in, even if the Crown is right, so as to base the penalty on something less than the whole tax which he ought to be charged under the Act?

Difficulties and extravagant results of this kind caused DIPLOCK, J., and the Court of Appeal to search for an interpretation which would yield a more just result. What we must look for is the intention of Parliament, and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the Crown's contention. But we can only take the intention of Parliament from the words which they have used in the Act and, therefore, the question is whether these words are capable of a more limited construction. If not, then we must apply them as they stand, however unreasonable or unjust the consequences and however strongly we may suspect that this was not the real intention of Parliament. The Court of Appeal found it possible to adopt a secondary meaning for the crucial words. Their conclusion appears to be summed up in a sentence (9):

> " So as a matter of English it seems to us at least a legitimate interpretation of the phrase ' tax which he ought to be charged ' to limit its significance to that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return: in other words, the tax appropriate to the undisclosed income ".

I agree with the Court of Appeal that, if it is possible to infer the meaning which they attach to these words, that should be done. One is entitled and, indeed, bound to assume that Parliament intends to act reasonably and, therefore, to prefer a reasonable interpretation of a statutory provision if there is any choice. But I regret that I am unable to agree that this case leaves me with any choice. When I look at the way in which the provisions of s. 25 (3) (a) were brought into the Income Tax Acts, and at the way in which those provisions must be applied in circumstances other than those contemplated by the Court of Appeal, I find myself unable to hold that the crucial words are capable of the interpretation which they have adopted.

The Act of 1952 is a consolidating Act, and one must presume that such an Act makes no substantial change in the previous law unless forced by the words of the Act to a contrary conclusion. Therefore, in interpreting a consolidating Act it is proper to look at the earlier provisions which it consolidated. The previous law was contained in s. 107 of the Income Tax Act, 1918, and s. 23 (2) of the Finance Act, 1923, to which I have already referred. Section 107 gave the court no power to impose a treble tax penalty and it did not require the General Commissioners to impose the maximum penalty ; they could modify the penalty to any extent they might think just. The Attorney-General was unable to point to any provision in force before 1923 which required the maximum penalty to be imposed even in cases where there was no fraud; there were certain provisions imposing the maximum penalty if fraud was established. Section 23 (2) of the Act of 1923 is in the same terms as s. 25 (3) (a) of the Act of 1952. If the Crown's construction is right, then Parliament imposed for the first time in 1923 an obligation to inflict the full treble tax penalty even on innocent though negligent offenders, and did this at a time when the rate of tax (then 4s. 6d.) made such a penalty oppressive in most cases. It is so contrary to the practice of Parliament to commit in effect unlimited discretion to a branch of the executive as to the amount of penalties to be imposed on persons guilty of no more than negligence that I would not easily hold that this was done in 1923; but I am forced to the conclusion that this was then done and it is idle to speculate whether Parliament, or, indeed, any member of Parliament, understood the full effect of the enactment. I refer to the appellants as a branch of the executive because s. 1 (2) of the Inland Revenue Regulation Act, 1890 (which does not appear to have been amended or repealed), provides that they

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(9) [1959] 2 All E.R. at p. 522; [1959] 2 Q.B. at p. 378.

A > " shall in the exercise of their duty be subject to the authority, direction, and control of the Treasury, and shall obey all orders and instructions which have been or may be issued to them in that behalf by the Treasury ".

It is proper to add that the present practice appears to be to confine such orders and instructions within narrow limits.

B I find it impossible to hold that the words " not exceeding £20 and treble the tax which he ought to be charged under this Act " in s. 107 (1) (a) of the Act of 1918 meant anything other than treble the whole tax which he ought to be charged for the relevant year. The argument for the more limited meaning adopted by the Court of Appeal is based almost entirely on the extravagant consequences which flow from giving the words in the present Act their natural meaning. But that argument loses almost all its force when applied to the Act of 1918. Under that C Act, the General Commissioners, an independent body, had full discretion to modify the penalty, and all that could then be said was that, owing to the increase in the rates of tax, the maximum penalty had become so high as to be extravagant in the great majority of cases. But there was no obligation under the Act of 1918 to inflict the maximum penalty in cases where it was disproportionate to the offence. In 1923, the same words were inserted in s. 107 (1) (b), D but with the omission of the vital words " not exceeding ". Why these words were omitted I do not know, but their omission creates the present difficulty. Normally it would be impossible to hold that, when the same words as those already in one subsection are later inserted in another subsection of the same section, they can be given a meaning different from the meaning of the words which were there already. I do not find it possible in this case to hold either that E the words in the original Act of 1918 had a limited meaning, or that they were given a limited meaning by the Act of 1923, or that, after 1923, the same words in sub-s. (1) (a) and (b) had different meanings; I cannot avoid the conclusion that these words did not have a limited meaning before 1952 and that, therefore, they do not have a limited meaning now when they are reproduced in the consolidating Act of 1952.

F My Lords, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend, LORD RADCLIFFE. I am in general agreement with it and, in particular, I agree with his account of the methods of tax administration and of the way in which this case has been dealt with, so I need not add further to my own speech already, perhaps, too long. In my judgment, this appeal must be allowed.

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LORD RADCLIFFE: My Lords, in my opinion, we are bound to allow this appeal.

It has not been in dispute that, in 1952, the respondent committed a breach of the obligation imposed on him by s. 19 of the Income Tax Act, 1952. He did not, when required so to do, deliver to the inspector of taxes a true and correct H return of all the sources of his income and of the amount derived from each source for the year preceding the year of assessment 1952-53. In fact, the signed return which he did deliver on Apr. 19, 1952, stated incorrectly that his income for the year 1951-52 from interest on bank deposits, including Post Office and other Savings Bank deposits, had been £18 6s. whereas his true income from that source had been £51 5s. 9d. Further, it has not been in dispute that, by virtue of I s. 25 (3) of the same Act, he thereby forfeited, if proceeded against in a court of law, the sum of £20 and treble the " tax which he ought to be charged " under the Act. Such a forfeiture is imposed by the section on anyone who

> " neglects or refuses to deliver . . . or wilfully makes delay in delivering, a true and correct . . . return . . . "

It was decided by this House in *A.-G.* v. *Till* (10) that a person who, though not failing to make a return at all, nevertheless makes an incorrect return is within the description that I have quoted above. I am bound to say, looking back, that I think that that decision might well have been otherwise and, if it had been, the problem that we are now faced with would not have arisen. But, since it went the way it did, we must now take it that the respondent was a person who neglected to deliver a true and correct return.

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(10) 5 Tax Cas. 440.

The whole question, therefore, is what penalty is attached to his default by the words " the tax which he ought to be charged under this Act ". The Crown says that the meaning of these words is that the defaulter incurs, apart from the £20, a penalty of three times his total income tax bill in respect of all sources of income directly assessable for the year in which the offence is committed. It says that this is the way in which the words have been understood and applied ever since they first appeared in an Income Tax Act (the first use of them in this context was in s. 181 of the Income Tax Act, 1805); that whenever their import has been noticed judicially, as in *A.-G.* v. *Till* (11) and in *A.-G.* v. *Johnstone* (12), the same meaning has been attributed to them; and that the Income Tax Codification Committee itself, which, in the years before 1939, laboured with so much intelligence and devotion to no eventual result, clearly assumed this to be the correct meaning. All this, I think, is true; and these considerations are persuasive. But, having regard to the extreme severity which might attend such a penalty under present scales of taxation and the fact that in this very case the Court of Appeal have found it possible to impute another and less onerous meaning to the words, I think it better to approach the question of construction without giving any weight to this consideration that, if the Court of Appeal are right, they have discovered in the phrase a significance that has long lain unobserved, and so lain after many persons, it is fair to suppose, have had cause to scrutinise them with somewhat anxious attention.

What, then, are the alternative readings which have been suggested? Diplock, J., before whom this action came in the High Court, took the view that (i) the point of time at which there should be ascertained the amount of tax which a defendant " ought to be charged " was the date of the initiation of the proceedings for the penalty, and (ii), if, at that date, there had been a correct assessment on the full chargeable income, there was no tax with which it could be said that the defendant ought to be charged and nothing, therefore, recoverable except £20. In my opinion, this view is wrong in its initial assumption. The date at which any penalty incurred is to be ascertained must be the date when the offence is committed; assessment or payment after that cannot affect the liability. Otherwise, every time, an error being detected, a correct assessment is made in order to determine the true tax liability for the year, the penalty by way of multiplied tax automatically disappears. I agree with the learned Master of the Rolls (Lord Evershed) when he says in the judgment delivered in the Court of Appeal (13): " We do not think that this can be right." In the Court of Appeal itself, a different interpretation prevailed. It was based on the general idea that, when there has been an incorrect return, the tax which the maker of it " ought to be charged " in treble is something which can be called the " excess tax ". This is variously described (14) as

> " the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income "

and as

> " that amount of tax with which, at the relevant point of time, the taxpayer ought to be charged but with which he has not been charged by reason of his defective return: in other words, the tax appropriate to the undisclosed income."

My Lords, I do not think that the words of s. 25 (3) which are in question give any hint of an intention to measure the tax penalty by a computed excess of this sort. It can be done if an appropriate formula is used. Section 48, for instance, does apply such a formula, where the conditions are such that an assessment, though an inadequate one, has been made. Again, s. 49 allows treble the excess tax where a false return of Sch. D income has led to under assessment, or would have led to it if undetected. But no such formula is used or indicated in the section that we have to consider. Moreover, there is another and fundamental obstacle to the introduction of this " excess tax " idea which the Court of Appeal judgment imports into the meaning of the section. Their definition depends essentially on the existence of a first incorrect assessment, such as they believed to have been made in this case, which assessment can then be compared with the corrected true assessment which emerges when the full facts are known. We were assured by the Attorney-General in the course of his argument that, in this case, there had been no such assessment for 1952-53, and, as this misunderstanding contributed to the Court of Appeal's view of the admissible interpretation of s. 25 (3), I think it necessary to set out exactly what did apparently happen, because, so far as I can see, the order of events followed here is as likely as not to be typical of the order that will be observed in any other case of untrue or inaccurate returns.

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(11) [1909] 1 K.B. 694.
(12) 10 Tax Cas. 758.
(13) [1959] 2 All E.R. at p. 521; [1959] 2 Q.B. at p. 377.
(14) [1959] 2 All E.R. at pp. 521, 522; [1959] 2 Q.B. at pp. 377, 378.

In April, 1952, the respondent made a return purporting to set out all the sources of his income for the year 1951-52 and of the amount derived from each source. This return would afford, of course, valuable information for the purposes of the assessment to be made on him for the year 1952-53, though, in so far as the basis of assessment is the current year's income, not that of the preceding year, such a return can be informative only, and there is no inherent connexion between the figures it shows and the figures that should be used for the true assessment. It also affords, I suppose, a means of checking by its figures the assessments which have been made for the previous year on that year's current income. No assessment for 1952-53 was ever made on the respondent on the basis of his statement that his income (I include in this the income of his wife) from Savings Bank interest for 1951-52 had been £18 6s. The only assessment that was ever made on him for 1952-53 was made after the true figures had been established. There was then an assessment for each schedule, Sch. D and Sch. E, under which he derived assessable income, and these assessments have been put in evidence. The Sch. D assessment on " untaxed interest " is not intelligible unless the Sch. E assessment is first looked at. The Sch. E assessment relates directly only to the respondent's income from his employment in H.M. Customs and Excise. But, owing to the practice of " coding in " for the purpose of P.A.Y.E. deductions, two small items of income which really belonged to Sch. D were taken into account (see Part III of the assessment form) for the purpose of arriving at the code number appropriate to the operation of P.A.Y.E. By this means, £21 of the Savings Bank interest and £19 of " excess rents " income were taken to reduce by £40 the £396 of allowances which would otherwise have been taken into account in allotting the P.A.Y.E. code number and, ultimately, in computing the Sch. E assessment. The result was that £21 of the untaxed interest was, in effect, taxed under Sch. E and recovered through P.A.Y.E.; and the deduction of £21 from the full amount of £51 " untaxed interest " in the Sch. D assessment is merely a recognition of this arrangement, designed to prevent the £21 from being taxed twice over. It does not mean that the respondent's assessments, when they came to be made, were on anything less than the full sum of £51 for untaxed interest. Considering the way that the matter is dealt with in more than one letter in the correspondence exhibited, I do not wonder that the Court of Appeal took the facts to be otherwise. I still do not know why the figure of £21 was taken for the purpose of adjusting the P.A.Y.E. code number. It is quite possible that it was related to the £18 6s. shown in the inaccurate return of April, 1952; but, even so, P.A.Y.E. is no more than provisional retention of tax. It is not assessment.

It appears, therefore, that, in this case, there was never any failure to charge the taxpayer with the true amount of his tax for the year or any inadequate lower assessment induced by his wrong return. There never was any sum, therefore, that could be computed by comparing the tax charged by such a first assessment with the total tax liability when ascertained, nor was there any figure attributable to an additional assessment. As I see no reason to suppose that what happened here represents an unlikely sequence of events, I am afraid that I regard the successive failures of Diplock, J., and the Court of Appeal to find a maintainable interpretation of " treble the tax which he ought to be charged under this Act " that escapes the onus of trebling the whole tax bill for the year as a very strong indication that there are really no means of escape open. I do not wish, however, to accept this conclusion without giving some attention to another possible interpretation which is indicated by that phrase of the Court of Appeal " the tax appropriate to the undisclosed income". Can one fairly regard the words of the section as enacting in some disguised way that the basis of computation is to be the difference between what would be the tax on the figures actually shown by a man in his return, whether or not there has been any assessment, and the tax on what he ought to have shown if he had made a full and correct return? This is a device applied by s. 49 to certain cases, but it is noticeable that it there applies only to Sch. D income. I find it impossible to penetrate this disguise. With all respect to those who may think otherwise, the contents of even a completely full and correct return are no measure of the proper assessment of a man's income for the year in which he makes it. The assessing authority is not under so much as a presumptive duty to make an assessment according to the return; how could it be when, except for Sch. D, the basis of assessment is the current year, which is not dealt with by the return, not the past year, which is? Assessments can be made, even where there is no return. They can be made, whatever a return shows. The contents of a return can be queried and, further, more reliable information extracted. They can be cross-checked and the results amended in consequence of extraneous information available to the surveyor. In other words, the relationship of the figures of the return to the proper assessment of the year is so tenuous that I do not find it possible to suppose that the " tax which he ought to be charged under this Act " can ever have been intended to mean the amount of tax which a person would escape if his inaccurate return were accepted as providing final figures for the purposes of assessment. The basic facts of the administration and collection of tax do not admit any reality to such a conception.

I come back, therefore, to the only construction which is, I believe, open to a court of law. When a man does what the respondent did, sends in what is not a true and correct return, he commits an offence, and the measure of his penalty must be ascertained as the situation is at that date. At that date he will neither have been assessed nor will he have paid any tax for the year except, it may be, some provisional deduction under P.A.Y.E. The question what tax he ought to be charged under the Act seems to me to be, in these terms, a simple one. It is the sum of tax for which he will become liable for that year when assessment properly carried out under the Act has imposed liability on him. It could not be anything else when the offence consists of failing or refusing to make a return at all, and I do not see how the meaning of the words can change if the offence takes the form of not making a full return. I appreciate that the view to which the Court of Appeal felt entitled to come was largely encouraged by certain general considerations as to the result of accepting the Crown's contention in cases of this kind. Personally, I do not find any of these considerations compulsive, in the sense that they can alter the meaning of the words that Parliament has used; but, as I am as well not altogether in agreement with the cogency of some of the things that have been said, I ought, perhaps, to make a brief allusion to them.

The first point made related to the way the Crown's claim was computed, which was said to be inconsistent with its own construction of the section. It was said, for instance, that, if the measure was the full tax payable by direct assessment in the year, tax levied by deduction being omitted, it was anomalous to include Sch. E tax collected under P.A.Y.E. This is not, I think, a valid criticism. Schedule E income remains liable to direct assessment at the instance either of the Revenue or of the taxpayer, though assessment can be dispensed with, and the P.A.Y.E. deductions are only provisional payments of tax in advance. In this respect, income subject to P.A.Y.E. is quite different from, for instance, dividend income which is not directly assessable to income tax. Secondly, it was said that the treble tax claimed on the Savings Bank interest had, in fact, been computed only on the undisclosed portion instead of on the whole. This criticism arises from a misunderstanding of the two assessments and the way they worked out and I have already explained what the actual circumstances were. Lastly, the comment was made that, to be consistent, surtax ought to be included in the basic computation as well as income tax. The respondent was not a surtax payer, so the point does not arise here. All that need be said is that, if it does have to be decided at any time, there are arguments for treating the assessment and collection of surtax as carrying their own history and their own penalties and s. 25 (3) as not including surtax in the "tax" to be computed. In any event, the point has no bearing on what we have now to determine.

Secondly, it is, of course, very true that the penalty provision, as interpreted by the Crown, may not only impose fines which for some taxpayers would require payment of tens of thousands of pounds but also presents striking anomalies when its effect is contrasted with the effect of other penalty sections in the same Act. I do not think it necessary to dwell on these or to illustrate them, because the opportunities of doing so are almost inexhaustible. What I do not perceive, however, is how these considerations can alter the interpretation of the words used by the statute. If it is said that Parliament could not have intended to impose such onerous fines for breaches which, in some cases, may not be blameworthy in any degree, I can only point out that Parliament has imposed just the same penalty where the default is neglect to make any return at all, and yet none of the suggested interpretations of the section achieves any penalty short of treble the whole direct assessment in those cases where there has been neither return nor assessment. Personally, I do not see any marked distinction in degrees of blame between mere carelessness which results in not making a return and that form of carelessness which leads to a return being made which misleadingly appears to be complete when it is not. Again, whatever we managed to say about the meaning of the words in this case, there is no doubt that s. 18 of the Act would still impose a penalty of treble the whole tax when a person without just excuse fails to give a notice of his liability to tax; that para. 4 of Sch. 6 would impose what may be the still more onerous burden of treble the tax on all income from all sources if there is fraud in claiming a relief; and that s. 48, s. 49 and s. 441 would contain provisions which in certain cases involve a charge of three times the full tax.

When it is said, therefore, that we ought to search for a more rational meaning of the words of s. 25 (3) than that which is offered by the interpretation supported by the Crown, I think that much depends on what you regard as rational in this setting. Most of these penalty clauses have their origin in the Tax Acts of 1803-06, if not in the earlier Act of 1799. Income tax administration in those years was not the huge and efficient system to which we are now accustomed. If the purpose of Parliament at that time was, as I suspect, to impose heavy penalties for any kind of evasion, primarily as a deterrent, there is no reason for surprise that the various penalties are neither adjusted harmoniously to each other nor in themselves proportionate to degrees of blame or threatened losses of revenue. It was as "rational" to hit out blindly and heavily at anyone who was caught as to maintain savage and indiscriminate punishments under the criminal code until an effective police force had been established. What is more surprising is that, apart from the small changes made by the Finance Act, 1923, nothing has been done by Parliament ever since to review the whole unsatisfactory set of penalty sections and remodel them in the light of conceptions appropriate to the present day. Such a review has been called for both in the Report of the Income Tax Codification Committee (see Cmd. 5131, paras. 173-183) and in the Final Report of the most recent Royal Commission on Income Tax (see Cmd. 9474, Part VII, cap. 33), and the recommendation has, no doubt, reached the destination usually reserved for advice invited by governments from such committees.

LORD COHEN: My Lords, I had commenced writing a full judgment in this case but, before I had completed it, I had the privilege of reading the opinion which has just been expressed by my noble and learned friend, Lord Radcliffe. I agree so entirely with his conclusions and with the reasons he gives for thinking this appeal must be allowed that I shall only detain your Lordships long enough to say that I prefer not to express any opinion whether surtax enters into the calculation of treble tax until that point arises.

I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, the judgment of the Court of Appeal would seem to have proceeded on a false premise, namely, that, after the false return was made by the respondent, he was assessed on the return so made and that there was a balance of income undisclosed on which he had not been assessed. But that was not the position. The discovery by the Revenue of the undisclosed income was made after the return had been made and before any assessment was made. The respondent was then assessed, after deduction of due allowances, on the full amount of income subject to assessment, including the Post Office Savings Bank interest which he had failed to disclose. Thereafter proceedings were taken for recovery of penalty in respect of the incorrect return. The Court of Appeal, in my opinion correctly, say that the offence is committed when the false return is received by the commissioners. The liability to penalty necessarily arises at the time of the offence. It is a case of a false return with which we are here concerned, and it will be convenient to set out the relevant and material dates. The return, which was in respect of the income tax year 1952-53, was dated Apr. 19, 1952. It disclosed as arising in the year ended Apr. 5, 1952, untaxed interest on accounts and deposits in banks, including Post Office and other savings banks of £18 6s. In fact, the Post Office Savings Bank interest credited to the respondent and his wife in that year was £51 5s. 9d. After several years' correspondence, an assessment was made on Nov. 30, 1955, of £30 in respect of untaxed interest, tax on which at 9s. 6d. in the pound came to £14 5s. This amounted to tax on the whole £51 of Post Office Savings Bank interest, for £21, part of his personal allowance, was deducted from the £51, leaving a net sum of £30. On Mar. 9, 1956, a Sch. E assessment was issued, in respect of the respondent's employment, amounting, after allowances, to £427 on which tax was computed of £125 6s. 6d. These two assessments, apart from some Sch. A assessment, otherwise settled I think by allowances, constituted the respondent's whole tax liability for the year 1952-53. It may be noted that liability in respect of a Sch. E assessment was computed on income arising in the tax year and was the subject of direct assessment. It is not income, as the Court of Appeal seem to have thought, from which tax is deducted at the source. The liability in respect of the Savings Bank interest on the other hand fell to be computed on the income arising in the preceding year, 1951-52. The respondent's total liability to tax for the year 1952-53, as so assessed and charged, was thus £139 11s. 6d., the sum of £14 5s. and £125 6s. 6d. The next material date to be noted is June 13, 1956, the date of issue of the writ for penalties. The claim made by

A the writ is for £438 14s. 6d., being penalty, under s. 25 (3) of the Income Tax Act, 1952, of £20 and treble the tax of £139 11s. 6d.

On one view of the Court of Appeal judgment, it might appear that, if the true facts and sequence of events had been appreciated, they might have decided this case in favour of the Crown. I quote only one passage from the judgment where they say (15):

B

> " There remains the judge's interpretation of the relevant words (the third view above indicated), viz., that ' the tax which he ought to be charged ' means what we have called the excess tax, i.e., the tax which the taxpayer ought to be charged and was not charged because of his failure to make a true and correct statement of his income. Where there has been failure to make C any return at all, the ' tax which he ought to be charged ' will, of course, be the total of his tax liability for the relevant period. But where, as in the present case, the taxpayer's default lay in an understatement of one of his sources of income, then the tax which he ought to be charged will, on this interpretation, mean the tax which he ought to be charged (but was not charged by reason of his default) on the undisclosed income."

D It would seem clear from this passage that the court did not, as I have said, appreciate the true facts of the case. If the court had dealt with the true situation, I am not clear what result they would have reached. There is much in the train of thought in the judgment which suggests that they might still have held that the proper penalty was only £20 and treble tax on the amount which the taxpayer failed to disclose on his return. As the respondent was not E represented on the appeal and no case was lodged on his behalf, it is only right that any point that can be advanced on his behalf should be considered. It is partly, I understand, because of the difficulties and uncertainty which the Crown conceive this judgment has created for it in its enforcement of the penalty provisions of the Act that it has brought this appeal.

The claim here is made under s. 25 (3) of the Income Tax Act, 1952. The F point in issue is a short one, namely, what is meant by the words in sub-s. (3) (a), " treble the tax which he ought to be charged under this Act ". There are a number of penalty sections under the Act, all of which were referred to in the course of the argument. They do not provide any coherent or intelligent code, and in the confines sometimes of even a single section apparent anomalies can be discovered. It will be convenient to consider these sections in three groups G according to the variation of language by which the penalty is imposed.

In the first group I place s. 18 and s. 25, omitting for the time being the sections to which s. 25 applies; in the second group s. 48 and s. 49; and in the third group para. 4 of Sch. 6. Sections 18 and s. 25 read as follows:—

> " 18.—(1) It shall be the duty of every person who is chargeable to income tax for any year of assessment to give notice to the surveyor that H he is so chargeable at or before the end of that year: Provided that no such notice need be given by any person as respects any year for which he has delivered a statement of his profits and gains in accordance with the provisions of this Act.
>
> " (2) If any person, without reasonable excuse, fails to give such a notice as aforesaid, he shall—(a) if proceeded against by action in any court, I forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment.

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(15) [1959] 2 All E.R. at p. 521; [1959] 2 Q.B. at p. 377.

"25.—(1) Any such lists, declarations, statements and returns as are provided for by the preceding provisions of this Chapter shall be in such form as the Commissioners of Inland Revenue shall prescribe, and in prescribing forms under this subsection the commissioners shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom.

"(2) Any statement of annual value or profits or gains to be charged under Sch. A, Sch. B, Sch. D or Sch. E shall include a general declaration declaring the truth thereof and that the same is fully stated on every description of property, or profits or gains, included in the Act relating to the tax, and appertaining to the person returning the statement, estimated to the best of his judgment and belief, according to the provisions of this Act.

"(3) A person who neglects or refuses to deliver, within the time limited in any notice served on him, or wilfully makes delay in delivering, a true and correct list, declaration, statement or return which he is required under the preceding provisions of this Chapter to deliver shall—(a) if proceeded against by action in any court, forfeit the sum of £20 and treble the tax which he ought to be charged under this Act; or (b) if proceeded against before the General Commissioners, forfeit a sum not exceeding £20 and treble the tax which he ought to be charged under this Act, and where he is proceeded against before the General Commissioners, the penalty shall be recovered in the same manner as any other penalty under this Act, and the increased tax shall be added to the assessment.

"(4) The commissioners shall also proceed to assess or cause to be assessed every such person who makes default as aforesaid.

"(5) If any person who is required to deliver a list, declaration, statement or return on behalf of any other person delivers an imperfect list, declaration, statement or return and declares himself unable, within the time limited, to deliver a more perfect list, declaration, statement or return and states the reasons for his inability, he shall not, if the General Commissioners are satisfied with his explanation and grant further time for delivery, be liable to the penalty prescribed by this section if he delivers, within the further time granted, as perfect a list, declaration, statement or return as the nature of the case permits.

"(6) If a person delivers to any surveyor a list, declaration or statement on a form prepared for the purpose by direction of the Commissioners of Inland Revenue, he shall be deemed for the purposes of this section to have been required by a notice under the preceding provisions of this Chapter to prepare and deliver that list, declaration or statement, and the time limited for the delivery thereof shall be deemed for the purposes of this section to have expired on the date of its delivery to the said surveyor.

"(7) Any list, declaration, statement or return required by the preceding provisions of this Chapter to be delivered to the surveyor shall be made available to the General, Additional or Special Commissioners and their respective clerks, and, whenever necessary, to the assessors for the preparation and making of assessments."

The provisions of sub-s. (2) of s. 18 and sub-s. (3) of s. 25 are in identical terms, apart from the introductory words indicating the nature of the offence struck at by the penalty provision. Section 18 deals with concealment of chargeability to tax for any year of assessment, a reference back to s. 1 of the Act. The offence presumably will be committed if the potential taxpayer allows the year of assessment to run out without disclosing his chargeability. Section 25 relates to persons who are known to the surveyor of taxes and are required to make one or other of the returns in s. 19 to s. 25 of the Act, including persons required (s. 19) to deliver true and correct returns of all sources of their income.

I can see no ground for placing any different construction on the words "treble the tax which he ought to be charged under this Act" in sub-s. (3) of s. 25 from the meaning they have in s. 18 (2); or for saying that they have one meaning where the taxpayer neglects or refuses to deliver any return within the stipulated time as required by the Act, and a different meaning when he wilfully makes delay in delivering a true and correct return of his income as similarly required. The decision of this House in *A.-G.* v. *Till* (16) is binding authority that delivery of an incorrect return is breach of this requirement. The question of the construction of these words may to some extent be resolved, I think, by asking how it is to be ascertained what tax the defaulter ought to be charged under the Act. The only way, in my opinion, is through the machinery of assessment set up by the Act. The court cannot take on itself this task. It was so held, I think rightly, in an unreported Irish case—*A.-G.* v. *White* (17), under corresponding income tax provisions in Ireland, judgments in which were made available to your Lordships. Can it be said that the words have an ambulatory meaning, so that, if the taxpayer makes an incorrect return, the tax which he ought to be charged under the Act is limited to tax on the amount of the undisclosed income? This is the view, I think, taken by the Court of Appeal. I find it impossible to put such a construction on words which seem to me to be quite unambiguous. So limited, the tax would be only part of the tax which he ought to be charged under the Act. It was conceded by the learned Attorney-General that the penalty is to be measured only by tax on income which is the subject of direct assessment, a concession which I am disposed to think could not be withheld. Income from which tax is deducted under Sch. D is not income charged to tax in the hands of the recipient. Nor is it contended for the Crown that the tax to be charged includes surtax, for reasons which I do not find it necessary to examine. It may be noted also in passing that the non-fraudulent offender has a method of escape from the stringency of the penalties under s. 55 of the Act, which gives opportunity for rectification of returns and other relief.

Section 48 and s. 49 of the Act are as follows:—

> "48.—(1) Where a person who ought to be charged with tax, as directed by this Act, is not duly assessed and charged by reason that he has—(a) fraudulently changed his place of residence or fraudulently converted, or fraudulently released, assigned or conveyed any of his property; or (b) made and delivered any statement or schedule which is false or fraudulent; or (c) fraudulently converted any of his property, which was chargeable, by altering any security relating thereto or by fraudulently rendering it temporarily unproductive, in order not to be charged for the same or any part thereof; or (d) been guilty of any falsehood, wilful neglect, fraud, covin, art or contrivance whatsoever, such person shall, on proof thereof to the General Commissioners for the division in which he has been charged, or, if he has not been charged, then for any division in which he is chargeable, be assessed and charged treble the amount of the charge which ought to have been made upon him: Provided that, if any charge has been made, but that charge is less than the charge which ought to have been made, such person shall be assessed and charged, over and above the former charge, treble the amount of the difference between the charge which was made and the charge which ought to have been made, such amount to be added to the assessment.
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> "(2) A person who knowingly and wilfully aids, abets, assists, incites or induces another person to make or deliver a false or fraudulent account, statement, or declaration, of or concerning any profits or gains chargeable, or the yearly rent or value of any lands, tenements, hereditaments or heritages, or any matters affecting any such rent or value, shall for every such offence forfeit the sum of £500.

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(16) 5 Tax Cas. 440.

(17) Unreported, Mar. 3, 1931.

> " 49.—(1) If the Additional Commissioners or the General Commissioners —(a) have made a charge to tax under Sch. D in respect of a sum in excess of the amount contained in either the statement or the schedule of a person to be charged; or (b) discover, from the information of the surveyor, or otherwise, that a charge to tax in respect of a sum in excess of either such amount ought to be made, and an assessment is made, at any time within the year of assessment or within three years after the expiration thereof, they may, unless the person to be charged proves to their satisfaction that the omission by him did not proceed from any fraud, covin, art or contrivance or any gross or wilful neglect, charge that person, in respect of such excess, in a sum not exceeding treble the amount of the tax on the amount of the excess.
>
> " (2) If the person to be charged has neglected or refused to deliver a statement or schedule, the said commissioners may charge him in a sum not exceeding treble the amount of the tax with which, in their judgment, he ought to be charged, and such sum shall be added to the assessment and applied in the same manner as other increased charges are applied."

The proviso to sub-s. (1) of s. 48 clearly limits the penalty to treble the tax on the amount of income undisclosed where a charge has already been made on the disclosed amount. There may be observed, however, several new features in the matter of penalty. There is no £20 penalty. There is no provision for proceedings for penalty in a court. The penalty is a fixed penalty of treble tax, not a maximum within which the commissioners have a discretion to operate. Lastly, if the fraud is discovered before any tax is imposed, the penalty is treble tax. Only where tax has been already charged does the taxpayer escape with treble tax measured by what he has fraudulently concealed. It may be doubted whether this section shows any leniency to the fraudulent taxpayer as contrasted with the treatment accorded to a neglectful taxpayer under s. 25. The restricted penalty imposed by the proviso, limited though it be by the amount fraudulently undisclosed, may be a very heavy penalty as compared with a discretionary penalty that the commissioners are entitled to impose under s. 25. Only in contrast with the penalty imposed by a court under s. 25 can it be said that the fraudulent taxpayer who comes under the proviso may escape relatively lightly. That is undoubtedly an anomaly. But it would seem to be no greater an anomaly than that accorded to two fraudulent taxpayers under s. 48 itself, according as an assessment has already been made on one and not on the other, a difference in treatment which I confess I find it difficult to understand. Whatever anomalies exist between s. 25 and s. 48, these provide no ground for reading into s. 25 (3) (a) the proviso to s. 48 (1), as the Court of Appeal in effect would seek to do, with the result incidentally of repeating in the case of neglectful taxpayers the anomaly already observed to exist as between fraudulent taxpayers. The reference in the section to " the charge which ought to have been made " as contrasted with the words " the tax which he ought to be charged " in s. 25 (3) raises another question which seems to me to lead nowhere. It would, I think, make no real difference if the words of s. 25 were substituted for the words in s. 48 so far as the meaning of s. 48 was concerned. Section 49 provides another variation of a penalty clause. It applies only to charges to tax under Sch. D. The words " not exceeding " reappear in this section. The penalty in the circumstances to which the provisions of the section apply is a sum not exceeding treble the tax on the amount the taxpayer has omitted to return. Again, there is no question of a £20 penalty.

Lastly, I come to para. 4 of Sch. 6. It runs as follows:—

> " 4.—(1) A person who, in making a claim for or obtaining any relief to which this schedule relates, or in obtaining any certificate as aforesaid— (a) is guilty of any fraud or contrivance; or (b) fraudulently conceals or untruly declares any income or any sum which he has charged against

> or deducted from, or was entitled to charge against or to deduct from, another person; or (c) fraudulently makes a second claim for the same cause, shall forfeit the sum of £20 and treble the tax chargeable in respect of all the sources of his income as if such claim had not been allowed.
>
> "(2) A person who knowingly and wilfully aids or abets any person in committing an offence under this paragraph shall forfeit the sum of £500."

Here your Lordships find a further variation of penalty in cases of fraudulent claims for relief, reflecting often relatively small results in the matter of tax liability. The penalty here is the severest of all. The £20 penalty makes its appearance again; treble tax is mandatory; and it is imposed "in respect of all the sources of his income as if such claim had not been allowed". It is thus not limited as in s. 18, s. 25 and s. 48 to income subject to direct assessment.

I have referred to these sections because they all disclose in the circumstances to which they apply a variety of penalties which present no intelligible pattern and which, in relation to one another, seem often highly inequitable. Nor does the general power of mitigation vested in the Commissioners of Inland Revenue and the Treasury by s. 500, in my opinion, really affect this result. The survey of these sections has, I think, this relevance to the subject-matter of this appeal. It shows that it is impossible to argue from one penalty section to another or to infer because of illogicalities between different sections, or inequitable results that may follow from a particular construction, that, therefore, the legislature cannot have meant what the words of s. 25 (3) plainly say. I would add that these sections have an ancient lineage dating back more than 150 years and show very little essential change in that period. Section 25 (3) shows a greater number of changes evolved during that period, but, in spite of opportunities thus afforded, Parliament has not thought fit to make any substantial change, apart from quantum of penalty, in the form of language by which the penalty was imposed from at least 1805.

In conclusion I would say a word about the effect of s. 25 on certain sections of the Act to which it applies. These are notably s. 21 to s. 23 and s. 27 to s. 29 inclusive. The results in the view of the Court of Appeal were so startling as to play a large part in their reaching a construction of s. 25 (3) that would enable them to escape the rigour of a literal construction of its words. For the reasons which I have given, I think, on any view of its effect on the sections in question, that escape would be impossible. But it is a question whether any talk of escape is necessary. In any case in which it was necessary to consider the matter, I would wish to hear argument on two points. First, whether the impact of s. 25 on sections like s. 21 and s. 22 affects tax on the income of any person other than the constituent in respect of whose income a return is made by a person in a representative or quasi-representative capacity. Secondly, whether when a return is made under such sections as s. 23, s. 27 or s. 29, which are not concerned with returns of income but with lists of names of persons who may be chargeable to tax in respect, inter alia, of payments made by the person responsible for the return, there is any basis for a penalty under s. 25 other than that of the fixed penalty of £20. In other words, whether there is any income covered by the subject-matter of the return in respect of which it can be said that the person making the return "ought to be charged to tax under this Act". These are incidental matters which cropped up in the course of the argument before this House, and which, on the view taken by the Court of Appeal of resulting personal chargeability, seem to have weighed heavily with the court. I say no more about these two questions which on any view can, in my opinion, have no effect on this case.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitor: *Solicitor of Inland Revenue.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

OLDFIELD *v.* NATIONAL ASSISTANCE BOARD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Ashworth, JJ.), February 4, 1960.]

Affiliation —Affiliation order—Order not an affiliation order unless it contains direction for payment of money—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 29), *s.* 44 (2)—*Affiliation Proceedings Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 55), *s.* 4.

In s. 44 (2) of the National Assistance Act, 1948, which enables the National Assistance Board " if no affiliation order is in force " to apply for a summons the words " affiliation order " are confined to an order that includes an order for the payment of money (see p. 528, letter E, post).

A mother made an application under s. 3 of the Bastardy Laws Amendment Act, 1872, on Nov. 12, 1956. Paternity was not disputed and the father, O., was willing to pay the mother £100, which she was willing to accept, and which he intended should release him from all further payment for the child. The justices adjudged O. to be the father and by consent made no order for any money payment other than court costs of 10s. 6d. Assistance having been given in 1959 by reference to the child's requirements the National Assistance Board preferred a complaint against O. The complaint was heard on Mar. 16, 1959, when, pursuant to s. 44 (2) of the National Assistance Act, 1948, and s. 1 of the Affiliation Proceedings Act, 1957, the justices ordered O. to pay 25s. a week to the board until the child was sixteen. The father appealed on the ground that there was already an affiliation order in force.

Held: the order of Nov. 12, 1956, was not an affiliation order because it contained no order for payment of money, and accordingly the justices' order of Mar. 16, 1959, should stand.

Appeal dismissed.

[As to maintenance by a father, see 3 HALSBURY'S LAWS (3rd Edn.) 108, para. 168; and as to affiliation proceedings by the National Assistance Board, see ibid., 112, 113, paras 173, 174 and p. 128, para. 200; and 27 HALSBURY'S LAWS (3rd Edn.) 489, paras. 969, 970.

For the Bastardy Laws Amendment Act, 1872, s. 4, see 2 HALSBURY'S STATUTES (2nd Edn.) 480; and for the Affiliation Orders Act, 1914, s. 7, see ibid., 490.

For the National Assistance Act, 1948, s. 44, see 16 HALSBURY'S STATUTES (2nd Edn.) 970.

For the Affiliation Proceedings Act, 1957, s. 1, s. 4 and s. 12 (3), see 37 HALSBURY'S STATUTES (2nd Edn.) 37, 40 and 48.]

Case referred to:

Williams v. *Davies*, (1883), 11 Q.B.D. 74; 52 L.J.M.C. 87; 47 J.P. 581; 3 Digest 401, *347*.

Case Stated.

This was an appeal by Case Stated by the justices for the county of Lancaster and for the petty sessional division of Fylde in respect of their adjudication as a magistrates' court sitting at Lytham. On Feb. 7, 1959, a complaint was preferred by the respondents, the National Assistance Board, against the appellant, James Terence Oldfield, stating that he was the father of an illegitimate child born on May 11, 1956. Assistance having been given under Part 2 of the National Assistance Act, 1948, on Jan. 19, 1959, and other days, by reference to the requirements of the child, pursuant to s. 44 (2) of the Act the board applied for a summons to be served on the appellant under s. 3 of the Bastardy Laws Amendment Act, 1872. In accordance with s. 12 (3) of the Affiliation Proceedings Act, 1957, the justices treated the application as an application for a summons under s. 1 of that Act. The complaint was heard on Mar. 16, 1959, when the following facts were found. On May 11, 1956, the child was born. On Nov. 12, 1956, the justices sitting at Lytham heard a complaint made by the mother under s. 3 of the Bastardy Laws Amendment Act, 1872, when counsel for the appellant stated that the parties had consented to an order being made in favour of the mother in terms that the appellant should pay her the sum of £100 and that an order should be made without weekly payments. As a consequence of the statement, the justices adjudged the appellant to be the putative father of the child and the following entry was made in the court register:

> " Name of complainant, (the mother). Name of defendant, Jas. Oldfield. Matter of complaint. Bastardy. Minute of adjudication. Order made. No weekly payment. 10s. 6d. court costs."

The notes of evidence taken by the clerk to the justices at the time read:

> " Mother (S.). Child born 11.5.56. Single woman. Defendant, father. Ask for order without payment for £100. Counsel agrees no corroboration required. Order by consent. Order that defendant is father of child. No money payment to be made."

The appellant paid the sum of £100 to the mother on or about Nov. 12, 1956, with the intention that this payment should release him from all further liability to maintain the child. Assistance was paid by the respondents by reference to the requirements of the child on Jan. 19, 1959, and divers other days. The appellant was the father of the child (the evidence of the mother having been corroborated in a material particular by other evidence to their satisfaction).

It was contended for the appellant that the previous proceedings before the justices pursuant to s. 3 of the Bastardy Laws Amendment Act, 1872, and the order made thereon on Nov. 12, 1956, barred subsequent proceedings, there being an affiliation order in force within the intent of s. 44 (2) of the National Assistance Act, 1948. The order made by the justices on Nov. 12, 1956, was an order made on a complaint pursuant to the Bastardy Laws Amendment Act, 1872. The justices' jurisdiction in such proceedings to make an order (as opposed to a finding of paternity) was a jurisdiction to make an affiliation order within that Act and whether or not the order that the justices in fact made was such an affiliation order the justices did not thereafter have jurisdiction to deny it was such an order or have jurisdiction to vary, interpret or otherwise reconsider the effect of that order as being otherwise than an affiliation order within the intent of s. 44 (2) of the National Assistance Act, 1948. By virtue of the decision in *Williams* v. *Davies**, the justices might not adjudicate a second time as to the paternity of the child at the suit of the respondents having done so at the suit of the mother.

It was contended by the respondents that the words " affiliation order " in s. 44 (2) of the National Assistance Act, 1948, refer to an order made under the Affiliation Proceedings Act, 1957 (or the Bastardy Laws Amendment Act, 1872), requiring a person against whom an adjudication of paternity has been made to pay (i) a sum of money weekly for the maintenance and education of the child; or (ii) a sum in respect of the expenses incidental to the birth of the child; or (iii) the child's funeral expenses when the child has died before the making of the order. That the justices had jurisdiction to hear and determine the complaint and in particular to make an adjudication of paternity followed by such order referred to in s. 4 (2) of the Affiliation Proceedings Act, 1957, as they might think fit in all the circumstances of the case. That the order made by the magistrates' court on Nov. 12, 1956, did not exhaust the jurisdiction of a magistrates' court under s. 44 (2) of the National Assistance Act, 1948, as regards the respondents, who were not a party to the previous proceedings and whose right to apply for an order under the Affiliation Proceedings Act, 1957, was a separate and distinct right and not co-extensive with any right enabling the mother to institute affiliation proceedings. That the fact that a magistrates' court had made a previous adjudication of paternity against the appellant in respect of the child on complaint made by the child's mother did not preclude the justices from making a second adjudication against the appellant in respect of the child in proceedings by the respondents under s. 44 (2) of the National Assistance Act, 1948. That the effect of the previous adjudication of paternity made on the mother's complaint irrevocably determined the status of the appellant in relation to the child so that the justices must on hearing evidence in accordance with the provisions of s. 4 of the Affiliation Proceedings Act, 1957, adjudge the appellant to be the putative father of the child. That the appellant was estopped by reason of the prior adjudication of paternity from denying that he was the putative father of the child. That even if the justices disregarded altogether the evidence tendered by the respondents as to the proceedings on Nov. 12, 1956, and the adjudication made thereon, there was other evidence tendered by the respondents in support of the complaint sufficient in law to justify an adjudication of paternity against the appellant.

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* **(1883), 11 Q.B.D. 74.**

The justices were of opinion that no affiliation order was in force within the meaning of these words in s. 44 (2) of the National Assistance Act, 1948, by reason of the wording of s. 4 of the Bastardy Laws Amendment Act, 1872 (the relevant statute in force on Nov. 12, 1956) which conferred jurisdiction on justices to adjudicate on the paternity, and, if the justices saw fit, to make an order for payment of a weekly sum and certain expenses. The award of costs on Nov. 12, 1956, was made under s. 55 of the Magistrates' Courts Act, 1952, Sch. 6 of which repealed that part of s. 4 of the Act of 1872 which, prior to June 1, 1953, had contained the power to award costs; and thus, in the opinion of the justices, did not affect the question whether an affiliation order was in force. *Williams* v. *Davies**, did not apply because the justices were of opinion that no affiliation order was in force. The appellant was the father of the child and they accordingly ordered that the appellant should pay the weekly sum of 25s. to the respondents until the child should attain the age of sixteen years. The question for the opinion of the court was whether the justices were correct in law in assuming jurisdiction to hear the complaint of Feb. 7, 1959, in deciding that as a matter of law no affiliation order within the meaning of s. 44 (2) of the National Assistance Act, 1948, was in force; in hearing evidence from the appellant to the effect that he was not the father of the child despite the adjudication of Nov. 12, 1956, to the effect that he was the putative father of the child, and in deciding that *Williams* v. *Davies** did not apply to the complaint so as to prevent them from adjudging the appellant to be the putative father of the child.

D. H. Wild for the appellant.

J. R. Cumming-Bruce for the respondents.

LORD PARKER, C.J.: This is an appeal by way of Case Stated by justices for the County of Lancaster sitting at Lytham, before whom a complaint was preferred by the respondents, the National Assistance Board, against the appellant, alleging that he was the father of a certain illegitimate child. The justices heard the complaint. They heard evidence on the part of the mother, and they heard the evidence of the appellant, who contested the issue. They found, and the finding as such is not challenged, that the appellant was the father of the child, and they ordered that he should pay the weekly sum of 25s. to the respondents direct until the said child should attain the age of sixteen years. It is said that the justices were wrong, for reasons to which I will refer in a moment.

The powers of the National Assistance Board in this regard are to be found in s. 44 of the National Assistance Act, 1948. Speaking quite generally for the moment, where assistance has been given under the Act by reference to the requirements of an illegitimate child, the National Assistance Board have power to make the putative father pay towards the requirements of that child. Power is given by sub-s. (6) of s. 44 to apply to the court to have an order, which has already been made, varied so that instead of the money being paid by the putative father to the mother it shall be paid direct to the National Assistance Board. Under sub-s. (5) power is given to intervene in any proceedings brought by the mother in order to provide that any payments which she would otherwise get are paid direct to the National Assistance Board, and under the group of sub-ss. (2), (3) and (4) power is given to the board themselves to take proceedings against a man alleging that he is the putative father and to obtain the order which the mother might have obtained. Subsection (2), which is the important subsection for the purposes of this case, reads as follows:

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* (1883), 11 Q.B.D. 74.

> " If no affiliation order is in force, the board or local authority may within three years from the time when the assistance was given or accommodation provided make application to a court of summary jurisdiction having jurisdiction in the place where the mother of the child resides for a summons to be served under s. 3 of the Bastardy Laws Amendment Act, 1872."

The opening words are " If no affiliation order is in force ", and the sole issue with which the court is now concerned is as to the meaning of the two words " affiliation order " in that subsection. That issue arises for this reason. On Nov. 12, 1956, a long time before the present complaint, an application was made by the mother under s. 3 of the Bastardy Laws Amendment Act, 1872, and the justices adjudged that the appellant was the father of her child. The father was prepared to pay £100, and the mother was prepared to accept it, and the justices, having been told that, merely adjudged that the defendant, the present appellant, was the father of the child, and they made no order for any money payment other than the court costs of 10s. 6d. The father thereafter paid the mother the £100, and the question is whether the order the justices so made on Nov. 12, 1956, was an affiliation order. If it was, then the National Assistance Board have no power under s. 44 to obtain the order which they did from the justices at Lytham.

It is convenient, I think, to look first at s. 4 of the Bastardy Laws Amendment Act, 1872, (1). I will not read it all, but it is enough to say that on certain evidence being given and the justices being satisfied, they might adjudge the defendant to be the putative father of the bastard child. That was the first step, and then s. 4 continued: ". . . and they may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother . . ." Pausing there, two steps were envisaged; the first was the adjudication that the man was the putative father, and the second, if the justices think fit, was an order for the payment of money. The Affiliation Orders Act, 1914, s. 7, defined " affiliation order "; true, it was a definition made for the purposes of that Act. It read (1):

> " In this Act, unless the context otherwise requires the expression ' affiliation order ' means an order made under the Bastardy Laws Amendment Act, 1872, or any Act amending the same, adjudging a man to be the putative father of a bastard child and ordering him to pay a sum of money weekly or otherwise to the mother . . ."

Finally, by the Affiliation Proceedings Act, 1957, which was a consolidating Act made under the Consolidation of Enactments (Procedure) Act, 1949, it was provided by s. 4 (2):

> " If the evidence of the mother is corroborated in some material particular by other evidence to the court's satisfaction, the court may adjudge the defendant to be the putative father of the child and may also, if it thinks fit

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(1) Since repealed by the Affiliation Proceedings Act, 1957, s. 12 and schedule.

> in all the circumstances of the case, proceed to make against him an order (referred to in this Act as 'an affiliation order') for the payment by him of . . ." A

money and expenses and the like.

In all those three Acts the words used are a little different. As will be seen, in the Act of 1872 there is no definition but it was contemplated that there should be, as it were, two stages, an adjudication and then what is called an order for the B payment of money. In the Act of 1914, the adjudication and the order for the payment of money are together treated as the affiliation order, and in the Affiliation Proceedings Act, 1957, the order for the payment of money alone is treated as the affiliation order. For my part, however, the significant fact is that under all those three statutes adjudication alone is not an order. That being so, the next step is to look at the context in which these words are used. Section 44 C of the National Assistance Act, 1948, is a financial section providing for the collecting of money by the National Assistance Board. One would think that "affiliation order" in such a section must mean an order which was more than the mere adjudication of a man as the putative father, and was one which provided for the payment of money. The words "is in force", in my judgment assist that contention. It would be easy otherwise to say that the board might D make an application for a summons to be served (2) against any man who had not been adjudged to be the putative father. That is not, however, the scheme; the scheme is that an application can be made if no affiliation order is in force, and by that, I think, is meant no order for the payment of money. If one looks at the structure of s. 44, it seems to me that that is borne out, and for that reason coupled with the significance which I attach to the fact that in all the E three Acts to which I have referred adjudication alone is nowhere treated as an order, I think that "affiliation order" in s. 44 (2) is confined to an order for the payment of money. In the present case, as I have already said, there was no order for the payment of money made in 1956. Accordingly, an application did lie under s. 44 (2). That application was heard by the justices; they dealt with all the evidence, as they had to pursuant to s. 44 (3), and they adjudged, as I F have already said, that the appellant was the father and ordered him to pay 25s. a week to the respondents. In my judgment, the justices were right, and this appeal should be dismissed.

CASSELS, J.: I agree.

ASHWORTH, J.: I also agree. G

Appeal dismissed.

Solicitors: *Bower, Cotton & Bower*, agents for *George Davies & Co.*, Manchester (for the appellant); *Solicitor, National Assistance Board* (for the respondents).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(2) Viz., now, served under s. 1 of the Affiliation Proceedings Act, 1957, see ibid., s. 12 (3).

PEPPER *v.* PEPPER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Collingwood, J.), January 18, 1960.]

Magistrates—Husband and wife—Maintenance order—Variation—Order for maintenance of wife and child—Birth of another child—Attachment of earnings order made against husband—Husband's earnings reduced—Whether magistrates on wife's complaint to increase order can reduce maintenance to husband's "normal deduction rate" under Maintenance Orders Act, 1958 (6 *&* 7 *Eliz.* 2 *c.* 39), *s.* 6 (3)—*Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

On Feb. 12, 1959, the justices found that the husband had deserted the wife and ordered him to pay £5 10s. a week to the wife (namely, £3 10s. for her maintenance and £1 each for the two children of the marriage of whom she had custody). On July 18, 1959, the wife gave birth to a third child of whom the husband was the father. The husband having fallen into arrears with his payments, the justices on Aug. 11, 1959, on the wife's complaint, made an order for the attachment of the husband's earnings under the Maintenance Orders Act, 1958, and assessed the husband's "normal deduction rate" under that Act at £2 10s. a week. On Aug. 13, 1959, the justices heard an application by the wife to vary the original order and increase the sum paid to her because the third child had been born. There was no cross-application by the husband to reduce the amount of maintenance. The justices made an order reducing the weekly payment by the husband to the wife to £2 10s. (namely, £1 in respect of her maintenance and 10s. for each of the three children), basing their order on the "normal deduction rate" figure determined on Aug. 11, 1959. On appeal by the wife,

Held: that the justices had no jurisdiction to vary the order without having before them a cross-complaint by the husband for a reduction of the amount of maintenance, on which cross-complaint his evidence could be tested.

Trathan v. *Trathan* ([1955] 2 All E.R. 701) applied.

Per LORD MERRIMAN, P.: (i) a finding under the procedure for attachment of earnings is not necessarily binding in proceedings for variation of the maintenance order under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895 (see p. 533, letter I, post).

(ii) on an application for attachment of earnings the court has no right to consider the potential earnings of the defendant in some other occupation than that in which he earns the remuneration that it is sought to attach (see p. 534, letter I, to p. 535, letter A, post).

Appeal allowed.

[As to the variation of maintenance orders, see 12 HALSBURY'S LAWS (3rd Edn.) 491-493, para. 1091; and for cases on the subject, see 27 DIGEST (Repl.) 726, 727, *6934-6941*, 728, *6947-6948* and 3rd DIGEST Supp.

For the Summary Jurisdiction (Married Women) Act, 1895, s. 7, see 11 HALSBURY'S STATUTES (2nd Edn.) 852.

For the Maintenance Orders Act, 1958, s. 6 (3), see 38 HALSBURY'S STATUTES (2nd Edn.) 461.]

Cases referred to:

Bowen v. *Bowen*, [1958] 1 All E.R. 770; 122 J.P. 202; [1958] 1 W.L.R. 508; 3rd Digest Supp.

Trathan v. *Trathan*, [1955] 2 All E.R. 701; 119 J.P. 451; [1955] 1 W.L.R. 805; 3rd Digest Supp.

Appeal.

The wife, Iris Joan Pepper, appealed against an order of the Melton Mowbray justices dated Aug. 13, 1959, whereby they varied an order made in the wife's favour on Feb. 12, 1959, reducing the sum of £5 10s. a week which the husband, James Henry Pepper, had been ordered to pay under the original order (namely, £3 10s. a week for the wife's maintenance and £1 a week each for the then two children of the marriage) to £2 10s. a week (namely, £1 a week for the wife's maintenance and 10s. a week for each of the now three children of the marriage), that sum being the " normal deduction rate " under an attachment order made by justices of the same division on Aug. 11, 1959, under the Maintenance Orders Act, 1958.

The facts and the justices' reasons are set out in the judgment of LORD MERRIMAN, P. (see pp. 532, 533, post).

B. Woods for the wife.

G. D. Lane for the husband.

LORD MERRIMAN, P.: This is a wife's appeal against the decision of the justices for the Melton Mowbray petty sessional division of Leicestershire, given on Aug. 13, 1959, when they had before them a complaint by the wife to vary an earlier order, obtained before the said court on Feb. 12, 1959, based on the husband's desertion and adultery, for £3 10s. a week, and custody of the two children of the marriage as there then were, with maintenance at the rate of £1 a week in respect of each child, a total of £5 10s. Her complaint to vary that order was specifically limited to the following points, that on July 18, 1959, she had given birth to a third child of whom the husband was the father, and she therefore applied for a variation giving the custody to her and for an unspecified sum for maintenance of that child. That, and that alone, was the issue expressly raised by the wife's complaint.

On that, of course, the magistrates could have found, if it was so contended—but it was not—that the husband was not the father of the child, and that the child was not, therefore, to be dealt with under the Summary Jurisdiction (Married Women) Act, 1895, at all, or they could have found, as they did, that the child was the child of the husband, but nevertheless, for some reason or another, could have refused to give the wife the custody—needless to say, they did not. They gave the wife the custody, and then there arose the question of the maintenance of the child. Now, manifestly they were not bound by any previous figure which had been assessed in respect of the other children; the amount would be at large. They could award a purely nominal amount, or any amount within the permitted range, for this young child, and that, I think, as regards the form of the proceedings, was all that was in issue before the magistrates.

What they have done is something quite different. They have proceeded to re-assess the amount payable to the wife and reduced it from £3 10s. to £1, and they have re-assessed the amount in respect of the first two children and reduced it from £1 to 10s., and they have awarded the sum of 10s. also in respect of the third child, of whom custody was given to the wife. The wife's objection to this order is that on a complaint to vary by adding the latest child the magistrates, without any cross-complaint on the part of the husband at all, have entirely reconstituted the original order. Of course, to the original order some variation is essential if you are adding a third child; but the question is, as I see it, whether the magistrates had any jurisdiction without a cross-complaint by the husband to alter the whole basis of the order so far as the wife and the other two children are concerned.

Now, it is said (and I am going to put it in the most extreme form in which it has been put before us) that if application is made to vary an order under s. 7 of the Act of 1895, or, to put it in concrete form, if the wife applies, as she did in this case, to add an additional figure, namely, for the third child, to the original order, it follows from this that magistrates may increase or diminish the amount of any weekly payment ordered to be made as long as they stay within the limits. I do not think that is the effect of the section, in that bald form, and I certainly do not think that when an application to vary is of a specific kind and for the express reason that a third child has been born, that automatically imports the right to tear up the original order and re-write it altogether. For my part I think that this is a matter which this court has already decided, and I propose to hold that we are bound by the original decision. In *Trathan* v. *Trathan* (1), DAVIES, J., and I sitting in this court took what we thought was the strict view, and, if I may, I will read one passage from my own judgment, which was repeated, incidentally, in the later case of *Bowen* v. *Bowen* (2). The actual point in *Trathan* v. *Trathan* (1) was that on an application to vary the magistrates had taken on themselves the right to discharge the order, and, in that case I said (3):

> " It is plain on the face of s. 7 itself that separate issues would be raised, and under the Magistrates' Courts Act, 1952, s. 43, as under the Summary Jurisdiction Act, 1848, s. 1, there must be a complaint which alleges that there should be an alteration and on what ground; or alleges that there should be a variation and on what ground; or alleges that there should be a discharge, and again on what ground, though in that case at least the ground must be based ' upon fresh evidence '."

That was, of course, to draw the distinction between complaints which are merely for variation of amount—with regard to which I need only say that it is common knowledge that the requirement of the words " upon fresh evidence " has been removed (4)—and those cases in which a discharge would almost necessarily involve the calling of fresh evidence. So here, this is a case which can only be brought on fresh evidence, because it is the subsequent birth of the child since the order was made which entitled the wife to ask for the particular variation. But it is said that DAVIES, J., who agreed absolutely with my judgment and said so, has said, in a passage which I am going to read in a moment, something which affords authority for the view that on any sort of application to vary, anything may be done by way of variation one way or the other. DAVIES, J., said (5):

> " For the reasons which LORD MERRIMAN, P., has given I agree that on an application by a wife for an increase of the amount payable under an order the court has no power, unless proper steps by a cross-summons are taken, to entertain an application to discharge that order. I do not think it is necessary to repeat the reasons that my Lord has given, or to examine the statutes. I should like to add one observation. Speaking for myself, I do not think it is necessary to decide, for the purposes of this appeal, whether on an application to increase the amount of an order, the court has power to decrease it. I do not desire to express any view about that, as I do not think that it is necessary for the purposes of this decision. For we are here concerned with a case where the justices on an application to increase have purported to entertain an application to discharge, and for the reasons that my Lord has given I am satisfied that that is wrong."

It seems to me that that passage, right or wrong, is a very long way from affording any authority for the sort of case with which we are dealing here, which, I repeat, is an application to vary because of the " fresh evidence " that a child has subsequently been born, and which is said to give justices the opportunity to revise the whole order—maintenance for the wife, maintenance in respect of the other children, and, presumably, to alter the custody order in respect of the other children if they thought fit to do so.

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(1) [1955] 2 All E.R. 701.

(2) [1958] 1 All E.R. 770.

(3) [1955] 2 All E.R. at p. 707.

(4) Fresh evidence is not required as a condition of the exercise of the power conferred on a magistrates' court by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to increase or diminish the amount of a weekly payment (Money Payments (Justices Procedure) Act, 1935, s. 9).

(5) [1955] 2 All E.R. at p. 708.

I do not agree, and I think that we are bound by the decision in *Trathan* v. *Trathan* (6) to hold that that point is not a good one.

I am now bound to deal with the intervening history between the making of the original order and the order against which appeal is brought, and I must say that I feel very considerable doubt about it, first of all because, as far as I can see, some of the considerations which have been urged before us about it were never even gone into before the magistrates, and because it involves consideration, so far as I know for the first time, of the Maintenance Orders Act, 1958. This case has indeed had rather a chequered history during the last twelve months. The original order, as I said, was made on Feb. 12, 1959. At that time the husband was a bus driver said to be earning £11 a week or thereabouts, and on that sort of evidence there was nothing particularly startling about an order which between the wife and the two children came to something like £5 10s. I presume that the magistrates on that occasion took into account the fact that, so far as we are given to understand, the man was even then living, and still is, with the woman with whom he was charged with adultery. The additional fact has been brought out parenthetically that a child was about to be born, but even that fact, so far as we know, was not known to the magistrates. However, for one reason or another—and I am not going to attempt to judge which of the two versions is correct—the man gave up his earnings as a bus driver and took employment as a farm worker. That had an advantage and a disadvantage. The disadvantage was that the wage was the agricultural wage, which is considerably less than a bus driver's wage; the advantage was that with the employment went a tied cottage, where he and his paramour have apparently since been living.

In due course the husband, on Apr. 21, 1959, made an application to reduce, on the ground that his wages were now only £7 6s. 1d. net which he was earning as a farm worker, and he also applied for the remission of a certain sum off whatever was the amount of the arrears at the time, which we have not been told exactly. That application, as I understand it, in both branches was dismissed. Undeterred by that dismissal on Apr. 21, 1959, on Apr. 29, 1959, he applied again with a complaint to reduce. That was adjourned from May 5, 1959, to May 12, 1959, and was likewise dismissed, and it is necessary to bear in mind that the court must have had before them at the time the fact that he was still in this farm work and had not resumed his work as a bus driver. We are given to understand, though we have not had the notes before us, that it was contended on the part of the wife that he had the potential earnings of a bus driver as against the actual earnings of a farm worker; but that is as it may be.

Then, on July 18, 1959, the third child was born, and on Aug. 7, 1959, the wife made her complaint, the substance of which I have already read, and the return date for which was Aug. 13, 1959. However, in the meanwhile, though precisely when I am not quite clear but I understand that it was on July 21, just after the child was born, the wife took out an ordinary enforcement summons for committal of the husband in respect of arrears, which were just under £60. The return date for that was July 28, but on the suggestion of the magistrates' clerk that complaint for enforcement was apparently dropped, and a complaint was taken out for enforcement under the " attachment of earnings " procedure under the Maintenance Orders Act, 1958. That complaint came on, oddly enough, two days before the case with which we are directly concerned, namely, on Aug. 11, 1959, and on that occasion the magistrates, as they were bound to do, went into the two factors which have to be considered under the procedure for attachment of earnings (7).

The two factors are these:— first of all, what is the figure for what are called " protected earnings "? I will read the definition of " protected earnings " in a moment. It means, putting it shortly, what the man is entitled to keep for himself and anyone for whom he is responsible; and secondly, what is the " normal deduction rate ", meaning the amount which the employer should be ordered to deduct and pay over to the wife, or, in this case, to the collector for the court, in respect of the amount of what is called the " related maintenance order ", in other words, the order which it is sought to enforce and also any sum in respect of the payment of arrears which may be decided on.

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(6) [1955] 2 All E.R. 701.

(7) See Schedule to the Maintenance Orders Act, 1958; 38 HALSBURY'S STATUTES (2nd Edn.) 475, 476.

The magistrates went into these figures on Aug. 11, 1959. They heard evidence which in substance agreed with what the husband was putting forward when he asked for a variation in his favour in April, 1959, that the gross wages were £7 16s. and the net £7 6s. 1d. Having ascertained that figure, the question then was what was to be the proportion of that figure which was to be " protected earnings " and what was to be the " normal deduction rate ", and they found that the " protected earnings " were to be £4 16s. 1d. and the " normal deduction rate " £2 10s. So far so good. I will deal with the detail of that in a moment. This happened on Aug. 11. On Aug. 13, 1959 (we do not know whether the same magistrates sat on Aug. 11 and on Aug. 13), the magistrates proceeded, on the strength of being informed about the " protected earnings " and the net wages, to recast the original order so that it conformed to the " normal deduction rate ", and, varied the order for the wife down to £1, with 10s. in respect of each child, having in the meanwhile accepted the evidence that the child was the child of the husband and that there were therefore three children to be paid for instead of only two.

In my opinion, this procedure was quite irregular, because I am of opinion still, as we held in *Trathan* v. *Trathan* (8), that any order such as that required a cross-complaint on the part of the husband, of which it is admitted there was none. Secondly, even assuming that they had the technical right to act at all in connexion with the alteration of the original order in the sense that I have mentioned, I do not think that they had, strictly speaking, the right to do so merely on the strength of what they or some other magistrates had heard in connexion with the attachment of earnings order two days before. This matter must in any case go back to the justices so that they may have the questions at issue put on a proper basis. In other words, I think that the husband ought to issue a complaint for reduction of the order, in whatever sense he can make good by evidence, and his evidence must be subject to being tested.

Though I agree that there is some force in the argument, I am not convinced that there is an estoppel as between these two parties about the man's means merely because of the form the attachment of earnings order took two days before, but I do realise, and I think that this must be stated plainly, that a great deal of what I have said, if strictly accurate so far as the Act of Parliament is concerned, may prove to be more or less academic. I say so for this reason. On any ordinary application to vary either up or down, assuming the application to be supported by a proper complaint on proper grounds, the basic, though not the only, thing that has to be ascertained is what the means of the parties are. Now that the words " upon fresh evidence " are no longer applicable (9) in connexion with mere variations of amount, whether up or down, that is all that has to be ascertained. There is ample authority for that, which I do not propose to repeat. What is to be taken into account in the magistrates' court is, what the husband's earnings are, what his responsibilities are, whether the wife is earning money, and so forth, balancing one thing against another and arriving at a right figure.

I have said that in my opinion a finding under the attachment of earnings procedure is not necessarily binding on any such inquiry, but I am going to read the words governing the calculation of the " normal deduction rate " which appear in s. 6 (3) of the Maintenance Orders Act, 1958, namely:

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(8) [1955] 2 All E.R. 701.

(9) See note (4) p. 531, ante.

> " An attachment of earnings order shall—(a) specify the normal deduction rate, that is to say, the rate at which, after taking into account any right or liability of the defendant to deduct income tax from payments made under the related maintenance order, the court making or varying the attachment of earnings order thinks it reasonable that the earnings to which that order relates should be applied from time to time in satisfying the requirements of the maintenance order, not exceeding the rate appearing to that court to be necessary for the purpose of—(i) securing payment of the sums falling due from time to time under the maintenance order; and (ii) securing payment within a reasonable period of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order which are payable by the defendant."

Pausing there, I wish to reserve the point which has been taken which is said to be the subject of some other intended proceedings in this court, that in this case, seeing that the related order was for a total sum of £5 10s. as soon as the magistrates went into the figures and saw that only £2 10s. was going to be available at all—in passing, I mention that I know that it is suggested that they reserved the question of outstanding arrears to be dealt with on another occasion—it at once became apparent that any order which they might make would not secure " payment of the sums falling due from time to time under the maintenance order ", because by no known procedure can £2 10s. be made sufficient to pay £5 10s. or secure payment of the " sums already due and unpaid " under the maintenance order. I express no opinion on that until I have heard the point properly argued.

Under s. 6 (3) (b) of the Maintenance Orders Act, 1958, an attachment of earnings order must

> " specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide, the court aforesaid thinks it reasonable that the relevant earnings within the meaning of the schedule to this Act should not be reduced by a payment made in pursuance of the attachment of earnings order."

I stress the words " and the needs of persons . . ." to the end of the quotation. The " protected earnings rate " is the sum of £4 16s. 1d. at which the justices arrived under the attachment of earnings procedure. When it is said in arriving at that that they have had " regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide ", that seems to me to be something very like a definition of or at least a pointer to the various factors which a court should take into account in considering the means of the parties, and it is much too late in the day for any court to say " We only considered the husband and the wife. We ignored the claims of the second or unofficial wife and the second or unofficial family " as the case may be. It is too late in the day to say that the court shall take that rigid view, and therefore it seems to me that the words " for whom he must or reasonably may provide " would impel the court to consider the means of the parties, not, indeed, to prefer the paramour and her expected child to the needs of the wife and her children, but to take into account the fact, as was said, I think, in the Report of the Royal Commission on Marriage and Divorce (10) that there just is not the money to go round, and to find the fairest way that they can of apportioning the money. And that is why I say at the end of it all that when this rather tangled skein is sorted out and put on a regular basis the magistrates may get back very nearly to where we started with this, as I say, irregular order. But that is the inevitable result so long as this attachment of earnings order holds the field. I want to make it plain that I reject the suggestion that in an attachment of earnings case the magistrates have any right to consider the potential earnings of the defendant in some other occupation than that in which it is sought to attach his earnings. That will not do. The attachment of earnings procedure works by directing to a particular employer an order to pay out of the wages which he is paying to the husband in respect of a particular employment a specific sum either to or for the benefit of the wife, and in that calculation the question whether the husband has a potential capacity to earn greater wages does not come into the picture at all.

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(10) 1956, Cmd. 9678.

It may be that the proper course in this case, apart from putting the husband right in the way in which he can bring his side of the matter before the court, is that the wife may be advised, if it is possible, to get rid of this attachment of earnings order and go back to the ordinary enforcement procedure, and, if she is able, to base it not only on his actual earnings but on his potential earnings; but I express no opinion about that because it is not my business. It may be, and again I express no opinion, that although subsisting enforcement proceedings are got rid of by s. 8 of the Maintenance Orders Act, 1958, if she reverts to the procedure of ordinary enforcement, then that notice will vacate the attachment of earnings order, and the matter might then be dealt with on that basis. But, as I say, we have got so little real information about the way in which this matter stands from that point of view that I do not propose to lay down any dogmatic view on that subject.

I end, therefore, as I began, by saying that in my opinion in its present form this order cannot stand, and the wife's complaint must be remitted to the justices for the whole matter to be put in order, so far as it can be put in order, and dealt with on a proper basis.

COLLINGWOOD, J.: I agree. The only matter before the justices in this case was the wife's complaint dated Aug. 7, 1959, asking for an increase in the amount of maintenance payable to her by her husband.

The original order under which maintenance was payable was made on Feb. 12, 1959, and that order was made on the grounds of the husband's desertion and adultery for the payment of £3 10s. weekly to the wife and £1 weekly in respect of each of two children, a total of £5 10s. per week. The grounds on which the wife asked for an increase were these. On July 18, 1959, another child was born, and in her complaint of Aug. 7 the wife asked for an order for custody of that child, and also that maintenance should be payable to her by her husband for that child. On Aug. 13, 1959, the justices made an order which is the order from which this appeal is brought, and thereby they varied the original order by reducing the payment to the wife to £1 a week and they made an order in respect of each child, now three children, for 10s. a week, a total of £2 10s.

The reason which they put forward for making that order is this. Only two days before, before the same court (when I say the same court I do not mean the same justices, because they speak of their being informed of the matter) an order had been made for the attachment of the husband's earnings under the Maintenance Orders Act, 1958. That order had specified the "normal deduction rate" as £2 10s. a week, and the husband's "protected earnings" as £4 16s. 1d., these figures being based on the net earnings which the husband had put forward as being £7 6s. 1d. a week. What the justices have done, therefore, is to substitute the figures which they have found to be the proper figures on inquiry under the attachment order for the original order which the wife had obtained in February, 1959.

Now, counsel for the husband has urged before this court that that is within their powers, because once a wife asks for a variation that opens the door to justices to vary either up or down, just as they like, that they are not restricted to varying upwards, although that is the only thing the wife was asking for. If that is correct, what it involves, in my opinion, is that every application by a wife for an increase in maintenance imports an implied application by the husband to reduce, and vice versa. That is to say, without there being any necessity for A notice being given to the wife that such application is to be made she is faced with the possibility of a reduction. In my opinion that is not correct, and that it is not correct is clear, I think, from the judgment of LORD MERRIMAN, P., in *Trathan* v. *Trathan* (11), and I cannot see any justification for drawing the conclusion which counsel for the husband would have us draw from the reservation made by DAVIES, J., in his judgment in that case (12). B

In my opinion the justices were mistaken in the course which they took here. They had no power to vary the order in the way in which they did on the application which was then before them, and I agree that the case should be remitted as my Lord has said.

LORD MERRIMAN, P.: The appeal is allowed, and the order set aside C save as to custody of the third child, the wife's complaint is remitted to a fresh panel of the justices for the Melton Mowbray petty sessional division, and the husband is to have leave to make at the time any cross-complaint that he may be advised to make.

Appeal allowed. Order accordingly.

Solicitors: *Barradale, Blacket Gill, Silkin & Young*, agents for *Latham, New &* D *Smyth*, Melton Mowbray (for the wife); *Dawson & Co.*, agents for *H. P. Rushton*, Grantham (for the husband).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

E

NOTE.

Re WRING. Re COOK.

F

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., and Donovan, J.), February 9, 1960.]

Habeas Corpus—Practice—Application for habeas corpus in criminal matter—Application by person in execution—Right of applicant to be heard in person.

[**Editorial Note.** In so far as the present case establishes that an application G for a writ of habeas corpus may not be made in person it re-establishes a long-standing practice prior to *Practice Note*, [1947] W.N. 218, which extended to prerogative writs in terms. The practice stated in that note and followed in *R.* v. *Staff Sub-Committee etc.* ([1956] 1 All E.R. 753) is accordingly confined to applications for prerogative orders.

As to purposes for which a writ of habeas corpus will not be granted, see 11 H HALSBURY'S LAWS (3rd Edn.) 35, 36, paras. 62, 63.

As to applications which only counsel can make, see 3 HALSBURY'S LAWS (3rd Edn.) 18, para. 22, and 11 HALSBURY'S LAWS (3rd Edn.) 37, para. 66.]

Cases referred to:

Featherstone, Re, (1953), 37 Cr. App. Rep. 146; 3rd Digest Supp.

Greene, Re, (1941), 57 T.L.R. 533; 2nd Digest Supp. I

Motions for habeas corpus.

The applicants, Bryan John Wring and Albert Samuel John Cook, applied in person for writs of habeas corpus. Each of the applicants was serving a sentence of imprisonment passed on him by a court of competent jurisdiction and each claimed that the sentence was invalid and that he was, therefore, unlawfully detained. The applications were made, in the first instance, by letters to the

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(11) [1955] 2 All E.R., see at pp. 703-707.

(12) [1955] 2 All E.R. at p. 708.

A court, but neither of the applicants had made an affidavit in support of his application.

The applicants appeared in person.

LORD PARKER, C.J.: The court has considered these two applications made by prisoners in person for habeas corpus. The court is quite clear that there is nothing in the grounds raised which would enable this court to make the B order.

The court would like to take this opportunity of setting out the position in regard to these applications. The Divisional Court of the Queen's Bench Division has repeatedly stated that habeas corpus is not to be regarded as a means of appeal against conviction or sentence. As the court stated in *Re Featherstone* (1):

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> "The court does not grant, and cannot grant, writs of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner was being held after the term of the sentence D passed on him had expired."

Accordingly, a prisoner who wishes to challenge either his conviction or his sentence, should apply to the Court of Criminal Appeal or to quarter sessions, as the case may be. If the prisoner none the less persists in his desire to apply for habeas corpus, the courses open to him are: (a) to consult a solicitor about the possibility of instructing counsel to make an application on his behalf; or E (b) to ask someone to make an application for him or arrange for one to be made, and in either case to swear the necessary affidavit; or (c) to apply to the local committee of the Law Society for legal aid for the purpose of making an application.

There is no right of access to the Divisional Court otherwise than by the means described above. As a concession, however, the court is prepared to F consider any written statement by the prisoner setting out the grounds on which he considers that he is unlawfully detained and sent by letter to the Master of the Crown Office. This is not an application, since it is not in accordance with the Supreme Court Rules, but the Divisional Court (or in vacation the vacation judge) does, as a matter of practice, consider the letter and statement in order to see whether the prisoner has an arguable point. If he has, the court arranges G for the Official Solicitor to instruct counsel to make a formal application under the rules on the prisoner's behalf. If the court is of opinion that there is no arguable point, the prisoner is informed that the court sees no reason to depart from the formal procedure, leaving it to the prisoner to proceed in accordance with the rules. Prisoners will not be permitted to make such an informal approach more than once.

H The Divisional Court has ruled that no applicant for a writ of habeas corpus can be heard in person unless some exceptional ground is shown for departure from the established practice. Compare *Re Greene* (2). A prisoner, therefore, is not produced for the purpose of making an application in person unless the court so directs. As I have said, these applications are refused.

DONOVAN, J.: I agree.

Applications dismissed.

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(1) (1953), 37 Cr. App. Rep. at p. 147, per LORD GODDARD, C.J.
(2) (1941), 57 T.L.R. 533.

MOUNSDON AND ANOTHER *v.* WEYMOUTH AND MELCOMBE REGIS CORPORATION.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and Ashworth, JJ.), January 20, 21, February 2, 1960.]

Town and Country Planning—Enforcement notice—Appeal against notice—Notice founded on breach of condition of grant of planning permission—Whether appellant could maintain that there had been no development and that no permission had been necessary—Development more than four years before notice—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 51), *s.* 23 (1), (4).

Planning permission to use land as a caravan site was granted to M. on Apr. 9, 1952, on a condition, among others, that only three caravans should be sited on the land. In August, 1952, eleven caravans were on the site; in July, 1954, fourteen and in July, 1958, twenty-six caravans were on the site. On Aug. 30, 1958, the local planning authority served on M. an enforcement notice alleging that there had been development within four years preceding the date of the notice and that the development consisted of a material change of use by using the land as a site for caravans exceeding three in number; the notice alleged that the condition of the planning permission to develop land had not been complied with as the land was used as a site for more than three caravans. M. appealed under s. 23 (4) of the Town and Country Planning Act, 1947, seeking, by complaint, that the enforcement notice should be quashed. On appeal from dismissal of his complaint,

Held: the enforcement notice should be quashed for the following reasons—

(i) an essential element in an enforcement notice was that development should have taken place, and an enforcement notice based on breach of a condition on which planning permission was granted could be quashed on the ground that the development alleged had not taken place, or on any other of the three grounds mentioned in s. 23 (4) (a) of the Town and Country Planning Act, 1947 (see p. 542, letters D and E, and p. 543, letter F, post).

Eastbourne Corpn. v. *Fortes Ice Cream Parlour* (*1955*), *Ltd.* ([1959] 2 All E.R. 102) applied.

(ii) M. was not precluded by having obtained planning permission in 1952 from contending now that planning permission had not been needed (see p. 543, letter H, post).

Swallow & Pearson v. *Middlesex County Council* ([1953] 1 All E.R. 580) applied.

(iii) the development alleged by the enforcement notice was an increase in the number of caravans beyond three and, as that had taken place more than four years before the service of the enforcement notice, the development alleged within that four years (which was necessary to found a valid enforcement notice under s. 23 (1)) had not been established (see p. 544, letter A, post).

Appeal allowed.

[**Editorial Note.** The principle stated at (i) above may be found to be equally applicable to limitations and non-compliance with limitations where an enforcement notice is served, under s. 38 of the Town and Country Planning Act, 1959, for such non-compliance.

For the Town and Country Planning Act, 1947, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 524.]

Cases referred to:

Eastbourne Corpn. v. *Fortes Ice Cream Parlour (1955), Ltd.*, [1958] 2 All E.R. 276; [1958] 2 Q.B. 41; 122 J.P. 324; [1958] 2 W.L.R. 886; *revsd.* C.A., [1959] 2 All E.R. 102; [1959] 2 Q.B. 92; 123 J.P. 277; [1959] 2 W.L.R. 630; 3rd Digest Supp.

Guildford R.D.C. v. *Penny*, [1959] 2 All E.R. 111; [1959] 2 Q.B. 112; 123 J.P. 286; [1959] 2 W.L.R. 643.

Swallow & Pearson v. *Middlesex County Council*, [1953] 1 All E.R. 580; 117 J.P. 179; [1953] 1 W.L.R. 422; 3rd Digest Supp.

Case Stated.

This was an appeal by Case Stated from a decision of the justices for the borough of Weymouth and Melcombe Regis given on Dec. 12, 1958, dismissing complaints preferred by the appellants, Mr. and Mrs. Mounsdon, on Sept. 25, 1958, against two enforcement notices issued by the respondents under s. 23 and s. 24 of the Town and Country Planning Act, 1947, dated Aug. 30, 1958, and duly served. Each notice contained the following recitals:

> "Whereas it appears to the Mayor Aldermen and Burgesses of the borough of Weymouth and Melcombe Regis . . . that development of certain land at . . . consisting of the making of a material change in the use thereof by using the same as a site for caravans exceeding three in number has been carried out within the four years preceding the date of this notice"

and

> "whereas the aforementioned change of use constitutes a development within the meaning of the above Act and the conditions set out in a notice of permission to develop land granted in respect of the said land and dated Apr. 9, 1952, under the provisions of Part 3 of the said Act, have not been complied with inasmuch as the land to which the permission relates has been used for siting more than three caravans."

By each notice the appellants were given notice to

> "discontinue the use of the said land as a site for caravans exceeding three in number and to remove all the caravans exceeding three in number and each of them from the said land . . ."

The following facts were found. The land referred to in the notices was .37 of an acre in extent. Two caravans were placed on the land during the winter of 1945-46 and in the summer of 1946 there were three caravans on the land. During the winter of 1946-47 there were eighteen caravans on the land and during the summer of 1947 six of these caravans remained on the land and the remainder were moved to caravan sites elsewhere. At the end of the summer of 1947 the appellants placed a further fifteen caravans (making a total of twenty-one) on the land and these remained there unoccupied throughout the winter. On July 1, 1948, eight of these caravans remained on the land and were let for occupation by holiday makers. On or about June 26, 1951, an enforcement notice dated June 25, 1951, was served by the respondents on the appellants ordering them to cease to use the land as a camping site and for stationing or storing caravans. An appeal against this enforcement notice was lodged and set down for hearing on Oct. 23, 1951. The appellants asked for an adjournment pending an application being made for planning permission and the appeal was withdrawn in April, 1952. On Apr. 9, 1952, a notice of the grant of planning permission was issued by the local planning authority. The conditions imposed included (a) that not more than three caravans should be sited on the land (b) that this permission referred to the use of the land as a caravan camping site for the period commencing at Easter and ending on Sept. 30 inclusive each year. No appeal was lodged against the conditions imposed. In the course of visits of inspection by employees of the respondents the number of caravans on the land on the following dates were: Aug. 2 and 3, 1952—eleven caravans; August, 1953, thirteen caravans; July, 1954, fourteen caravans;

Sept. 8, 1955, seventeen caravans; Aug. 17, 1956, seventeen caravans; July 26, A
1958, twenty-six caravans; Nov. 17, 1958, twenty-seven caravans.

It was contended for the appellants (among other contentions) that they had an established user of the land for siting caravans as at July 1, 1948, and required no planning permission to continue to use the land for that purpose, and that the enforcement notices ought to be quashed under s. 23 (4) (a) of the Town and Country Planning Act, 1947. That the enforcement notices must be construed B
strictly and against the council where ambiguous. That the number of caravans was first increased above three before July 1, 1948, and was not therefore development within s. 12 of the Act and that the notices should be quashed. Alternatively that the enforcement notices were ineffective in so far as they related to breaches of condition outside the period of four years before service.

It was contended by the respondents that the appellants had not appealed C
against or objected to the planning permission of Apr. 9, 1952. That the increase in the number of caravans amounted to material change of use and hence to development as defined by s. 12 (2) of the Act of 1947. That the justices must accept the statement in the enforcement notice that development had taken place and could not inquire into the facts relating to the alleged change of use to decide whether or not it constituted development. That the D
period of twenty-eight days in every year during which the General Development Order, 1950, permitted land to be used for certain purposes without planning permission had been greatly exceeded. That the enforcement notice might require more to be done than was necessary having regard to the requirement as to the period within which a notice must be served under s. 23 (1) of the Act of 1947. E

The justices decided that permission was granted as shown in the notice of permission dated Apr. 9, 1952, and in the enforcement notice for not more than three caravans to be sited on the land; that permission was required in respect of any further development and that such permission had not been granted. The justices dismissed the appellants' complaints.

Michael Albery, Q.C., and *C. I. Poole* for the appellants. F

J. S. Daniel for the respondents.

Cur. adv. vult.

ASHWORTH, J., read the judgment of the court: The piece of land with which the case is concerned is situate in the Borough of Weymouth and is a little over one-third of an acre in extent. In the winter of 1945-46 two caravans G
were placed on the land and thereafter the number of caravans increased, though it varied as between winter and summer. On July 1, 1948, the number was eight, such caravans being let for occupation by holiday makers. In June, 1951, the respondents issued enforcement notices requiring the appellants to cease to use the land as a camping site; proceedings by the appellants for the purpose of setting aside these notices were withdrawn in April, 1952, as the H
appellants had meanwhile applied for and obtained planning permission to use the land as a caravan site, subject to certain conditions under which the number of caravans was limited to three and the period during which the land might be used as a camping site was limited to the period between Easter and Sept. 30 in each year.

The appellants did not observe these conditions. In August, 1952, there I
were eleven caravans on the land, in August, 1953, there were thirteen and in July, 1954, there were fourteen. In July, 1958, the number of caravans had risen to twenty-six. On Aug. 30, 1958, the respondents issued the enforcement notices now in question. In the first recital of these notices it was alleged that development of the land in question

> " consisting of the making of a material change in the use thereof by using the same as a site for caravans exceeding three in number has been carried out within the four years preceding the date of this notice."

The second recital was in these terms:

> "Whereas the aforementioned change of use constitutes development within the meaning of the Act and the conditions set out in a notice of permission to develop land granted in respect of the said land and dated Apr. 9, 1952, under the provisions of Part 3 of the Act have not been complied with inasmuch as the land to which the permission relates has been used for siting more than three caravans."

The notices then required the appellants to discontinue the use of the said land as a site for caravans exceeding three in number and to remove all the caravans exceeding three in number from the land within seven days from the expiration of twenty-eight days after service of the notices.

On Sept. 25, 1958, the appellants preferred complaints with the object of setting aside the notices dated Aug. 30, 1958, and these complaints were dismissed on Dec. 12, 1958. It is only fair to the justices who heard them to state that at that time the Court of Appeal had not heard the appeals in *Eastbourne Corpn.* v. *Fortes Ice Cream Parlour (1955), Ltd.* (1) and *Guildford R.D.C.* v. *Penny* (2). The decision of this court in the first of these cases (which was subsequently reversed by the Court of Appeal) was cited to the justices and was duly regarded by them as binding.

On the hearing of the present appeal the main issue between the parties raised the following problems: If a local planning authority serves on a person an enforcement notice alleging a breach of the conditions subject to which permission to carry out development was granted, is it open to that person in proceedings under sub-s. (4) of s. 23 of the Town and Country Planning Act, 1947, to contend that permission was not required and that there has been no development?

It is in our view clear from the decisions of the Court of Appeal in the cases already cited that if an enforcement notice merely contains an allegation that development has been carried out without permission, it is open to the person aggrieved by the notice to contend that no development within the meaning of s. 12 has taken place. Although the problem raised by the present appeal might, as it seems to us, have been brought before the courts in *Guildford R.D.C.* v. *Penny* (2) since a limited permission was in fact granted in that case, there is no direct reference to it in the judgment of the Court of Appeal. It was contended for the respondents that throughout s. 23 there is to be found a clear distinction between a case in which no permission was sought or granted and a case in which a conditional permission was granted. Thus by sub-s. (1) a planning authority is given power to serve an enforcement notice in either of two situations: (a) if development has been carried out without the grant of permission required in that behalf, or (b) if any conditions subject to which such permission was granted in respect of any development have not been complied with. By sub-s. (2) the notice is to specify the development alleged to have been carried out without such permission or, as the case may be, the matters in respect of which it is alleged that any such conditions have not been complied with. By sub-s. (4) para. (a) a court is directed to quash the notice if satisfied (i) that permission was granted for the development to which the notice relates or (ii) that no such permission was required in respect thereof, or (iii) as the case may be, that the conditions subject to which such permission was granted have been complied with. By para. (b) a court is directed to vary the notice if though not satisfied under para. (a) it is none the less satisfied that the requirements of the notice exceed what is necessary for restoring the land to its condition before the development took place or for securing compliance with the conditions, as the case may be. It is to be observed that the phrase "as the case may be" appears in sub-s. (2) and in paras. (a) and (b) of sub-s. (4). This phrase was relied on by counsel for the respondents as emphasising and so to speak maintaining the distinction drawn in sub-s. (1) between absence of permission and conditional permission. Accordingly, he says, when para. (a) of sub-s. (4) is considered, the first two grounds are appropriate to a case in which absence of permission is alleged whereas the third ground, prefaced by the words " as the case may be ", is appropriate to a case in which non-compliance with conditions is alleged.

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(1) [1959] 2 All E.R. 102; [1959] 2 Q.B. 92.
(2) [1959] 2 All E.R. 111; [1959] 2 Q.B. 112.

The respondents' argument, however, involves one further step, namely, that the distinction between the first two grounds in para. (a) of sub-s. (4) and the third ground is a distinction for all purposes. That is to say, a person aggrieved by a notice alleging non-compliance with a conditional permission is limited to the third ground if he seeks to have the notice quashed.

While we accept the argument that in s. 23 a distinction is drawn between absence of permission and conditional permission we are unable as a matter of construction to interpret para. (a) of sub-s. (4) as both drawing a distinction and imposing a limitation. The phrase " as the case may be " seems to us to have been inserted for the purpose of clarification and not for the purpose of restricting a court's right to quash a notice alleging non-compliance with conditions. An essential element in an enforcement notice is that development should have taken place, and in our view if an aggrieved person is to be precluded from challenging this point in the case of a notice alleging non-compliance with conditions on which permission to develop was granted, clearer provisions are required than those contained in para. (a) of sub-s. (4). Before the decision of the Court of Appeal in the two cases already cited, it was open to a planning authority to argue that an aggrieved person could not challenge the allegation of development, whichever of the three grounds mentioned in para. (a) was relied on by him for the purpose of setting aside the notice. Such an argument can no longer be put forward when either of the first two grounds is relied on and in our view to allow it to be raised when the third ground is relied on involves a result so much at variance with what appears to be the general sense of the section that we should avoid it unless clearly compelled otherwise.

This conclusion appears to us to be in accord with the reasoning of the Court of Appeal. In *Eastbourne Corpn.* v. *Fortes Ice Cream Parlour (1955), Ltd.* (3) LORD EVERSHED, M.R., said:

> " I return to the vital language of s. 23 (4) of the Act of 1947, and, in my judgment, much assistance towards a proper solution is to be found in the last seven words '. . . the development to which the notice relates '. For properly expounded by reference to the earlier sub-s. (1) and sub-s. (2), these words must, in my view, mean (and I am again indebted to Mr. Megarry in the *Guildford* case (4)) ' the development which is alleged to have been carried out without the grant of permission required in that behalf under this Part of the Act.' In my judgment, it is the use of the word ' alleged ' derived from sub-s. (2) that provides the all-important clue. It is, as I think, an essential requirement of the enforcement notice that it should *allege* development carried out without permission; and I can see no compelling reason for holding that the only subject of the ' allegation ' is the absence of permission, the development itself (that is, the requirement) being assumed. On the contrary, it appears to me more natural to treat the allegation as being, as it were, a double allegation—an allegation both of the development (requiring permission) having been carried out and of the absence of permission; and, if so, that the justices' powers conferred by the formula in question involve inquiry whether no permission under Part 3 of the Act was required on the ground that there had been in fact no development either after 1948 or at all, no less than on the ground that, though

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(3) [1959] 2 All E.R. at p. 106; [1959] 2 Q.B. at p. 106.
(4) [1959] 2 All E.R. 111; [1959] 2 Q.B. 112.

A post-1948 development had occurred, it was of a kind that did not require permission."

And in *Guildford R.D.C.* v. *Penny* he said (5):

> " This appeal raises two questions, namely—first, whether the justices at Woking had jurisdiction under the Town and Country Planning Act, 1947, B to inquire into and determine whether there had in fact been development on the land owned and occupied by the appellants, within the meaning of s. 12 of the Act; and second, if so, whether they were entitled to conclude, as they did, that there had not been any development.
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> " The facts appear from the Case Stated and may be briefly summarised as follows. The appellants, Mr. and Mrs. Penny, are the proprietors of C 1½ acres of land within the jurisdiction of the respondents, the Guildford Rural District Council, as the appropriate local planning authority. On July 1, 1948—the date of the coming into operation of the Town and Country Planning Act, 1947—the land was being used (as it had been before that date and as it has continued to be used since) as a site for residential caravans. On July 1, 1948, the number of such caravans appears to have been eight, D but thereafter the number steadily increased. In 1955 and 1956 recourse was had to the powers and jurisdiction of the local planning authority and (on appeal) to the Minister, the result of which was that the Minister permitted twenty-one caravans to be placed on the land. The appellants, however, were not satisfied with the scope allowed by this determination on the part of the Minister; and it is not now in doubt that, in spite of the E time and the trouble taken, we must determine the question before us without regard to what was then done."

Although, as already stated, the question was not argued in *Guildford R.D.C.* v. *Penny* (6) whether the jurisdiction of the justices in a case where conditional permission was granted was limited to the third ground mentioned in para. (a) F of sub-s. (4), we can hardly think that if that limitation (for which the respondents now contend) were imposed by the section, it would have passed unnoticed.

In our judgment, therefore, if an aggrieved person seeks to set aside an enforcement notice alleging non-compliance with the conditions on which permission to develop was granted, it is open to the justices to quash the notice if satisfied of any of the three grounds set out in para. (a) of s. 23 (4).

G The respondents further contended that even if they were wrong on the major issue already considered the appellants had " put themselves within the planning net " by applying for and obtaining permission after the enforcement notices issued in 1951. In passing, it may be noted that counsel for the respondents conceded that these notices were defective in form and of no effect. It was contended that, having obtained planning permission, the appellants H could not now argue that it was unnecessary and it was suggested that *Swallow & Pearson* v. *Middlesex County Council* (7) was distinguishable on the ground that planning permission was not obtained in that case whereas in this case it was. We do not think that the distinction affects the principle applied in that case and in others to which reference was made in the course of the argument. In our view the appellants are not precluded from raising the issue as to development by reason of the grant of planning permission in 1952.

I The last point taken on behalf of the respondents was that on the facts the appellants had not done enough to satisfy the justices that permission was not required. In this connexion it is to be noted that by s. 23 (1) the planning authority is limited to a period of four years after alleged development has taken place, within which an enforcement notice can be served. In the present case the enforcement notice was issued in August, 1958, and expressly referred to development alleged to have been carried out within a period of four years preceding the notice. The development complained of in the enforcement notice is an increase in the number of caravans beyond three, but as the number of caravans in 1954 was fourteen, the development alleged was carried out before that date. In these circumstances the alleged development was not established.

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(5) [1959] 2 All E.R. at p. 112; [1959] 2 Q.B. at p. 123.
(6) [1959] 2 All E.R. 111; [1959] 2 Q.B. 112. (7) [1953] 1 All E.R. 580.

Having regard to the interpretation of the Act prevailing at the time when the justices considered this case, we can well understand how they reached their conclusion, but in our judgment, for the reasons which we have endeavoured to state, it was wrong and accordingly this appeal should be allowed. The case should be sent back to them with a direction to quash the notices.

Appeal allowed.

Solicitors: *Peacock & Goddard*, agents for *Hollowell & Bollam*, Weymouth (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Weymouth (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

GOULD *v.* NATIONAL PROVINCIAL BANK, LTD. AND ANOTHER.

[CHANCERY DIVISION (Russell, J.), February 3, 1960.]

Discovery—Default of appearance—Defendant in default of appearance—Defendant not a proper party to action—Whether discovery should be ordered against defendant.

G. executed a legal charge on his house and entered into three guarantees with National Provincial Bank, Ltd. with the object of securing the repayment of £1,325 owed by his son-in-law, J., to the bank. G. brought an action against the bank and J. claiming a declaration that these documents were invalid and should be set aside. He alleged that he had been induced to enter into them by a false representation, allegedly made by an employee of the bank, that J. had a "nice profitable business". J. did not enter an appearance and, at a time when he was in default of appearance and defence, G. applied for discovery of documents against J.

Held: discovery would not be ordered because

(i) J. was not a proper party to the action, as he was neither legally nor equitably interested in any part of the relief claimed, and

(ii) J. not having entered an appearance, there was no issue at the time between the plaintiff and J. in relation to which discovery should be ordered.

[As to discovery against parties to the proceedings where there are questions to be decided between them, see 12 HALSBURY'S LAWS (3rd Edn.) 9, para. 9; as to defendants for discovery only, see ibid., pp. 10, 11, para. 11.]

Cases referred to:

Codd v. *Delap*, [1906] W.N. 57; *on appeal* C.A., [1906] W.N. 78; 18 Digest (Repl.) 209, *1811*.

Heatley v. *Newton*, (1881), 19 Ch.D. 326; 51 L.J.Ch. 225; 45 L.T. 455; 18 Digest (Repl.) 9, *47*.

Procedure Summons.

Mr. Herbert Gould, the plaintiff, issued a writ against National Provincial Bank, Ltd. and Mr. Harold James Jefferies claiming a declaration that a legal charge dated Oct. 20, 1951, made between the plaintiff of the one part and the defendant bank on the plaintiff's house and three guarantees dated Oct. 20, 1950, May 11, 1951, and Sept. 1, 1952, executed by the plaintiff were invalid and ought to be set aside; and claiming further or in the alternative rescission and delivery up of the documents for cancellation. The purpose of the legal charge and the three guarantees was to secure the repayment to the bank of a sum of £1,325 owed by Mr. Jefferies, who was the son-in-law of the plaintiff, to the bank. By his statement of claim the plaintiff alleged that he was misled into executing these documents by a representation by a bank manager employed by the defendants that Mr. Jefferies " has a nice profitable business ". He alleged that this was a fraudulent misrepresentation and he also alleged undue influence and abuse of a relationship which involved a duty on the part of the bank to the plaintiff. The bank by their defence denied these allegations. Mr. Jefferies did not enter an appearance. The plaintiff applied under the summons for directions for discovery of documents relating to his business against Mr. Jefferies.

Charles Sparrow for the plaintiff, Mr. Gould.
R. H. W. Dunn for the first defendant, National Provincial Bank, Ltd.
The second defendant was in default of appearance.

RUSSELL, J., stated the nature of the action and continued: The plaintiff wants discovery from the second defendant of documents relating to his business on the ground that such documents would be relevant to an issue on the pleadings, wherein the plaintiff alleges that the bank's representative said that the second defendant's business was a nice profitable one and that that was not the fact because the business was at all material times in serious difficulties. The plaintiff says that the documents in the possession, power or control of the second defendant will assist the court in determining whether that allegation is or is not correct. It is the first essential step in the allegation of fraudulent misrepresentation by or on behalf of the bank.

I was referred to certain rules of court. R.S.C., Ord. 31, r. 12, reads:

> " Any party may . . . apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein."

Counsel for the plaintiff says that the second defendant is a party and so is the plaintiff, and that there is nothing in that rule which provides that it shall not cover a case where one of the parties is in default of appearance and defence. He also points out that R.S.C., Ord. 13, r. 12, is in these terms:

> " In all actions not by the rules of this order otherwise specially provided for [which would be, for example, an action of this character] in case the party served with the writ does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially indorsed under Ord. 3, r. 6, of a statement of claim, the action may proceed as if such party had appeared . . ."

Counsel for the plaintiff says that that means that the action in all respects may proceed as if the party had appeared and, therefore, equally in that order there is nothing to suggest that discovery cannot be obtained against the party who is in default of appearance.

In my view, there is in this case what I may describe as a special and earlier point. If the second defendant be not a proper party to the proceedings, the question is should discovery anyway be ordered against him because he has in fact remained a party. If he is not a proper party, I am clearly of opinion that discovery should not be ordered since it would mean this, that he would be being retained as a party for no purpose other than discovery. I consider that the second defendant in this case is not a proper party.

The relief claimed is first " a declaration that the legal charge . . . and the three guarantees aforesaid . . . are invalid and ought to be set aside ". The second defendant is not a party either to the legal charge, which is between the plaintiff and the bank, or to any of the three guarantees, which are guarantees of the second defendant's overdraft with the bank. The second claim is: " Further or in the alternative rescission of the said documents or the respective transactions effected thereby ". The third is: " Delivery up of the said documents for cancellation ". The second defendant, in my view, has no legal or equitable interest in either the legal charge or any of the three guarantees. I think that can be tested by inquiring whether, should the plaintiff and the bank choose as a matter of agreement between them to tear up the guarantees or the charge by way of legal mortgage, the second defendant could have no say in the matter at all either in law or in equity. If that is so, I cannot see how he can be concerned in an action whose only purpose in effect is to seek on the one hand the tearing up or destruction of these documents, or on the other hand the preservation and establishing the validity of the legal charge and the three guarantees.

It is suggested by counsel for the plaintiff that the second defendant is interested in this way, that it is his banking account which is being guaranteed and the legal charge is in support of those guarantees. Of course, in a sense he is interested: but it seems to me that, for a person to be a proper party to an action of this nature, it is essential that he should be legally or equitably interested in some part of the relief claimed. That view of this particular case seems to me to represent the justice of the matter and satisfies me that an order for discovery should not be made against the second defendant.

There is another aspect of the matter which is more general. Counsel for the bank also says that no discovery should be ordered against a defendant who is in default of appearance since ex hypothesi there is no issue between the plaintiff and the second defendant. No part of the statement of claim has been put in issue by the second defendant, and that must apply to any such case as this. He says that, if there is no issue between the plaintiff and the second defendant in these proceedings, discovery cannot be ordered as between the plaintiff and the second defendant. Counsel for the plaintiff says that that is not so unless there has been in some shape or form a submission to the claim or an admission of the facts. In this connexion reference was made to two cases. The first is *Heatley* v. *Newton* (1). That was a case in which the plaintiff, who had bought property at an auction and paid a deposit to the auctioneers, brought an action against the vendors and the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, and for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of the plaintiff were fictitious, and were either biddings by the vendors or their agents, or were announced by the auctioneer without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into court, and to have the action dismissed against them on such payment being made. The Master of the Rolls made an order that, the vendors undertaking to pay the auctioneers their costs of the action without prejudice to how they should ultimately be borne, and to pay any interest and damages to which the plaintiff might be held entitled, and the auctioneers undertaking, in the event of the vendors not carrying out their undertaking, to pay to the plaintiff interest on the deposit up to the time of payment into court, and the costs of the action up to and including that application in the event of the court holding the plaintiff entitled to such interest and costs, the auctioneers should be at liberty to pay the deposit into court, and that all further proceedings against them should be stayed. It was held on appeal that the order must be discharged, the auctioneers not having submitted to give the plaintiff all the relief which he could in any event be entitled to against them, for if the allegations in the statement of claim were established the plaintiff would be entitled to have judgment against them for the deposit with interest, and to have an order for costs of the action against all the defendants.

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(1) (1881), 19 Ch.D. 326.

Pausing there, it is to be observed that in that case the auctioneers were simply saying that the proceedings should be stayed against them on terms which would be less than the full relief to which the plaintiff would be entitled if he should succeed in the action. Two passages in the judgment were referred to in argument before me. The first is in the judgment of BAGGALLAY, L.J., where he said this (2):

> "Another point, upon which I do not feel so clear, was strongly pressed by Mr. Crossley, that the plaintiffs were entitled to keep Fox & Bousfield before the court, apart from any question of personal pecuniary responsibility, upon the ground alone of being able to obtain discovery from them which would enable them to establish their case as against the other defendants. I am not prepared to admit, as a general principle, that a plaintiff is entitled to have persons kept before the court as defendants, that they may aid him in obtaining discovery from the other defendants, but here the two things are so mixed up together that, as it appears to me, enough has not been done on the part of Messrs. Fox & Bousfield, as regards the plaintiff's interest, to entitle them to be dismissed from the suit, or to entitle them to have the proceedings stayed against them."

That passage seems to me rather neutral, but LUSH, L.J., says (3):

> "Now, the order in question exonerates Messrs. Fox & Bousfield from the time they made the payment into court from all liability except interest and costs up to that time, and it compels the plaintiff to take the undertaking of the vendors that they will be answerable for all damages to which the plaintiffs may be held entitled. I do not think that the court has a right to do this, seeing that the auctioneers were originally properly joined as defendants in the action. I quite agree that you cannot claim to retain parties as defendants in a suit merely because you want to interrogate them; but it appears to me that where they are properly made defendants it is a ground for not letting them off summarily, that there is a very great advantage accruing to the plaintiffs from being at liberty to interrogate them instead of simply calling them as witnesses at the trial."

Then he continues to deal with the matter in relation to the form of discovery which is involved in interrogatories rather than that which is involved in the ordinary discovery of documents.

The other case, referred to by counsel for the bank, was *Codd* v. *Delap* (4). That was a case in which the plaintiff sued Delap and others for a declaration that the plaintiff was beneficially entitled to fifty fully paid-up shares in a certain railway company. The statement of claim set out (amongst other things) the plaintiff's title to the shares, and alleged that the shares were at the commencement of the action registered in the books of the company in the name of the defendant Stevens as mortgagee, and that the defendant Delap claimed to be beneficially entitled to them as against the plaintiff. The defendant Stevens (who was the solicitor of the defendant Delap, and was made a defendant only with respect to these shares) by his defence admitted the allegations in the statement of claim in relation to these shares, and disclaimed all interest whatever in them. An application by the plaintiff, by summons in chambers, for leave to administer interrogatories to the defendant Stevens with respect to these shares and other matters having been dismissed by the judge, the plaintiff now moved to discharge the order. It was argued that the defendant Stevens was properly made a defendant, and could not avoid giving discovery by saying that he now claimed no interest in the shares, and that it was impossible for the plaintiff to get on unless he could obtain answers from Stevens as to what he said and did on certain occasions. Farwell, J., refused in his discretion to grant the application, saying (5):

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(2) (1881), 19 Ch.D. at p. 336.

(3) (1881), 19 Ch.D. at p. 337.

(4) [1906] W.N. 57.

> " There was now no issue between the plaintiff and Stevens, but the plaintiff desired to interrogate Stevens to see if his answers would help him. If the interrogatories were answered, the plaintiff could not read the answers at the trial against any of the other defendants. The plaintiff, in fact, was seeking to obtain from Stevens a statement on oath of what his evidence would be at the trial of the action. It was a novel application, and must be dismissed with costs."

This was also a case involving interrogatories rather than a mere discovery of documents, but I certainly find support in what Lush, L.J., said for my decision to decline to order discovery of documents having regard to the fact that the second defendant, in my view, is not a proper party and, therefore, cannot be retained as a party merely for the purposes of discovery. Lush, L.J., said (6):

> " I quite agree that you cannot claim to retain parties as defendants in a suit merely because you want to interrogate them . . ."

On the other hand, it does not seem to me that either of those questions are quite in point on the question here, whether discovery can be ordered against a defendant who is in default in appearance and so long as he is in default in appearance. As suggested by counsel for the bank, there cannot be any issue between the parties on which discovery against the second defendant should be granted and, therefore, there should not be any discovery. Counsel for the plaintiff points out that there is nothing in Bray on Discovery on whether discovery can be ordered against a defendant who is in default in appearance. He has also argued that, since the court in such circumstances would have power to make the full order claimed in default of defence, then that power to make the greater order must include the power of making a lesser order, such as the order for discovery. For my part, I do not follow that at all. It seems to me that an order for discovery is to be considered like any other order of this type. On the supposition that the court in such circumstances is in a position to make a full order and to grant the full relief claimed against the particular defendant, it seems to me as between the plaintiff and that particular defendant no relief by way of discovery is required. Although it is not actually necessary for my decision in this case, the right view is, I think, that, if a defendant is in default of appearance, there is no issue at that stage between the plaintiff and that defendant, and therefore there is nothing in relation to which discovery should be ordered. It is perfectly clear that at a later stage the defendant might get leave to enter appearance and deliver a defence on terms, but if he were to do so it seems to me that at that stage there would be an issue and at that stage discovery could be ordered.

In my view, the application for discovery against the second defendant should be refused.

Application refused.

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Southall & Co.*, Birmingham (for the plaintiff); *Wilde, Sapte & Co.* (for the first defendant).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(5) [1906] W.N. at p. 58.

(6) (1881), 19 Ch.D. at p. 337.

TAYLOR *v.* ELLIS AND ANOTHER.

[CHANCERY DIVISION (Cross, J.), February 9, 10, 1960.]

Mortgage—Possession of mortgaged property—Mortgagor not in occupation—Power of leasing only with consent in writing of mortgagee—Tenancy granted by mortgagor—No evidence of consent in writing—Mortgagee having knowledge of tenancy—Mortgagee going without interest for many years—Whether mortgagee entitled to recover possession against tenant as trespasser—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 99.

A mortgage dated Oct. 27, 1924, provided that no lease of the property or any part of it made by the borrowers during the continuance of the security should have effect by force or virtue of s. 18 of the Conveyancing and Law of Property Act, 1881, unless the lender " shall consent thereto in writing ". On Sept. 19, 1940, the surviving mortgagor granted a tenancy, determinable by one month's notice on either side, to H. The surviving mortgagor died in 1943. Up to Oct. 5, 1950, interest was duly paid under the mortgage but not after that date. The mortgagee died on July 21, 1957, having had knowledge of the tenancy and having allowed the tenant to remain in possession. There was no evidence whether written consent to the tenancy had ever been given. The plaintiff, the executrix of the mortgagee, took proceedings for possession.

Held: the plaintiff (as mortgagee) was entitled to possession because

(i) the onus of proving written consent to the tenancy lay on the tenant, who could not discharge it, and

(ii) knowledge by the mortgagee of the tenant's occupation of the property and the fact that the mortgagee had refrained from taking possession himself for many years did not preclude the mortgagee from treating the tenant as a trespasser when the mortgagee chose to do so, neither did the mere fact that for some years the mortgagee had been content to go without interest.

[As to a mortgagee's right to possession, see 27 HALSBURY'S LAWS (3rd Edn.) 277, para. 511; and as to leases granted by a mortgagor ultra vires, see ibid., pp. 255, 256, paras. 464, 468; and for cases on the latter subject, see 35 DIGEST 335-339, *776-816*.

For the Law of Property Act, 1925, s. 99, see 20 HALSBURY'S STATUTES (2nd Edn.) 641.]

Cases referred to:

Joseph Constantine S.S. Line, Ltd. v. *Imperial Smelting Corpn., Ltd.*, [1941] 2 All E.R. 165; [1942] A.C. 154; 110 L.J.K.B. 433; 165 L.T. 27; 12 Digest (Repl.) 436, *3333*.

Hepworth v. *Pickles*, [1900] 1 Ch. 108; 69 L.J.Ch. 55; 81 L.T. 818; 31 Digest (Repl.) 187, *3194*.

O'Rourke's Estate, Re, (1889), 23 L.R.Ir. 497; 35 Digest 336, *783, o*.

Parker v. *Braithwaite*, [1952] 2 All E.R. 837; 3rd Digest Supp.

Adjourned Summons.

On Oct. 27, 1924, William John Ellis and Albert Edward Ellis granted a mortgage of a property at Etchingham to Thomas Taylor to secure the repayment of £250 with interest. There was an express agreement and declaration in the mortgage

> " that no lease made by the borrowers of any of the said premises or any part thereof during the continuance of this security shall have effect by force or virtue of s. 18 of the Conveyancing and Law of Property Act, 1881 [now s. 99 of the Law of Property Act, 1925] unless the lender shall consent thereto in writing."

Mr. W. J. Ellis died in 1936, leaving Mr. A. E. Ellis the sole mortgagor. On Sept. 19, 1940, the surviving mortgagor granted a tenancy of the whole of the premises to Mr. William Hayler, the second defendant, and as from that date the second defendant was in occupation under this tenancy, which was determinable by one month's notice on either side. On Nov. 11, 1943, the mortgagor died. His legal personal representatives were a Mrs. Jeffrey and Mr. Lionel Charles Ellis, the first defendant. Mrs. Jeffrey died in 1947 and on Aug. 18, 1954, a grant of probate of the will of the mortgagor was made to the first defendant. No repayment of the principal sum had ever been made but up to Oct. 5, 1950, interest was duly paid under the mortgage. No interest had been paid since that date. On July 21, 1957, the mortgagee died. The plaintiff, his widow and executrix, on Aug. 5, 1959, issued a summons against the first defendant, who did not enter an appearance, and the second defendant, asking for possession of the premises.

N. C. H. Browne-Wilkinson for the plaintiff.

B. J. H. Clauson for the second defendant.

The first defendant was not represented and did not appear.

CROSS, J., stated the relevant facts and continued: The issue between the parties, of course, is whether or not the tenancy granted by A. E. Ellis on Sept. 19, 1940, to William Hayler is or is not binding on the plaintiff. It was in quite normal terms, and undoubtedly would have been binding on the mortgagee if in fact he consented to it in writing. There is nothing in the terms of the tenancy which would prevent it being an exercise of the statutory power of leasing.

The first point which arises is whether or not the mortgagee gave his consent to it in writing. Normally, in cases of this sort there is not the least difficulty in saying whether or not consent in writing was given, but difficulty has arisen in this case as both the mortgagee and the mortgagor who created the tenancy are dead.

The way the matter stood on the affidavit evidence was that a Mr. Geoffrey Hurst Serres, who is an assistant solicitor with a firm of solicitors, Andrews & Bennett, who are acting for the plaintiff in these proceedings, said in para. 7 of his affidavit that neither the mortgagee nor any person on his behalf ever gave his consent to the grant of such a tenancy. It has emerged, and it is common ground between the parties, that there really is not any positive evidence that the mortgagee never gave his consent in writing to the tenancy as, for example, there would have been had Mr. A. E. Ellis, the deceased mortgagor, told Mr. Serres that he had never asked for or obtained any consent from the mortgagee. If that had been proved, there would, of course, have been positive evidence that there was no consent. The matter simply rests in this way that the firm of Andrews & Bennett were acting in 1940, when the tenancy was granted, both for the mortgagee, and for the mortgagor, and that there is no record in the firm's papers of any written consent by the mortgagee to the creation of the tenancy. There is no positive evidence that the mortgagee did not give his consent and it remains possible that he may have done so. On those facts the point that has been argued is on whom does the onus lie to establish that the mortgagee either gave or did not give his consent in writing.

The matter can best be decided by asking oneself how the point would be pleaded in an action of ejectment. The mortgagee in his statement of claim against anybody in possession of the land would have to do no more than set out the mortgage, which showed that he had the immediate legal estate, and claim possession. It would not be necessary for him to allege that the defendant claimed to be in possession as a tenant, but that the tenancy was not binding on him. It would be sufficient for the mortgagee to say that he had the legal estate as mortgagee, and that he claimed possession. I did not understand counsel for the second defendant really to dispute that.

Then there comes the question of defence. Counsel for the second defendant suggests that it would be sufficient for the defendant to plead the tenancy by way of defence without asserting that the mortgagee had consented in writing to its creation, and that that would raise (as it were) a prima facie case on his side, which would force the plaintiff by way of reply to make a negative allegation that the mortgagee had never consented in writing to the granting of the tenancy. If that is the case, the plaintiff in this case would not be able to establish that proposition.

In my judgment that is not the right way of looking at the matter. I think that it can be tested in this way: suppose that there had been in the mortgage deed, as there might well have been, an absolute prohibition on the granting of any leases. Even so, it would always have been perfectly possible that the mortgagee might have so conducted himself as not to be able to rely on that absolute prohibition. He might, notwithstanding that, have waived his rights or consented in some way to the lease. If, however, a tenant was going to allege that in the face of an absolute prohibition, he would, I think, clearly have to set it out in his defence. It seems to me that in the same way here, where the provision in the mortgage is that a lease will only be binding on the mortgagee if the mortgagee consents thereto in writing, the defendant would have to show that there had been a consent in writing. It is an additional argument in favour of that way of looking at the matter, that the courts lean somewhat against imposing on any party to litigation the burden of proving a negative. This appears from various obiter dicta in *Joseph Constantine S.S. Line, Ltd.* v. *Imperial Smelting Corpn., Ltd.* (1). I would refer particularly to the dictum of LORD RUSSELL OF KILLOWEN (2):

> "In coming to this conclusion, I am influenced by three considerations. First, the proving of a negative, a task always difficult and often impossible, would be a most exceptional burden to impose upon a litigant."

In my judgment, therefore, on the first point the plaintiff is right and in the absence of any evidence that the mortgagee did consent in writing—and indeed the evidence as far as it goes strongly suggests that he did not, because if he had consented in writing one would have expected the document to be available—I think that it must be taken that to begin with this tenancy was not binding on the plaintiff.

Then the question arises: did the mortgagee become bound by the tenancy by reason of subsequent events? It is quite common for a mortgagee who is previously not bound by a tenancy to consent to take the mortgagor's tenant, whom he could have treated as a trespasser, as his own tenant. The commonest way in which that happens is that if the mortgagor fails to pay the mortgage interest the mortgagee serves a notice on the tenant to pay the rent to him, and a new tenancy is created between the mortgagee and the mortgagor's tenant. All that happened in this case was that for a great many years Mr. Hayler was allowed to remain in occupation of the property. Then comes the curious circumstance that from Oct. 5, 1950, onwards no mortgage interest was paid. Apart from that second point, it does not seem to me that the fact that the tenant of the mortgagor, who could be treated by the mortgagee as a trespasser, is allowed to remain in possession for a long period could itself in any way preclude the mortgagee from treating the tenant as a trespasser if and when he desires to do so. After all, as long as the mortgage interest is being paid the mortgagee may perfectly well be content to allow the tenant to remain in possession. The only way in which he could turn him out of possession is by going into possession himself, which is a thing a mortgagee is generally unwilling to do. It would be quite wrong to infer merely from the fact that the mortgagee allowed the tenant to remain in possession, having knowledge of the tenancy—there is no doubt in this case, and it is accepted, that the mortgagee knew of the tenancy—that the mortgagee has consented to take the tenant as his tenant.

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(1) [1941] 2 All E.R. 165; [1942] A.C. 154.
(2) [1941] 2 All E.R. at p. 180; [1942] A.C. at p. 177.

In that connexion I entirely agree with what Monroe, J., said in *Re O'Rourke's Estate* (3). The passage which I am going to read was quoted by Danckwerts, J., in his judgment in *Parker* v. *Braithwaite* (4). What Monroe, J., said was (5):

> "I certainly cannot infer the creation of a new tenancy between the tenant and the mortgagee merely because the mortgagee takes no active steps to disavow a tenancy created by the mortgagor. The mortgagor, while in possession, and bound to keep down the interest on his mortgage, is at liberty to manage the lands as he pleases. It is not for the mortgagee to interfere with that management unless he choose to go into possession. He treats the tenancy as one binding on the mortgagor, but in no way binding upon himself if he find it afterwards for his interest to repudiate it."

On this part of the case counsel for the second defendant referred me to *Hepworth* v. *Pickles* (6) which turned on the question of waiver of a right to enforce restrictive covenants. The facts are set out in the headnote:

> "By a conveyance dated in 1874, a certain plot of land was conveyed subject to a covenant that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beerhouse. Shortly after the date of the conveyance beer and spirits were sold in one of the houses erected on the land, and continued to be openly sold for upwards of twenty-four years . . ."

It was held that by reason of his knowledge of that course of dealing the person entitled to enforce the restrictive covenant had waived or released his rights.

That case does not seem to me to have any relation at all to a case of this sort. There is not here a covenant by the mortgagor that he will not part with possession of the mortgaged premises or purport to create any tenancy binding between himself and the tenant. There is no covenant which the mortgagee can enforce; his only way of protecting himself or preventing the creation of a tenancy binding as between the mortgagor and the tenant is to go into possession himself. As I have said, I do not think that it can for one moment be inferred from the fact he does not go into possession that he is in any way waiving his right to treat the tenant as a trespasser.

Then one comes to what is certainly a very curious feature of this case, namely, the fact that from October, 1950, onwards no interest has been paid under the mortgage. It is when interest ceases to be paid under the mortgage that one looks with an expectant eye to see if there has not been some recognition by the mortgagee of the mortgagor's tenant as his tenant, because you would expect him then to serve a notice saying "I want the rents". But there is absolutely no evidence here that anything happened at all. The mortgagee was apparently content to go without his interest until he died in 1957 and his executrix went without the interest down to the issue of the summons. If they had gone on going without the interest for twelve years they would have lost their rights altogether, but only nine years have elapsed. I cannot infer simply from the fact that no interest was paid anything against the mortgagee or the plaintiff as his executrix. It does not seem to carry the matter any further.

So in my judgment on the second point also the plaintiff is right. The result of that would be that the plaintiff is entitled to an order for possession.

Order accordingly.

Solicitors: *Gouldens*, agents for *Andrews & Bennett*, Burwash (for the plaintiff); *Spenser Limbrey & Co.* (for the second defendant).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(3) (1889). 23 L.R.Ir. 497.

(4) [1952] 2 All E.R. 837 at p. 841.

(5) (1889). 23 L.R.Ir. at p. 501.

(6) [1900] 1 Ch. 108.

Re BOULTON'S WILL TRUSTS. PUBLIC TRUSTEE *v.* ROBB AND OTHERS.

[Court of Appeal (Lord Evershed, M.R., Willmer and Upjohn, L.JJ.), January 21, 22, 1960.]

Estate Duty—Incidence—Property not passing to the executor as such—Death of life tenant—Assignment by life tenant and reversionary life tenant of one-third of income to contingent reversioner of one-third of trust fund—Estate duty levied only in respect of other two-thirds of trust fund—Whether duty rateably borne by whole estate—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9 (1).

By his will a testator gave his residuary trust fund on trust (in the events which happened) for Clara for life, then for Margaret for life and subject thereto equally for each of three named cousins, including F.R., who were living at the death of the survivor of Clara and Margaret and the issue then living of any of the said three cousins then dead such issue to take equally between them per stirpes their parent's share. All three cousins died before both Clara and Margaret, each of them leaving issue. Major R. was the only child of F.R. In 1950 Margaret assigned her reversionary life interest (subject to a reservation which she later released) to the trustees of the residuary trust fund so that any income which would after Clara's death be payable to her should be held on trust for the persons entitled when the income accrued as if she, Margaret, were dead. In 1951 Clara assigned to Major R. her life interest in one equal third part of the trust fund. On Feb. 8, 1958, Clara died, Margaret and issue of each of the three named cousins of the testator (including Major R.) being still living. Estate duty was claimed in respect of two-thirds only of the residuary trust fund, it being accepted by the Inland Revenue that one-third did not then pass because Major R. enjoyed one-third of the trust fund or its income to the same extent both before and after the death of Clara. The question arose whether the estate duty should be borne wholly by two-thirds of the trust fund in exoneration of the one-third enjoyed by Major R., or should be borne rateably by the whole trust fund.

Held: inasmuch as estate duty appeared to have been levied, and to have been levied justly, on the two-thirds of the trust fund other than the third in which Major R. was interested, the duty constituted, by virtue of the Finance Act, 1894, s. 9 (1), a charge on those two-thirds and, therefore, ought to be borne by them, not by the whole trust fund.

Appeal dismissed.

[As to property out of which duty is payable, see 15 Halsbury's Laws (3rd Edn.) 131, para. 269; and for cases on the subject, see 21 Digest 33, 34, *210-213*.]

Adjourned Summons.

This summons was issued by the sole trustee of the will of Matthew Ernest Boulton, deceased, for the determination of the question referred to below relating to the incidence of estate duty.

By his will dated Dec. 13, 1912, the said Matthew Ernest Boulton (hereinafter called " the testator ") directed his trustees to hold his residuary trust fund on trust (so far as relevant) for his sister Clara during her life and (in the events which happened) thereafter for his sister Pauline Margaret (hereinafter called " Margaret ") during her life and subject thereto for such of his three cousins Major General Frederick Spencer Wilson Robb, Montagu Caesar Robb and Geoffrey Charles Napier Sturt as should be living on the failure of the previous trusts or should have previously died leaving issue then living, such issue to take their parent's share in equal shares per stirpes. The testator died on July 14, 1914.

Montagu Caesar Robb died on Nov. 30, 1920, leaving three children surviving, of whom two were living at the date (referred to below) of the death of the said

Clara. Frederick Spencer Wilson Robb died on Feb. 8, 1948, having had one child, namely, Major Robb, who was still living at the date of Clara's death.

By an assignment dated Jan. 2, 1950, made between Margaret and the trustees of the testator's will it was provided that if Clara should die in the lifetime of Margaret the trustees should pay to Margaret during the rest of her life the income of an appropriated part of the testator's residuary trust fund sufficient to produce £3,000 per annum and Margaret assigned to the trustees all the annual income to arise during her life from the residuary trust fund (except the income of the appropriated fund) on trust to pay or apply each instalment of such income as and when it was received by the trustees to the same persons and in the same shares as the same would have been payable or applicable under the testator's will if Margaret had died immediately before such instalment of income had commenced to accrue.

By an assignment dated July 12, 1951, made between Clara and Major Robb, Clara assigned to Major Robb her life interest in one equal third part of the testator's residuary trust fund to the intent that such life interest might so far as the law permitted merge in the reversionary interest of Major Robb in the premises and be extinguished.

Geoffrey Charles Napier Sturt died on July 20, 1952, leaving two children one of whom was living at the date of the death of Clara, and the other of whom was then dead leaving issue then living (and were all infants). By an assignment dated May 27, 1955, Margaret assigned to the (then) sole trustee of the will of the testator the annual sum of £3,000 and all other income to which she might be entitled out of the funds mentioned in the assignment dated Jan. 2, 1950, to be held on the trusts of the latter assignment with regard to the income thereby assigned.

On Feb. 8, 1958, Clara died. Margaret was then still living. She died on May 4, 1959. Estate duty was claimed by reason of the death of Clara in respect of the two-thirds of the residuary trust fund (i.e., the whole fund except the one-third in which Major Robb was interested) and the question arose whether the duty ought to fall exclusively on the two-thirds in which Major Robb was not interested in exoneration of the one-third to which he was contingently entitled (and of which he was in receipt of the income pursuant to the assignments of Jan. 2, 1950, and May 27, 1955) or rateably on the whole fund.

John Pennycuick, Q.C., and *H. Hillaby* for the appellants.

E. I. Goulding for the plaintiff, the respondent trustee.

B. L. Bathurst, Q.C., and *E. W. Griffith* for other respondents.

LORD EVERSHED, M.R.: The point raised in this appeal is one of novelty and not free from difficulty. For reasons which will presently appear, it might in certain circumstances have strange consequences. [His Lordship referred to the will of the testator, Matthew Ernest Boulton, and to a pedigree, and continued:] The two sisters that have been mentioned have been called in this case (and I hope I may, without disrespect to their memory, continue to call them) by their Christian names, respectively Clara and Margaret. The first trust was to pay the whole income to Clara for her life, and, in the event (as happened on Feb. 8, 1958) of her death unmarried, to pay the whole income to Margaret for the residue of her life. Margaret died unmarried on May 4, 1959. All three named cousins had predeceased Clara. The appellants are certain of the issue of what I will call the Sturt stirps, and one member of Mr. Montagu Caesar Robb's family, a Miss Esme Robb. On the other side are the remainder of the Caesar Robb stirps and the one child (still living) of General Robb, namely, Major Eustace Robb, and I shall refer to them as the " the respondents ".

In the events which have happened, the corpus of the estate is now divisible in the shares indicated in the pedigree. Thus, Major Eustace Robb, as the sole member of the General's stirps, takes a third, the issue of Caesar Robb take between them another third, but not in equal proportions because they belong to two generations; that last observation applies also to the issue of Mr. Sturt. The complication and the present problem have arisen because of the dealings with their respective interests which the two sisters, Clara and Margaret, undertook. In point of time, the first transaction was one of Margaret, whereby she, in 1950 by appropriate deed, provided that her life interest when it came to enjoyment, should be held so that the persons who would have taken on each distribution date, were she then dead, should between them and in the appropriate proportions take the income of the estate, subject to the qualification that she retained for her personal enjoyment an annual sum of £3,000. Then next came an assignment, dated July 12, 1951, by Clara, and it is that assignment which is particularly relevant to the present problem. Before I read it, it will be convenient to say that after the date of that assignment, Margaret, by a later deed in 1955, in effect released the retained interest which she had previously created in her own favour to the extent of £3,000 a year. Clara, after very long and elaborate recitals of the will and subsequent events in reference to the estate, then proceeded to assign to Major Robb all

> "the life interest of the assignor [Clara] in one equal third part of the trust fund and in any property hereinafter representing or substituted for the same."

Then there followed a reference to certain specific property, which, as I understand from counsel for the appellants, then in part represented the estate. The relevant clause of the deed finished:

> "To the intent that the life interest of the assignor in the premises . . . hereby assured may so far as the law permits forthwith merge in the reversionary interest of the assignee in the same and be extinguished."

The intent was plain, and, as I shall presently state, has, I conceive, been acted on in practice, but as a matter of law was (as counsel for the appellants observed) strictly ineffective, and was so for this reason. Major Robb, the assignee, only had at the date when Clara executed this instrument a contingent reversionary interest. In order to take any share of corpus, he had to survive both Clara and Margaret. Therefore, in strictness, it was incompetent for Clara by this instrument to cause any merger of an appropriate part of the income interest in the estate with what Major Robb might take, did he survive the date of distribution. That was the instrument, and I assume that in accordance with it, from its date in 1951 until Clara's death on Feb. 8, 1958, Major Robb received one-third of the income of the estate. There was, as appears from the evidence, no kind of appropriation of any part of the assets, and, therefore, it is correct to say that he received one-third of the total income, notwithstanding (as junior counsel for the respondents pointed out) that the actual terms of the assignment purported to relate to the income of one-third of the estate. When Clara died Major Robb continued in fact to receive a similar share.

It will be recalled that by the joint effect of the two assignments made by Margaret, the income was then periodically distributed among the persons who would have been entitled to it had she died at the date of the income distribution, and at every relevant date there were representatives of all three stirpes and Major Robb was the sole representative of the General's stirpes. Thus he continued to enjoy a third of the income. Finally, when Margaret died, a similar state of affairs existed, so that Major Robb became entitled to one-third of the corpus.

This case relates to the estate duty which became leviable on the death of Clara. So far as the evidence goes, it is apparent what happened and, as I think, what view the Estate Duty Office took of their right to charge duty. In para. 22 of the affidavit of Mr. Worthington of the Public Trustee Office, it is stated:

> "In consequence of the said assignment dated July 12, 1951, estate duty has been claimed by reason of the death of the said Clara Gertrude Boulton in respect of two-thirds only of the residuary trust fund",

and a figure is then given of the amount of the duty. The question is, as Mr. Worthington then states, whether the duty should fall exclusively on the two-thirds of the fund in which Major Robb is not interested in exoneration of the one-third of which (it may be said) he has at all relevant times enjoyed the interest; or whether the whole amount of duty ought to be borne rateably by the persons interested in the whole subject-matter of the estate.

The argument of counsel for the appellants is, if one may say so (and as one would expect), clear, and certainly founded on legal propositions which may be difficult to controvert as such. What he says is this: Clara was only competent to dispose of that which she had, viz., an interest in the whole income of the estate during her life. She could, of course, dispose of the whole of it or any part of it she liked and for such period as she chose. What she could not do, says counsel, was, by any such assignment, to cause the subject-matter of the trust estate to be severed into distinct proprietary subject-matters. Therefore, he says, whatever the amount of the duty (and the office may be right or wrong in their assessment), it is a duty leviable on the property, incapable of severance, and not in fact severed, which passed at her death. As he stated clearly in his reply, the property which passed on Clara's death was the whole property. True it is that Major Robb enjoyed a third of the income of the property before Clara died, and it so happened that he enjoyed a similar fraction of the income immediately thereafter and now has a right to a third of the corpus; but that fractional identity is accidental and does not affect the proposition which I have tried to state.

It will be observed that the argument at once raises a somewhat alarming prospect which has, not unnaturally, impressed itself on the minds of those who have resisted the appellants' case; because it is said, or feared, that if that proposition is right, and that if the truth is, that the whole property passed, it may well be that the Estate Duty Office's charge or levy has been so far for a less sum than it ought properly to have been. Counsel for the respondents said, I have no doubt quite correctly, that if as a result of anything that is said in this court that fear should be realised, then if the appellants won, what with the amount of the additional duty and the increased rate, everybody, including the appellants, would be worse off than they are now. Whether that is right or wrong is a matter irrelevant to the decision of this case. But the fear having been expressed, I have formed the view that perhaps the less I expatiate on this matter the better.

I do not at all dissent from the general proposition that, strictly speaking, and certainly to the eye of the conveyancer, a person having an interest such as Clara had in a trust fund like this cannot sever the trust fund into distinct properties. But I do not, with all respect to the argument, think that is quite the problem which we have to decide. On the evidence, to which I have already made allusion, it seems to me quite plain what has occurred. The Estate Duty Office have claimed to levy duty on two-thirds only of the residuary estate. They have taken a view which, whatever might be said against it by a conveyancer, at any rate corresponds quite manifestly with common sense and, I should be inclined to think, with justice. They have said, "If you look at the facts as they were when Clara died, it appears that two-thirds of the estate then passed and one-third did not; and the one-third did not pass because Eustace enjoyed both before and after the death to exactly the same extent, one-third of the trust property or its income." The claim, therefore, was one made, so far as I can see, in respect of two-thirds of this trust property and no more.

A If that is right, what is the result? In my judgment, the result is that which s. 9 of the Finance Act, 1894, enjoins; for by the terms of sub-s. (1) of that section it is provided that

> "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, [as this did not] shall be a first charge on the property in respect of which duty is B leviable."

It may be a question whether the duty was leviable in respect of something else, but I have little doubt that it was levied in respect of two-thirds, and it seems to me that the short answer to this case, therefore, is that the duty should be rateably borne by the two-thirds of the estate in respect of which it was C levied. Counsel for the respondents drew attention to the change in language between s. 1 and s. 9, which I note. Counsel for the appellants' argument has been founded, as I have already said, on the proposition that you cannot avoid the circumstance that the property which passed was the whole property. I think, for my part, that there may be some help to be gained by considering later enactments in pari materia, including the terms of s. 43 of the Finance D Act, 1940, as amended. It does at any rate appear from that section that where someone with an interest such as Clara had disposes partly of such an interest, then the statute seems to contemplate that the subject-matter so disposed of will or may be the subject of exemption as being in some sense a distinct item of tax subject-matter (I avoid using the word "property"). However that may be, I confess that I take the view, as did the learned judge, that if E it is assumed, as I think it must be—and I am far from saying the assumption is not well founded—that the Estate Duty Office have properly performed their duties in making a levy for tax, then they have levied tax on a two-thirds of the estate which excludes that fraction in which Major Robb was interested. If that premise is right, then it seems to me that the conclusion must follow under s. 9 (1) of the Act of 1894 that the burden should be borne by the two-thirds F which attracted the levy. Agreeing, therefore, with the learned judge in this respect, I would, without saying more, and for reasons which I have indicated, dismiss the appeal.

WILLMER, L.J.: I agree, and have nothing to add.

UPJOHN, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Radcliffes & Co.* (for the appellants); *Lawrence, Graham & Co.* (for the trustee); *Payne, Hicks Beach & Co.* and *Wild, Collins & Crosse* (for the remaining respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* DAWSON. R. *v.* WENLOCK.

[COURT OF CRIMINAL APPEAL (Finnemore, Davies and Hinchcliffe, JJ.), January 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, February 2, 1960.]

Criminal Law—Conspiracy—Indictment—Several conspiracies included in the same count—Whether conspiracy should also be charged where these are substantive charges in relation to the same conduct.

Criminal Law—Practice—Alternative counts—Duty of court to look at realities of position and convict on count showing plainest evidence of guilt.

Criminal Law—Evidence—Bankruptcy—Public examination—Part of appellant's public examination in bankruptcy admitted on charge of fraudulent conversion—Evidence inadmissible—Larceny Act, 1916 (6 *&* 7 *Geo.* 5 *c.* 50), *s.* 43 (3).

Criminal Law—Obtaining of credit by fraud—Sale of goods—Goods not delivered—Whether an obtaining of credit—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 13 (1).

An indictment on which two appellants, D. and W., were charged with other accused included fifteen counts. Fourteen of these charged various fraudulent offences on dates in and between 1955 and 1957. The first count charged conspiracy to defraud between Nov. 1, 1954, and Dec. 31, 1957. The conspiracy was charged against all four accused and as a conspiracy with others named. The transactions which were the subject of the other fourteen charges were within the purview of the conspiracy charge. Both appellants were convicted on the conspiracy charge. D. was convicted also on other counts; of these (a) counts 7 and 8 charged respectively obtaining a valuable security by false pretences and obtaining credit by fraud in relation to the same matter; (b) count 11 charged fraudulent conversion*, and part of the public examination of D. in bankruptcy was admitted in evidence in relation to it; and (c) count 14 charged obtaining credit by false pretences, based on a transaction of sale of goods by D. to a purchaser at a time when D. had not all the goods in question but would have to obtain some to make up the quantity sold. On appeal against convictions,

Held: (i) count 1, the conspiracy count, was unnecessary, lengthened the case enormously and had in fact worked injustice; moreover it was a charge of several conspiracies, not one conspiracy, and accordingly the convictions on count 1 would be quashed (see p. 564, letter H, post).

R. v. *Luberg* ((1926), 19 Cr. App. Rep. 133) applied.

(ii) counts 7 and 8 were really alternatives and it had been wrong to convict on both; in such circumstances it was the duty of the court to have regard to realities, and, as there was plain evidence of the false pretences charged, conviction on that count (count 7) should stand, although it was not the lesser offence (see p. 565, letter E, post).

R. v. *Smith* ((1915), 11 Cr. App. Rep. 81) and *R.* v. *Johnston* ((1913), 9 Cr. App. Rep. 262) considered.

(iii) on count 11 evidence from D.'s public examination in bankruptcy was inadmissible by reason of s. 43 (3)† of the Larceny Act, 1916, but the

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* The charge of fraudulent conversion was laid under s. 20 of the Larceny Act, 1916; 5 HALSBURY'S STATUTES (2nd Edn.) 1022.

† Larceny Act, 1916, s. 43 (2) and (3) are as follows:—" (2) No person shall be liable to be convicted of any offence against . . . s. 20 . . . of this Act upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved.

" (3) In any proceedings in respect of any offence against . . . s. 20 . . . of this Act, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person."

A evidence should not have had any effect on the jury and the conviction on count 11 would stand as there had been no miscarriage of justice (see p. 566, letters F to H, post).

(iv) the convictions on count 14 would be quashed because D. had sold goods but had not delivered them and that, as distinct from an arrangement whereby delivery on a sale should be postponed although the price was
B paid, was not an obtaining of credit (see p. 567, letters C and D, post).

Osborn v. *Barton* ((1949), 66 (Pt. 1) T.L.R. 115) and *R.* v. *Ingram* ([1956] 2 All E.R. 639) explained.

Per CURIAM: the proper approach to an indictment containing a conspiracy charge and substantive charges is to deal first with the substantive charges and then to proceed to see how far the conspiracy count should be
C there at all and whether it is made out (see p. 564, letter C, post).

Observations on the inclusion of conspiracy charges together with substantive charges in an indictment (see p. 563, letters E to G, post).

Appeal of W. allowed; appeal of D. allowed in part.

[As to conspiracy generally and the form of indictment in criminal cases, see 10 HALSBURY'S LAWS (3rd Edn.) 310-314, paras. 569-571; and for cases on
D the subject, see 14 DIGEST (Repl.) 121-124, *851-860*; 126, *878-881*; 131, *941*, *947*; 135, *980-982*, *984*; 335, *3251*; 338, *3309*.

As to the availability of evidence in previous proceedings in bankruptcy of an accused person at a criminal trial, see 2 HALSBURY'S LAWS (3rd Edn.) 334, para. 646; 638, para. 1266; and 10 HALSBURY'S LAWS (3rd Edn.) 477, note (d); 793, para. 1535.

E For the Larceny Act, 1916, s. 20 (1), s. 43 (2), s. 43 (3), see 5 HALSBURY'S STATUTES (2nd Edn.) 1022, 1038, 1039.]

Cases referred to:

Osborn v. *Barton*, (1949), 66 (Pt. 1) T.L.R. 115; 94 Sol. Jo. 15; 5 Digest (Repl.) 1129, *9103*.

R. v. *Boulton*, (1871), 12 Cox, C.C. 87; 14 Digest (Repl.) 135, *980*.

F *R.* v. *Cooper & Compton*, [1947] 2 All E.R. 701; 112 J.P. 38; 32 Cr. App. Rep. 102; 14 Digest (Repl.) 633, *6421*.

R. v. *Hammersley*, (1919), 122 L.T. 383; 84 J.P. 23; 14 Cr. App. Rep. 118; 14 Digest (Repl.) 581, *5804*.

R. v. *Ingram*, [1956] 2 All E.R. 639; [1956] 2 Q.B. 424; 120 J.P. 397; 40 Cr. App. Rep. 115; [1956] 3 W.L.R. 309; 3rd Digest Supp.

G *R.* v. *Johnston*, (1913), 9 Cr. App. Rep. 262; 14 Digest (Repl.) 659, *6688*.

R. v. *Luberg*, (1926), 135 L.T. 414; 90 J.P. 183; 19 Cr. App. Rep. 133; 14 Digest (Repl.) 335, *3251*.

R. v. *Meyrick*, *R.* v. *Ribuffi*, (1929), 21 Cr. App. Rep. 94; 14 Digest (Repl.) 135, *984*.

R. v. *Smith*, (1915), 11 Cr. App. Rep. 81.

H **Appeals.**

The appellants, George John Frederick Dawson and Albert Wenlock, were arraigned with four other accused at the Central Criminal Court before JUDGE AARVOLD and a jury on Feb. 2, 1959, on an indictment containing fifteen counts. Dawson was charged on all counts. Wenlock was charged on counts 1, 2, 5 and
I 14. The first count (see p. 560, letter E) charged the accused with conspiracy together and with others between two dates separated by over three years; and subsequent counts charged various fraudulent offences, including false pretences, obtaining credit by fraud, and fraudulent conversion. All these subsequent charges related to matters within the period covered by the charge of conspiracy, and the circumstances to which counts 2 to 15 related were largely or wholly within the scope of the conspiracy charge in count 1. The trial lasted nine weeks and on Mar. 26, 1959, Dawson was convicted of conspiracy under count 1, of obtaining money by false pretences under counts 6, 7

and 13, of fraudulent conversion under count 11 and of obtaining credit by fraud under counts 4, 8, 9, 12 and 14. He was sentenced to six years' imprisonment on count 1 for conspiracy, five years' imprisonment on the counts for obtaining money by false pretences and fraudulent conversion and one year's imprisonment on the counts relating to obtaining credit by fraud, these sentences running concurrently. Wenlock was convicted of conspiracy under count 1 and was sentenced to two years' imprisonment. He was also convicted of false pretences (as also was Dawson) under count 2 and of aiding and abetting Dawson to obtain credit by fraud under count 14. On these convictions Wenlock was sentenced to two years' and one year's imprisonment, and all sentences passed on him were to run concurrently. The other four accused were acquitted on the whole indictment.

The appellants appealed on divers points and this report is confined to the following: (a) the appeal of Dawson and Wenlock against conviction on count 1, (b) the appeal of Dawson on counts 7 and 8 (on the ground that these were alternative counts and that there could not properly have been conviction on both), (c) the appeal of Dawson on count 11 (on the ground that evidence from Dawson's public examination in bankruptcy, which had been admitted, was inadmissible under s. 43 of the Larceny Act, 1916) and (d) the appeals of Dawson and Wenlock on count 14 (on the ground that a sale of goods was not the obtaining of credit). These counts were as follows—

> 1. That between Nov. 1, 1954, and Dec. 31, 1957, [the accused] conspired together and with one George Ernest Barker (otherwise known as Arya), Michael Eaton Eland, Orchard Gold Limited, Orchard Gold Producers Limited, Smarden Fruit Juices Limited, Bulk Containers Limited and with other persons unknown to cheat and defraud such persons as might be induced to part with money and goods in connexion with transactions relating to the purchase, sale, barrelling bottling and processing of orange juice concentrate and the purchase, sale and conversion of buses, bogies and landing vehicles and such persons as might be induced to discount or accept liability in respect of bills of exchange accepted by [Dawson] or by the said companies, by false pretences and by fraudulent conversion and by divers other false and fraudulent devices.
>
> 2. That on Jan. 28, 1955 [Dawson, Williams and Wenlock] with intent to defraud, caused the delivery of a cheque for £9,000 by Shimwell Investmen's Limited to Kenneth McLaglen by falsely pretending that [Wenlock] was then in a position to effect the sale of 75,000 gallons of orange juice concentrate in Germany at a price of not less than 15s. per gallon and that there was then in existence a firm offer from a prospective buyer for the said quantity of concentrate at the said price and that an order from Salvicta Limited for the said quantity of concentrate at 15s. per gallon contained in a [certain] letter was a firm and bona fide offer for the said quantity of concentrate at the price of 15s. a gallon.
>
> 7. That on Nov. 5, 1955 [Dawson and Elman] with intent to defraud caused Peter Peters to execute a valuable security, to wit, a cheque for £2,000 by falsely pretending that the value of the assets of Orchard Gold Limited, Smarden Fruit Juices Limited and Orchard Gold Producers Limited together was not less than £60,000 and that the liabilities of the said companies were negligible.
>
> 8. That on Nov. 5, 1955 [Dawson] in incurring a debt or liability obtained £2,000 credit from Peter Peters by means of fraud other than false pretences to wit, by falsely pretending that he would duly honour his obligations as the acceptor of three bills of exchange for £1,000, £1,000 and £900 respectively and that [Elman] would hold certificates in respect of 250 shares of Orchard Gold Limited for and on behalf of and to the order of the said Peter Peters.

A That [Elman] at the same time and place aided, abetted, counselled and procured [Dawson] in the commission of the said offence.

11. That on June 6, 1956 [Dawson and Elman] being entrusted by Veritas Investments and Finance Limited with a cheque for £1,600 in order that [Elman] might apply it or the proceeds thereof for the purchase by Bulk Containers Ltd. of 20 locomotive bogies, 7 diesel motors and 22 gear B boxes and for the construction therewith of 7 British Standard Diesel Locomotives of sound and proper construction to comply in all respects to the requirements and specifications of the British Standard gauge, fraudulently converted the same or a part thereof, to their own use and benefit.

14. That on Sept. 17, 1956 [Dawson] in incurring a liability obtained £750 credit from John Pearson by false pretences and by means of other C fraud, to wit, by falsely pretending that an offer by [Wenlock] to purchase from the said John Pearson 30,000 gallons of orange juice concentrate at 12s. per gallon was a bona fide offer and that one F. C. Peterson would purchase and pay for 30,000 gallons of orange juice concentrate at the price of 12s. per gallon and that [Wenlock] had previously purchased orange juice concentrate of the same type and quality at 17s. per gallon and that D an offer by [Dawson] to sell 30,000 gallons of orange juice concentrate to the said John Pearson was a bona fide offer and that [Dawson] would and bona fide intended to barrel the said 30,000 gallons and deliver the same to the said John Pearson in barrels. That at the same time and place [Wenlock and McLaglen] aided, abetted, counselled and procured the commission of the said offence.

E JUDGE AARVOLD ended his summing-up as follows—

"Members of the jury, I have very little more to add to what I have already said. This is a matter which now rests in your hands. You may think that a good way to approach the problem would be to consider the first count in the indictment first, that is the count of conspiracy, and to F make up your minds whether it has been proved that in this case there was a conspiracy in being, whether there was a course of fraudulent conduct agreed by the people named. If there were not such a course of fraudulent conduct, then you would acquit everybody. If there were such a course of fraudulent conduct, you would have to consider who took part in it, and when you made up your minds which, if any, of the defendants had taken part in it, G you would then have to consider whether, when they took part in that dishonest and fraudulent conduct, they knew that was what they were doing. Were they willing participants in dishonest acts?

"When you have dealt with the first count of the indictment in that way, the rest of the counts in the indictment will fall into a very much smaller compass and be more simple to decide; because, if you should find that anyone H was not taking part in the fraudulent conduct, if there were such conduct, you would acquit that person and you would acquit him of all the counts in which he was involved. If you find that a particular person was knowingly taking part in dishonesty and fraud in the way which it suggested, then you would have to turn to the particular count in the indictment with which that particular person is concerned, and then you would have to ask yourselves I whether the other matters alleged have been proved to your satisfaction. In the case of obtaining money or credit by false pretences you will ask yourselves whether it was the fraudulent conduct of the person concerned which operated on the mind of the person who parted with his money. You may think it simpler to consider after you come to your decision on the conspiracy charge. I only throw that out as a hint which you may think it useful for you to follow.

"I think that is all that I can usefully say to you. The matter is entirely your responsibility."

In the course of argument on the appeal the authorities listed below* were cited in addition to those mentioned in the judgment.

J. F. F. Platts-Mills for the appellant Dawson.

J. C. G. Burge for the appellant Wenlock.

J. M. G. Griffith-Jones and *J. C. Mathew* for the Crown.

Cur. adv. vult.

Feb. 2. **FINNEMORE, J.**, gave the following judgment of the court: These are appeals by George John Frederick Dawson, who was sentenced to six years' imprisonment and various lesser terms running concurrently, and Albert Wenlock, who was sentenced to two years' imprisonment in total, against their convictions and sentences at the Central Criminal Court. It is necessary to say that it was a case of very great length and considerable complexity which lasted, we are told, for nine weeks at the Central Criminal Court and the appeal has taken two full weeks to hear in this court. It is also right to say here that we are indebted to counsel on both sides for having put their submissions to us so clearly. There was a mass of evidence which had to be considered. There were some fifteen counts, one count for conspiracy to cheat and defraud and fourteen other counts dealing with various substantive charges. There was, we are told, some difficulty obviously in framing the charges because they changed from time to time before the accused were committed and, indeed, before the indictment itself was settled. There were several charges which were rejected by the chief magistrate at the preliminary hearing, some of which nevertheless appeared in the indictment. That course is permissible and in certain cases may be necessary, but we think it right to say, as has been said by other judges before us, that it is an undesirable practice and can easily in some cases work hardship on defendants, and the right to prefer in the indictment charges which the magistrate has rejected is one which ought to be very carefully regarded. This may be the reason (the difficulty of framing some of these charges) why count 1 charging the conspiracy to cheat and defraud was included. I hope that this judgment is not going to be unduly long, but we are anxious not to keep the people concerned in suspense and, still more, we do not wish to raise false hopes which might easily be raised in view of the opinion we have formed on a number of the counts. I propose, therefore, to say at once what is the final result of our decision, and then I hope briefly to indicate the reasons count by count.

As far as Wenlock is concerned, his appeal will be allowed and the conviction quashed. Dawson's case of course is very different, and while we are going to quash a number of convictions, we say at once there are several counts on which he was properly convicted which were serious cases of fraud, and the final result will be that we shall change the sentence overall from six years, to which he was sentenced, to one of four years.

With regard to Wenlock we want to say this. He was convicted on only two counts, counts 2 and 14, plus the conspiracy. The first was in January, 1955, and the second was in September, 1956. There was only one other matter in which he was concerned, I think it was count 5, which related to happenings in April, 1955. With all the other charges he had nothing to do either directly or indirectly. He was an agent trying to negotiate contracts, mostly on the continent and in particular in Germany, a country from which we believe he originally came. We think counsel for Wenlock was right when he said that all the contemporary documents in this case, assuming they were genuine, go to prove Wenlock's bona fides, and there is no proof, that we can see, that those documents were not in fact genuine. [His Lordship then stated that in regard to count 2 there was no evidence that the contract was other than a genuine contract so far as Wenlock was concerned, and in regard to count 14 there was no evidence that Wenlock was putting forward a bogus contract for he had told the buyer that it was not a contract and Wenlock was not authorised to sign a contract and there would not be one until the seller confirmed it from Germany, which he never did. His Lordship continued:] We think that Wenlock is really a typical example of a man who was sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connexion either direct or indirect, and in which he took no part whatever, and in which his name was never even mentioned. What this court has to consider is whether we are acting as a sort of super jury and trying to alter the verdict of the jury who saw and heard the witnesses, a verdict with which this court is extremely reluctant to interfere in any way. We think that we ought to say this. First of all this court has the overall duty of seeing there is no miscarriage of justice. It has to see that the verdict is reasonable in view of the actual evidence, and in this case we have ourselves seen the documents on which so much of the case depended. We want to make it quite plain that we are not in any way whatever criticising the jury, nor are we criticising the learned judge, who, if we may say so, subject of course to some matters which were quite inevitable in a case of this great length, summed this case up quite fairly and put quite properly to the jury the defences which had been put forward by the accused people. However, we have come to the view that the conviction of Wenlock on these two counts and on the count for conspiracy is unsatisfactory and must be set aside and the appeal allowed.

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* *R.* v. *Wickham*, (1839), 10 Ad. & El. 34; *R.* v. *Hill*, (1911), 7 Cr. App. Rep. 26; *R.* v. *Noel*, [1914] 3 K.B. 848; *R.* v. *Laurens* (*alias Lawson*), (1915), 11 Cr. App. Rep. 215; *R.* v. *Mills*, (1935), 25 Cr. App. Rep. 138; *R.* v. *West*, [1948] 1 All E.R. 718; *R.* v. *Lurie*, [1951] 2 All E.R. 704; *R.* v. *Ball*, (1951), 35 Cr. App. Rep. 164; *R.* v. *Maywhort*, [1955] 2 All E.R. 752; Archbold's Criminal Pleading, Evidence and Practice (34th Edn.), paras. 130, 137, 1030, 1044, 1905, 1916, 1936, 1943, 1944, 1960, 3683, 4053 and 4070; 1 Halsbury's Laws (3rd Edn.) 228.

Now with regard to the first count for conspiracy—I propose to say very briefly later what we are doing about the other counts—this court feels it is desirable to say something. This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a mammoth conspiracy. Several reasons have been given. First of all if there are substantive charges which can be proved, it is in general undesirable to complicate matters and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence, which otherwise would be inadmissible on the substantive charges against certain people, becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable and impose a quite intolerable strain both on the court and on the jury. We would like to refer once again to what has been said, not once but numbers of times in this court. There is first *R.* v. *Luberg* (1). Sankey, J., giving the judgment of the court, referred to what was said by Cockburn, C.J.:

> " There is the well-known case of *R.* v. *Boulton* (2), where Cockburn, C.J., in summing-up, refers to this procedure and says (3): ' I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it, for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses.' "

That is the end of the quotation, and Sankey, J., went on (4):

> " It is perfectly true that that case was different from the present one. It is equally true that since the decision in that case an Act of Parliament

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(1) (1926), 19 Cr. App. Rep. 133. (2) (1871), 12 Cox, C.C. 87.

(3) (1871), 12 Cox, C.C. at p. 93: cited in (1926), 19 Cr. App. Rep. at p. 137.

(4) (1926), 19 Cr. App. Rep. at p. 137.

> has been passed which enables a prisoner to go into the witness-box and give evidence. It is a perfectly admissible and proper course to pursue, and a course which is often pursued, but we think that if that course is pursued, great care and great caution is necessary during the hearing of the evidence to be quite sure that no evidence is given which is inadmissible, and great care is required in the summing-up to keep all the several issues perfectly clear."

Again, he said in regard to the summing-up (5):

> "The judge does not, I think, at the end of his long summing-up [which was not otherwise at all criticised] in one way put it quite correctly, where he says: 'That is the whole case and you must take it as a whole and not by bits.'"

That is very very like the directions given to the jury in the present case; they were told to look at the whole of the case, and having formed a view about the whole of the case, which really means the conspiracy, then to proceed to the substantive charges. We think that the proper course really is to proceed the other way, to deal with the substantive charges and then to proceed to see how far the conspiracy count should be there at all and if it is made out.

On the other side we would refer to *R.* v. *Meyrick, R.* v. *Ribuffi* (6) and also *R.* v. *Hammersley* (7), fairly recent cases, but the difference in those cases is that in each case the court held that there was only one conspiracy, even though people took part in it independently of one another, and, I think, in one case not even knowing the course of the main person in the conspiracy. They were both conspiracies to defeat the ends of justice, and both dealt with bribes given to police officers in order to allow infringements of the law to take place.

R. v. *Luberg* (8) and the quotation from COCKBURN, C.J., were again referred to in *R.* v. *Cooper & Compton* (9), and without going into it further, this court suggests that when counsel have to deal with these problems they would do well to read again and bear in mind the judgment of this court delivered in that case by HUMPHREYS, J. (10).

There is more than this in the present case, for this court, after very careful consideration of this point, is of opinion that this was not one conspiracy. Although conspiracy there was, it was a number of conspiracies. Dawson was dealing with orange juice; he was dealing with buses, bogies and landing vehicles, and he was dealing with bills of exchange, with different kinds of people at different times over a period of three years. The count charges conspiracy with, I think it is, some twelve men, of whom six were actually charged and three convicted. It is an odd circumstance that one person named Eland was included in a count as one of the conspirators, and in a later count included as one of the victims, which illustrates again the great difficulties in which one is placed by these abnormally long conspiracy charges. In addition to the other matters which we have mentioned, we are satisfied this was not one conspiracy, and it is no more correct to charge several conspiracies, though they are called one conspiracy, if it is to include other different charges, in one count. Again we want to say in the strongest possible way that quite apart from that we think it is wholly undesirable, and in this case it was obviously quite unnecessary, to have a long count of this kind, because it has lengthened the case enormously, and we think that in the result to which we have come it plainly worked an injustice on one at least of the appellants before this court today. Therefore we quash the convictions on the first count.

[HIS LORDSHIP stated that on count 2, the one charging Dawson and Wenlock with three false pretences, as two of the charges had been abandoned by the Crown and, on the third charge which affected Wenlock, as the genuineness of the letter in question was not disproved, the court felt that no false pretence had taken place and the convictions on that count would be quashed. HIS LORDSHIP referred to count 4, which charged an obtaining of credit from a company by fraud and stated that the court had decided that credit was not obtained from that company and the conviction of Dawson on that count would be quashed. Having stated that the conviction on count 6 would be quashed owing to an omission in the summing-up, HIS LORDSHIP continued:] Now counts 7 and 8 are very different. Of course counsel for Dawson made no sort of admission, but the real case on counts 7 and 8—that is why I take them together—was that the jury were wrong in convicting Dawson on both counts because they were alternative counts. That we take to be right. One was a charge of false pretences on which he was sentenced to five years' imprisonment, and the second, dealing with exactly the same matter, charged him with obtaining credit by fraud other than false pretences, on which he was sentenced to twelve months' imprisonment. Counsel for Dawson developed an argument that if that mistake is made and a person is convicted on two alternative counts, the rule is that the court should act on the lesser of the two and pass the smaller sentence. Now we do not think that that really is a rule; we think that the proper approach is that laid down in the case of *R.* v. *Smith* (11). LORD READING, C.J., there said that the court undoubtedly could and in a proper case would treat the conviction as if it had been on the lesser of the charges (12)—that was not a direction or rule. In the previous case, *R.* v. *Johnston* (13), to which reference is made in *R.* v. *Smith* (11), it was said that if the court was in doubt, then it should choose the lesser of the two charges of which the man had been convicted. We think that it is the duty of the court to look at the realities of the position, and in our view there was the plainest possible evidence of false pretences. We think the false pretence count, which is No. 7, is the proper one on which the conviction should be registered and not as it happens in this case, the lesser offence contained in count No. 8. It was a false pretence in which a wrong letter, amongst other things, was handed to the man concerned saying that the companies for whom the work was being done had many assets, including some £60,000 worth of stock and had negligible liabilities, when in fact the companies concerned were insolvent. There were other matters as well, but we think it is a very plain case of false pretences and a bad case of false pretences, and we therefore affirm the conviction on count 7 on which a sentence of five years was passed, which we think appropriate to reduce to a sentence of four years.

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(5) (1926), 19 Cr. App. Rep. at p. 139.

(6) (1929), 21 Cr. App. Rep. 94.

(7) (1919), 14 Cr. App. Rep. 118.

(8) (1926), 19 Cr. App. Rep. 133.

(9) [1947] 2 All E.R. 701.

(10) [1947] 2 All E.R. at pp. 702-705.

[HIS LORDSHIP after referring to count 9 on which Dawson had been convicted, and stating that the conviction on that count would be quashed owing to an erroneous inference of fact in the summing-up, reviewed the facts and contentions on counts 11 and 12, and after concluding that the fraudulent conversion charged in count 11 (see p. 561, letter A, ante) was made out, continued:] There is, however, another point which arises on count 11, which is an offence under s. 20 (1) (iv) (a) of the Larceny Act, 1916. Counsel for Dawson raised two points here. For some reason on this count—it only applies to this count—evidence was proffered and admitted of part of Dawson's public examination in bankruptcy, and counsel for Dawson took two points on that on s. 43 (2) and, secondly, s. 43 (3). Section 43 (2) says:

> "No person shall be liable to be convicted of any offence against . . . s. 20 [I leave the others out] upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which has been bona fide instituted by any person aggrieved."

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(11) (1915), 11 Cr. App. Rep. 81.

(12) (1915), 11 Cr. App. Rep. at p. 83.

(13) (1913), 9 Cr. App. Rep. 262.

He said that no proceedings could be taken on this matter and the count would fail. Counsel for the Crown's answer to that is that that section does not apply to bankruptcy proceedings. It seems to this court, having been referred to the relevant authorities, that that is the correct view. In the Larceny Act, 1861, there was s. 85 in which this provision first appeared. The interesting thing about s. 85 is that having used very much the words which I have just read from the Larceny Act, 1916, the section (viz., s. 85 of the Act of 1861) added this:

> " or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

That would seem to suggest that sub-s. (2) of s. 43 of the Larceny Act, 1916, as I read the subsection, would not apply to bankruptcy proceedings. The Act of 1861, however, made special provision that a similar protection should be given to a man who first disclosed offences of this kind in bankruptcy proceedings. The matter becomes, so it seems to us, quite plain when we look at the Bankruptcy Act, 1890, s. 27. That section provided: " There shall be repealed so much of s. 85 of the Act ", that is the Act of 1861, and then it repealed this very provision, and it made a new provision, that is s. 27 (2), which was as follows:

> " A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanours referred to in the said s. 85."

It appears to us to be as plain as anything can be that the legislature repealed the protection of what is now s. 43 (2) as applying to bankruptcy matters, and gave a new protection (14), which is now s. 43 (3) of the Larceny Act, 1916. Therefore, we think that s. 43 (2) had no application to this case, but we do think s. 43 (3) applies, and we think that this evidence was in fact inadmissible.

Now we have to consider another matter which was also urged on this point by counsel for the Crown. Did it in fact have any real effect on the jury ? We do not quite know why it was ever thought to be necessary, much less desirable, to tender this evidence, or why it was allowed to be given, but we have read it and considered it and heard the arguments about it. We think that it is a proper case in which we can say that we do not think that the questions which were in fact admitted from the public examination should have had any real effect on the jury or could have influenced them in any way in coming to the verdict which they reached on this count. We therefore think that it is right in the interests of justice to apply the proviso (15), because we think no miscarriage of justice resulted from it. Therefore we have affirmed the convictions on count 11 and also on count 12, and we think the proper sentence on count 11 is four years' imprisonment to run concurrently with the other sentence, and on count 12 twelve months' imprisonment, also to run concurrently.

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(14) The new protection was that given by s. 27 (2) of the Bankruptcy Act, 1890, which was repealed by the Bankruptcy Act, 1914, s. 168 and Sch. 6, and corresponds to s. 43 (3) of the Larceny Act, 1916. It may be observed that whereas s. 85 of the Act of 1861 and s. 43 (2) of the Larceny Act, 1916, are both directed against conviction, s. 27 (2) of the Bankruptcy Act, 1890, and s. 43 (3) of the Larceny Act, 1916, were or are directed against admissibility in evidence.

(15) Viz., the proviso to s. 4 (1) of the Criminal Appeal Act, 1907.

That leaves only count 14, to which I have made some reference already as far as Wenlock is concerned. In this case the major charge is against Dawson, and Wenlock was charged with aiding and abetting him. As far as Dawson is concerned, the charge is one again of obtaining credit. What happened, shortly, was this. He sold to Pearson a quantity of orange juice which was seen by Pearson, or by someone on his behalf. It was tested by somebody on Pearson's behalf, and it was situated then either at Smarden or West Ferry. The contract was for 30,000 tons, and if there was not that quantity of orange juice at the proper place where the sale took place, Dawson was to make it up with orange juice which he obtained elsewhere. £750 was paid quite plainly, as it seems to us, as part of the purchase price, and the argument was that inasmuch as there was not in fact 30,000 tons in the place and he therefore would have to get other orange juice to make up the quantity, it was in fact a case of his being given credit. We would refer to various cases on this question, which arises on some other counts as well, *Osborn* v. *Barton* (16) and *R.* v. *Ingram* (17). We think that the principles are not really difficult. If you buy goods and the man to whom you send the money does not send the goods back to you or hand them over, it does not mean you have given him credit. He may be guilty of other frauds, but he is not guilty of obtaining credit. On the other hand, if by arrangement you hand over to a person the purchase money for the goods with the arrangement between you that the goods are not going to be delivered until some time in the future, then that may be a case, as in *R.* v. *Ingram* (17), of credit being enjoyed by the person who has got to supply the goods (18). We do not think that this case was that at all. We do not think that in any real sense it can be said that under this count, whatever else he may have done, Dawson in fact obtained credit. Therefore, the conviction on that count is also quashed.

The result of all this is that the appeal of Wenlock is allowed and the conviction quashed. With regard to Dawson, on count 7 and on count 11 there is a sentence of four years' imprisonment to run concurrently, and on count 12 a sentence of twelve months' imprisonment to run concurrently. Also that will of course date from the original date.

Appeal of Wenlock allowed. Conviction quashed. Appeal of Dawson allowed in part. Sentence varied.

Solicitors: *G. B. Hemming & Son* (for the appellant Dawson); *H. Davis & Co.* (for the appellant Wenlock); *Director of Public Prosecutions* (for the Crown).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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(16) (1949), 66 (Pt. 1) T.L.R. 115.

(17) [1956] 2 All E.R. 639; [1956] 2 Q.B. 424.

(18) Counsel for Dawson in argument had quoted the argument of counsel for the Crown in *R.* v. *Ingram* ([1956] 2 Q.B. at p. 428) that there must be a time stipulated for the delivery of goods—the credit must be by agreement: it must be contractual or stipulated credit and there was no stipulation here.

ARBUCKLE SMITH & CO., LTD. *v.* GREENOCK CORPORATION.

[House of Lords (Viscount Kilmuir, L.C., Lord Reid, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), January 18, 19, February 18, 1960.]

Rates—Rateable occupation—Alterations preparatory to intended use—Purchase of warehouse premises for use as a bonded store—Alterations to premises—No use of premises as bonded store until after alterations were completed—Whether premises "unoccupied" during period of alteration—Local Government (Scotland) Act, 1947 (10 *&* 11 *Geo.* 6 *c.* 43), *s.* 243 (1), *as amended by Valuation and Rating (Scotland) Act,* 1956 (4 *&* 5 *Eliz.* 2 *c.* 60), *s.* 44, *Sch.* 7, *Part* 3, *s.* 379 (1).

The appellants bought warehouse premises, with possession on Mar. 1, 1957, for use as a bonded store for spirits. The premises could not be so used without the approval of the Commissioners of Customs and Excise. During the year from Whitsunday, 1957, to Whitsunday, 1958, alterations of the premises to comply with the commissioners' requirements were carried out. Provisional approval was granted by the commissioners on June 13, 1958, being a date after Whitsunday, 1958, and the appellants then began to use the premises as a bonded store. By the Local Government (Scotland) Act, 1947, s. 243 (1)*, as amended, rates were not payable in respect of the premises if they were unoccupied throughout the whole of the year from Whitsunday to Whitsunday. "Unoccupied" was not defined, but by s. 379 (1) of the Act of 1947, "occupier" meant a person in the actual occupation of the land.

Held: the appellants were not in rateable occupation of the premises during the year in question because their use for the purpose of effecting alterations was a preparing of them for future occupation but was not occupation for the purpose for which they were bought.

Commercial Bank of Scotland v. *Glasgow Corpn.* ((1925), S.L.T. (Sh. Ct.)142) and *Co-operative Permanent Building Society* v. *Pinkerton* ((June 18, 1958), unreported) overruled.

Hackney Borough Council v. *Metropolitan Asylums Board* ((1924), 131 L.T. 136) considered.

Appeal allowed.

[**Editorial Note.** English and Scottish law were treated as being the same in regard to occupation that renders premises rateable (see p. 571, letter A, post). There is, however, no statutory equivalent in English rating law of s. 243 (1) (as amended) or the definition of "occupier" in s. 379 (1) of the Local Government (Scotland) Act, 1947.

As to rateable occupation in England, see 27 Halsbury's Laws (2nd Edn.) 351-353, para. 782; and for cases on the subject, see 38 Digest 426-431, *10-55.*]

Cases referred to:

Borwick v. *Southwark Corpn.*, [1909] 1 K.B. 78; 78 L.J.K.B. 121; 99 L.T. 841; 73 J.P. 38; 38 Digest 426, *16*.

Clyde Navigation Trustees v. *Adamson*, (1863), 1 S.C. (3rd Series) 974; *affd.* H.L., (1865), 3 S.C. (3rd Series) 100.

Commercial Bank of Scotland v. *Glasgow Corpn.*, (1925), S.L.T. (Sh. Ct.) 142.

Co-operative Permanent Building Society v. *Pinkerton* (June 18, 1958), unreported.

Hackney Borough Council v. *Metropolitan Asylums Board*, (1924), 131 L.T. 136; 88 J.P. 129; 38 Digest 427, *17*.

Hampstead Borough Council v. *Associated Cinema Properties, Ltd.*, [1944] 1 All E.R. 436; 113 L.J.K.B. 446; 170 L.T. 266; 108 J.P. 155; sub nom. *Associated Cinema Properties, Ltd.* v. *Hampstead Borough Council*, [1944] K.B. 412; 2nd Digest Supp.

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* The relevant terms of this enactment are printed at p. 570, letter B, post.

A *Harter* v. *Salford Overseers*, (1865), 6 B. & S. 591; 34 L.J.M.C. 206; 29 J.P. 647; 122 E.R. 1313; 38 Digest 525, *726*.

Liverpool Corpn. v. *Chorley Union Assessment Committee*, [1913] A.C. 197; 82 L.J.K.B. 555; 108 L.T. 82; 77 J.P. 185; 38 Digest 428, *36*.

Mersey Docks v. *Cameron, Jones* v. *Mersey Docks*, (1865), 11 H.L. Cas. 443; 35 L.J.M.C. 1; 12 L.T. 643; 29 J.P. 483; 11 E.R. 1405; 38 Digest B 466, *286*.

R. v. *Melladew*, [1907] 1 K.B. 192; 76 L.J.K.B. 262; 96 L.T. 189; 71 J.P. 125; 38 Digest 426, *15*.

Townley Mill Co. (*1919*), *Ltd.* v. *Oldham Assessment Committee*, [1937] 1 All E.R. 11; [1937] A.C. 419; 106 L.J.K.B. 140; 156 L.T. 81; 101 J.P. 125; C Digest Supp.

Appeal.

Appeal by the ratepayers, Arbuckle Smith & Co., Ltd. against an interlocutor of the Second Division of the Court of Session (LORD PATRICK, LORD MACKINTOSH, LORD THOMSON (Lord Justice-Clerk) and LORD STRACHAN), pronounced on June 18, 1959, adhering to an interlocutor of the Lord Ordinary (LORD GUEST), dated D Mar. 25, 1959, decerning against the appellants in terms of the first conclusion of the summons for payment to the respondents, Greenock Corporation, of £2,141 13s. 4d. in respect of rates for warehouse premises at Ker Street, Greenock, for the year Whitsunday, 1957, to Whitsunday, 1958. The case before the Court of Session is reported 1958 S.C. 615.

Alexander Thomson, Q.C., *H. S. Keith* (both of the Scottish Bar) and *D. G.* E *Widdicombe* for the appellants.

W. R. Grieve, Q.C., *P. Maxwell* (both of the Scottish Bar) and *W. B. Harris* for the respondents.

Their Lordships took time for consideration.

Feb. 18. The following opinions were read.

F **VISCOUNT KILMUIR, L.C.**: My Lords, this is an appeal against an interlocutor of the Second Division of the Court of Session by which the court adhered to an interlocutor of the Lord Ordinary (LORD GUEST) decerning against the appellants in terms of the first conclusion of the summons for payment to the respondents of £2,141 13s. 4d. There is no dispute about the facts. The appellants purchased certain warehouse premises situated in Greenock with G entry as at Mar. 1, 1957, with a view to using them as a bonded store for spirits. It was not permissible for the appellants so to use the premises until provisional approval of such use had been granted by H.M. Customs and Excise. The appellants applied for provisional approval on Jan. 28, 1958. It was an essential preliminary to the grant of provisional approval that certain alterations to the premises should be carried out in order to make them secure in accordance with H customs regulations. The appellants commenced to carry out such alterations on Mar. 3, 1958, and completed them on June 16, 1958. Provisional approval was granted by H.M. Customs and Excise on June 13, 1958, and thereafter the appellants commenced to use the premises as a bonded store. The appellants had never prior thereto—that is at any time during the relevant period of Whitsunday, 1957, to Whitsunday, 1958—used the premises as a bonded store or I for any purpose of their business as warehousemen. They intended to occupy the premises when the alterations were complete and when H.M. Customs and Excise were satisfied with the security measures.

Liability for rates in Greenock depends on s. 222 of the Local Government (Scotland) Act, 1947, which enacts:

> " Save as otherwise provided with respect to any rate in this Act or any other enactment, every rate levied shall be payable by owners and occupiers in equal proportions ",

and on s. 16 (1) of the Valuation and Rating (Scotland) Act, 1956, which enacts: A

> " In the year first commencing after the passing of this Act and in every subsequent year every rate levied by a rating authority shall be payable by occupiers only . . ."

By s. 379 (1) of the Act of 1947, " occupier " is defined as meaning the tenant or
sub-tenant of any person in the actual occupation of land. Section 243 (1) B
of the Act of 1947 (as amended by the Act of 1956) enacts that, save as otherwise
provided in a local Act, any rate levied by the rating authority shall not be
payable in respect of lands and heritages if the lands and heritages are unlet,
unoccupied and unfurnished throughout the whole of the year from Whitsunday
to Whitsunday corresponding to or as nearly as may be to the period for which
the rate is levied. We were assured that there is no relevant local Act. The C
premises in question were admittedly unlet and unfurnished, and the question
is whether they were unoccupied in the sense used in the context of rating.
LORD PATRICK thought that the word " actual " in s. 379 (1) of the Act of 1947
had been used to make plain that the occupation which is necessary to make the
occupier liable to pay rates is de facto occupation as opposed to de jure occupation,
the kind of constructive occupation which might be held to flow from mere D
ownership of land. I am disposed to agree with him on this, and also when he
says that, for the purposes of the Act of 1947, an owner of land must have made
some actual use of the premises in the relevant year before he can be called on
to pay rates. The crucial question, however, is what kind of use is contemplated,
or in other words whether it is sufficient to make alterations with the intention
of carrying on a business when the alterations are completed. I do not think E
it is. I accept broadly the argument for the appellants which can be put in this
way. The sole purpose of the appellants in acquiring the premises was to use
them as a bonded store in connexion with their business as warehousemen. The
alterations were necessary in order that this purpose might, if the alterations
were approved by the Customs and Excise, receive effect. Yet activity carried
on in relation to premises, the sole object of which is to make the premises fit F
for the only use which is contemplated, does not amount to the kind of actual
user as is essential to rateable occupation. So long as the activities were confined
to making the premises fit for a contemplated purpose, the premises were
not serving the appellants' purposes as warehousemen. The premises were not
being applied to the purpose for which they existed but were in an antecedent
stage. It must be remembered that, under rating law, it is open to the owner G
to sterilise a property—whether by leaving a house without furniture or otherwise—which
is perfectly capable of being let for a valuable rent. If, therefore,
there is no use of premises according to their nature, I find it difficult to see how
there is occupation attracting liability for rates.

The learned judges who considered this case in the Court of Session were
obviously much impressed by the advantage which, in their view, the appellants H
would receive from altering the premises. I cannot, however, take their next
step of saying that, because it was an advantage to the appellants to alter the
premises, therefore the appellants were making beneficial use of the premises.
It is an undoubted advantage to the owner of an empty house to put on some
slates and keep it weathertight, but the fact that he does so could not create
rateable occupation where none existed. I cannot, myself, accept the view that, I
when a person is repairing or altering something designed for a particular purpose,
he is by that action making use of it. The learned Lords of Sessions were able
to find support for their view in the decisions of this House in *Mersey Docks* v.
Cameron, *Jones* v. *Mersey Docks* (1) and *Clyde Navigation Trustees* v. *Adamson* (2).
With the greatest respect, I cannot find any. When I consider the use made of
its premises by a docks and harbour board, I have no difficulty in recognising it

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(1) (1865), 11 H.L. Cas. 443.

(2) (1865), 3 S.C. (3rd Series) 100.

as a full as well as a beneficial occupation, although the board is precluded from making a profit. In these cases, the dock estates were clearly being used according to their actions and the decisions do not, in my view, help in the problem raised by the instant case.

As, however, reliance has been placed on certain English cases and everyone has treated the law of Scotland and the law of England as being the same on this point, I want to say that I do not think that they place any real difficulty in the way of the view which I have formed. It will be noted that, in *Hackney Borough Council* v. *Metropolitan Asylums Board* (3), LORD HEWART, C.J., indicated that the carrying out of alterations without more might not amount to rateable occupation. My difficulty is to perceive the relevance of the accumulation of small facts on which the decision that there was rateable occupation was reached. I do not think that the cases where the ratio decidendi was that the premises were in effect "stand-by" premises, such as *Borwick* v. *Southwark Corpn.* (4) and *Hampstead Borough Council* v. *Associated Cinema Properties, Ltd.* (5), help in the decision of this case. It follows that, in my view, the two cases in Sheriff Courts, *Commercial Bank of Scotland* v. *Glasgow Corpn.* (6) and *Co-operative Permanent Building Society* v. *Pinkerton* (7) were not rightly decided.

For all these reasons, I would allow the appeal.

LORD REID: My Lords, in this action the respondents sue for £2,141 13s. 4d., being rates due for the year from Whitsunday, 1957, to Whitsunday, 1958, in respect of warehouse premises at Ker Street, Greenock. The appellants acquired these premises in March, 1957, with a view to using them as a bonded warehouse. Before premises can be used for that purpose, the requirements of H.M. Customs and Excise as to security must be satisfied. Preliminary approval of the premises was given in September, 1957, and alterations with a view to improving the security of the premises were made by the appellants between Mar. 3 and June 16, 1958, whereupon provisional approval was given and the appellants were free to use the premises for their intended purpose.

The appellants' defence is that, throughout the year in question, the premises were "unlet, unoccupied and unfurnished" within the meaning of s. 243 (1) of the Local Government (Scotland) Act, 1947. If that is established, then occupiers' rates are not payable. Owners' rates having been abolished in 1956, the whole sum now sued for represents occupiers' rates, and, if the appellants' contention is correct, it is a complete defence to this action. The premises were unlet, and it is now admitted that they were unfurnished throughout the year. The case turns on whether they were "unoccupied" throughout the year. The facts are not in dispute. The premises remained empty, and the only operations carried out in them by the appellants during the year were some slight repairs to the roof in January and the alterations begun on Mar. 3 and not completed by Whitsunday. These alterations comprised bricking up some windows and doors and fitting iron bars to some other windows. The respondents do not attach importance to the repairs, but they maintain that, by making these alterations, the appellants occupied the premises. What, then, is the meaning of "unoccupied" in the Act of 1947. There is no definition of the word, and the only assistance to be got from the Act is in the definition of "occupier" in s. 379 (1), which includes "any person in the actual occupation of land". Premises are, therefore, unoccupied unless there is "actual" occupation by somebody. But that does not throw much light on what is meant by "occupation"; it only excludes occupation which is not actual but only notional —if there can be such a thing as notional occupation.

There is singularly little authority in Scotland on the meaning of occupation and, apart from two Sheriff Court cases, there is none in point in this case.

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(3) (1924), 131 L.T. 136.
(4) [1909] 1 K.B. 78.
(5) [1944] 1 All E.R. 436; [1944] K.B. 412.
(6) (1925), S.L.T. (Sh. Ct.) 142.
(7) (June 18, 1958), unreported.

In England, there is a wealth of authority, not always consistent, but again, with one possible exception, there is none exactly in point here. I, therefore, think it proper to begin by taking the word " unoccupied " as an ordinary word of the English language and considering its possible meanings. It could, I suppose, mean that no one ever set foot in the premises during the relevant period, but I reject that meaning at once both because it has never even been suggested so far as I know in any authority or text-book, and because very properly it was not argued in this case. So, if the owner can himself enter or send in others without thereby " occupying " the premises, the criterion of occupation must be either how frequently he or his representatives go in or what they do when they are there. No one has contended that entry for inspection or cleaning or ordinary maintenance, such as heating in cold weather or carrying out ordinary repairs to make the premises wind and water-tight, constitutes occupation, and it appears to me that occupation must involve something more than that. But, if that be so, I have difficulty in seeing on what reasonable principle the making of the alterations in this case can be held to constitute occupation. It might easily be necessary to do work not dissimilar in character and extent from that done here to make good doors and windows broken by natural or human agency. And moreover, where fairly extensive repairs are necessary, the old position is not always exactly restored; the opportunity is taken to carry them out in such a way as to make improvements. It would seem to me very odd if, in such a case, the criterion were whether or not the work done has improved the premises or made them more valuable to the owner. But I can see a clear distinction between maintaining, repairing or improving the fabric on the one hand and enjoying the accommodation which it provides on the other. And I think that it would accord with the ordinary use of language to say that the owner who in some way enjoys the accommodation is occupying the premises, but that the owner who merely maintains, repairs or improves his premises is not thereby occupying them; he is preparing for future occupation by himself, his tenant or his disponee.

It appears to me that the difficulty in this case arises from a misapplication of the requirement that, to be rateable, occupation must be beneficial. The argument is that, if you find the owner making use of his property and if that use is beneficial, then there must be occupation; the kind of use does not matter. But if the word " use " is used in that wide sense, that argument must, I think, be wrong, or at least too widely stated. If bricking up doors and windows is beneficial use, I do not see how it can be said that replacing or repairing broken doors and windows is not also beneficial use; the premises might be unusable until the repairs had been done. The real question in this case, to my mind, is not whether that kind of use was beneficial. It is whether that kind of use, beneficial or not, can amount to occupation.

A good deal was said in argument about the decisions of this House in *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (8) and *Clyde Navigation Trustees* v. *Adamson* (9). There, statutory boards had made full use of their premises; they did all the things that a normal occupier would do, and the quality of their use was not in issue. Their case was that they did not have to pay rates because they were precluded from making profit. Their occupation was, nevertheless, held to be beneficial and rateable; it was beneficial because it was of property capable of yielding a net annual value. Since that time, occupation of such property has been held rateable whether or not the occupier derives profit from it. But those cases throw no light on the question what kind of use amounts to occupation, and do not in the least support the fallacious argument; occupation to be rateable must be beneficial; those owners made beneficial use of their property; therefore they were in rateable occupation. I do not propose to examine subsequent English authorities. They show that it may be difficult in particular cases to show whether there was such enjoyment of the property as to amount to occupation. But with one exception they do not involve the present question. The exception is *Hackney Borough Council* v. *Metropolitan Asylums Board* (10). I find it somewhat difficult to determine the ratio decidendi, but it would seem to me that, although individual acts of maintenance and improvement do not constitute occupation, an accumulation of such acts may do so. I would doubt that. But I think it unnecessary to decide that such an accumulation could never amount to occupation; it is sufficient to say that that could only be so in exceptional circumstances, and that there is nothing exceptional in the present case. It follows that, in my opinion, the two Sheriff Court cases—*Commercial Bank of Scotland* v. *Glasgow Corpn.* (11), and *Co-operative Permanent Building Society* v. *Pinkerton* (12) were wrongly decided. For the above reasons, I agree that this appeal should be allowed.

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(8) (1865), 11 H.L. Cas. 443.

(9) (1865), 3 S.C. (3rd Series) 100.

LORD RADCLIFFE: My Lords, we have here to consider the rateability of a warehouse owned by the appellants but not put to any use by them during the relevant year except so far as entry on the premises by workmen and the carrying out by them of alterations to the fabric may constitute " use " for this purpose. The alterations were required in order to render the warehouse properly secure for service as a bonded store in accordance with customs regulations. The specific items of work mentioned were the bricking up of certain windows and doors. I take it, therefore, that this is not a case of an existing building being reduced for the time being to an incomplete state by far-reaching structural alterations, but is a case of an existing building being subjected to certain modifications of its structure which, until completed, left it unfit for the intended business use.

It has been common ground that the appellants' claim not to be rated in respect of the premises depends on s. 243 (1) of the Local Government (Scotland) Act, 1947, the effect of which is to provide exemption from rates in respect of any hereditament which has been " unlet, unoccupied and unfurnished " throughout the whole of the year from Whitsunday to Whitsunday corresponding to, or as nearly as may be to, the period for which the rate is levied. Certainly the warehouse was neither let nor furnished during the relevant period; but was it unoccupied? That rests on the meaning which is to be attributed to the words " occupier " or " occupied " or " occupation " where they appear in the context of a rating enactment. In s. 379 (1) of the same Act, " occupier " is defined as meaning the tenant or sub-tenant or " any person in the actual occupation of land ". In my opinion, the word " actual " has no particular significance here. The question is still, what is meant by " occupation "?, and that, I think, can only be answered by considering what acts, intentions or situations are requisite to constitute occupation for the purposes of rating. Both the learned Lord Ordinary (LORD GUEST) and the learned judges of the Second Division of the Court of Session treated the law of Scotland and the law of England as being the same on this point, though I have no doubt that differences between the two systems may lead to divergences in other respects. Consequently English decisions were referred to so far as they threw any light on the principles of law to be applied, though no English decision has dealt with a case precisely similar to that which is now before us. Having regard to the general link between the conceptions of rateability ruling in the two countries, which was confirmed by the successive decisions of this House in *Mersey Docks* v. *Cameron, Jones* v. *Mersey Docks* (13) and *Clyde Navigation Trustees* v. *Adamson* (14) I should have been disposed in any event to consider the case on the same basis; but I am confirmed in this approach by my understanding that both of your Lordships who are trained in Scottish law take the same view as the Second Division on this matter.

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(10) (1924), 131 L.T. 136.
(11) (1925), S.L.T. (Sh. Ct.) 142.
(12) (June 18, 1958), unreported.
(13) (1865), 11 H.L. Cas. 443.
(14) (1865), 3 S.C. (3rd Series) 100.

My Lords, I think that consideration of this case must begin by recognising that an empty dwelling-house is not rateable, and the owner of it is not regarded by the law as an occupier for rating purposes. It is, no doubt, something of a curiosity that the owner can, by his own decision and for his own purposes, withdraw from rateability a hereditament which may be of substantial annual value and for which a tenant would readily give a profitable rent. But so it is, even though the principle of it puzzled so great an authority as Lord Blackburn (see *Harter* v. *Salford Overseers* (15)). Whether the rule is, " in truth, an exception from the general law of rating " (per Lord Russell of Killowen in *Townley Mill Co. (1919), Ltd.* v. *Oldham Assessment Committee* (16)), it is none the less an established part of that law. It accords with the principle that, to be a rateable occupier, a person must enjoy some benefit from the land; his occupation must be " a thing of value ". The explanation has been said to be that the owner of an empty house does not use it " as a house " within the meaning of the original Poor Relief Act, 1601 (see per Lord Atkinson, in *Liverpool Corpn.* v. *Chorley Union Assessment Committee* (17)); and it has been decided at various times that, while putting the owner's furniture in the house does set up rateability, presumably because some use of it as a house is being obtained, keeping a caretaker in the house merely as a custodian does not constitute occupation by the owner. It is evident, therefore, that there will not be occupation in the context of rating unless some use is made of the hereditament in the course of the relevant year. " Use " is not a word of precise meaning, but in general it conveys the idea of enjoyment derived by the user from the corpus of the object enjoyed. When rating law turns its attention from dwelling-houses to industrial or commercial premises, the same conceptions are, in my opinion, applicable to determine whether or not occupancy ceases or begins, though they must be adapted to the particular circumstances of such premises, factory or warehouse, and the business for the purpose of which they are created. Nevertheless, I think that the words of Farwell, L.J., in *R.* v. *Melladew* (18) provide a satisfactory indication of the correct test:

> " Rateable property has many varieties; of some the normal use is by personal occupation, e.g., a dwelling-house, of others by occupation by live or dead stock, e.g., a linhay used as a shelter for cattle, or a barn; and the nature of the property and its mode of use must be considered in each case. The test, in a case like the present, of business premises, appears to me to be, Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it? "

Now the appellants never used the warehouse in question here as a warehouse during 1957-58. That, I think, is the determining point. They did not buy it for any purpose of use except as a bonded store, and that only when their adaptations were complete and their licence permitted. That is not a case of a warehouse being kept empty in one year by its owner after it had been used as such by him in the previous year; nor is it one of those cases of " stand-by " premises such as were the subject of decision in *Borwick* v. *Southwark Corpn.* (19) and *Hampstead Borough Council* v. *Associated Cinema Properties, Ltd.* (20). Nor again is it a case of premises bought for one business purpose being, in fact, put to some other use. Here, if nothing more had been done than was done up to the date when the work of adaptation began, there would have been no question of rateable occupation. The whole issue is whether the acts that were done in carrying out these works amounted to such a use of the hereditament as set up an occupation within the year. In

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(15) (1865), 6 B. & S. 591 at p. 595.

(16) [1937] 1 All E.R. 11 at p. 17; [1937] A.C. 419 at p. 433.

(17) [1913] A.C. 197 at p. 211.

(18) [1907] 1 K.B. 192 at p. 203.

(19) [1909] 1 K.B. 78.

(20) [1944] 1 All E.R. 436; [1944] K.B. 412.

A my opinion, they did not. Since language is not a precise instrument, it is possible to say that there was use of the premises in the circumstance that they were entered and subjected to the work of adaptation. I do not think, however, that it is this sort of user that is relevant when the court is considering whether a warehouse was in rateable occupation. There was no enjoyment of the value of the building as a warehouse. Indeed, I do not see how adaptation work differs in its B significance from current repair or maintenance work carried out for the purpose of keeping the building safe against wind and weather. If all that was done to or in an empty building was that workmen went in to effect such current repairs, I should have thought it rather extravagant to suggest that it thereby became occupied in the rating sense. Again, it is not, in my opinion, a correct, or at any rate a conclusive, test to determine whether an occupation was beneficial to C inquire whether it suited the owner to have the work in question done, or whether such work was to his advantage. Except in very special circumstances, it is to be assumed that it would be. But you could say as much about maintenance work. It prevents a loss of value to the owner just as adaptation or improvement should lead to an increment of value. These considerations, however, do not suffice to show that the occupation, assuming the acts to have amounted to such, was D itself " a thing of value " during the year. Where there was no act of user of the warehouse for the business purpose for which it existed, this requirement was not fulfilled.

It will appear from what I have said why I take the view that the judgments of the Lord Ordinary and of the Second Division of the Court of Session do not proceed on what is altogether the correct principle. For the same reasons, I do E not think that the two Sheriff Court cases to which we were referred, *Commercial Bank of Scotland* v. *Glasgow Corpn.* (21) and *Co-operative Permanent Building Society* v. *Pinkerton* (22) were rightly decided. The principle applied is entirely intelligible, but it is not, in my opinion, in accord with the proper conception of occupation in rating law. The English decision which is closest to this case on its facts is *Hackney Borough Council* v. *Metropolitan Asylums Board* (23). It is, F however, impossible to refer to that case as an authority on any matter of principle, owing to the extreme ambiguity of the judgment of the Divisional Court delivered by LORD HEWART, C.J. The most that can, perhaps, be inferred, for what it is worth, is that the court seems to have inclined to the view that there would not be occupation of an empty building during the period when nothing more was done in it than execute works of adaptation and reconstruction. What G makes the decision unsatisfactory is that it is impossible to see on what principle the comparatively trivial other acts on the premises were held by the court to turn what would or might not otherwise have been rateable occupation into such an occupation. I cannot see what their significance was, and I should be surprised if anyone else can.

I would allow the appeal.

H **LORD COHEN:** My Lords, I agree.

LORD KEITH OF AVONHOLM: My Lords, I agree and have little further to add. I have some difficulty in following the approach made by their Lordships of the Second Division to the question in this case and, in particular, to understand why those of their Lordships who gave opinions thought it necessary to consider whether the alterations that were made were beneficial, or of I value, to the appellants. These premises could not be entered in the valuation roll unless they were capable of beneficial occupation. The annual value which was put on them in the roll was the measure of the value of that occupation, in other words, it was, under s. 6 of the Lands Valuation (Scotland) Act, 1854, the rent which a hypothetical tenant might be expected to give for them in their actual state, taking one year with another. But for assessment to rates there must be occupation. If, therefore, there were rateable occupation of the premises, that annual value supplied the basis of assessment for occupiers' rates. The assessment in the present instance must have been on that footing. If the appellants were in occupation they were in beneficial enjoyment of the premises, and it does not really matter what use they were making of the premises. In *Clyde Navigation Trustees* v. *Adamson* (24), the Clyde Navigation Trustees claimed that they were not in rateable occupation so as to be liable to be assessed to poor rates. This House and the Court of Session held that they were liable and in the Court of Session (25) it was pointed out that it was only the assessor under the Lands Valuation Acts who could fix the value of that occupation. The question as I see it must always be: Was there such occupancy as would amount to enjoyment of the beneficial value of the subjects?

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(21) (1925), S.L.T. (Sh. Ct.) 142. (22) (June 18, 1958), unreported.
(23) (1924), 131 L.T. 136.

The question in this case is whether the appellants were in rateable occupation during any part of the rating year 1957-58. If their Lordships of the Second Division entertained the view that the appellants were in actual occupation, then there was no need to go on and consider whether that occupation was beneficial. That had already been fixed by the value in the valuation roll. But I think they may have meant that mere entry on the premises to make the alterations in question—which they called use or possession of the premises—was not enough unless that use was of value. Beneficial use, in other words, was necessary for actual occupation. I do not know that I would cavil at that proposition in this case, but I do not think that what was done here was beneficial use of the premises. The alterations were the same kind of alterations that might have been done in other circumstances by a tenant of premises, or by an owner-occupier in undoubted occupation of premises, but these would not add to his beneficial use or enjoyment, unless they were of such a character as added to the value of the premises, in which case they would, no doubt, be reflected in an increased valuation in the valuation roll. In that case, his beneficial use would be in the enjoyment of the increased value, not in the mere making of the alterations. In the premises here in question, there could be no possible benefit, or enjoyment, from the alterations until the next rating year.

I can detect no difference between the law of Scotland and the law of England in the principles that affect rateable occupation, though the system by which rateable values are fixed may be somewhat different. The statute defines occupier as including any person " in the actual occupation " of land. It is difficult to know what significance was intended by the word " actual ". The definition in the Act of 1947 is not new. It will be found in the Burgh Police (Scotland) Act, 1892. It may be intended to exclude the nominal occupation which may attach to an owner-occupier being entered, as I think is usual, in both the owner's and occupier's column of the valuation roll, irrespective of whether he is in actual occupation or not. But the point here is immaterial. The word " actual " cannot certainly weaken the criteria to be looked to in deciding whether there is rateable occupation. I cannot add to the views expressed in the speeches already delivered that nothing points here to actual occupation of the premises in question.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Rees & Freres*, agents for *Fraser, Stodart & Ballingall*, Edinburgh (for the appellants); *John Kennedy & Co.*, agents for *Town clerk*, Greenock, and *Cumming & Duff*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(24) (1865), 3 S.C. (3rd Series) 100.
(25) (1863), 1 S.C. (3rd Series) 974 at p. 986.

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BROWN *v.* ROLLS ROYCE, LTD.

[House of Lords (Lord Reid, Lord Radcliffe, Lord Cohen, Lord Keith of Avonholm and Lord Denning), January 20, February 18, 1960.]

Burden of Proof—Legal burden—Negligence—Legal burden on plaintiff averring negligence applied ultimately in relation to evidence as a whole—Distinction
B *between legal and provisional onus of proof.*

Master and Servant—Liability of master—Negligence—Burden of proof.

The appellant was employed by the respondents and his hands were
constantly in contact with oil owing to the nature of his employment.
He contracted dermatitis as a result of the contact with oil, and brought
an action for damages against the respondents for negligence in failing to
C supply him with barrier cream as a protection. The following additional
facts, among others, were found—(i) that the respondents did not provide
barrier cream; (ii) that a type of barrier cream was commonly supplied
by employers to men doing such work as the appellant was doing, but
that there was no evidence as to what, if any, other precautions those
employers took; (iii) there were strong differences of opinion in the
D medical profession as to the value of barrier cream in regard to dermatitis;
(iv) the respondents relied on their medical officer for advice on the precautions
to be taken against dermatitis and, on his advice, they did not
include barrier cream as one of the precautions required in their system;
(v) the medical officer exercised proper care and skill in advising on the proper
precautions to be taken against dermatitis and was not at fault in so doing;
E (vi) it was not proved that barrier cream was an effective precaution against
the contracting of dermatitis by workmen engaged in similar work to the
appellant; and (vii) it was not proved that barrier cream would probably
have prevented the appellant from contracting dermatitis. The Court of
Session thereon found in law that the respondents were not at fault in not
supplying barrier cream. On appeal, the appellant contended that the
F facts of the appellant's employment and contracting the disease coupled
with (i) and (ii) above discharged the preliminary onus of proof that was on
him and raised a presumption of negligence which it was for the respondents
to rebut.

Held: the legal burden of proof of negligence rested on the appellant
and, considering the facts found as a whole, the appellant had not proved
G negligence on the part of the respondents; thus, in determining whether
negligence had been proved, it would be wrong to regard certain findings of
fact (viz., those numbered (i) and (ii) above) separately and, having deduced
from them that negligence should be inferred, to conclude that the legal
burden of proof shifted and that it was thereafter for the respondents to
rebut negligence by proving that, if barrier cream had been supplied, it would
H not have protected the appellant from contracting dermatitis.

Observations by Lord Denning on the distinction between a legal
burden of proof imposed by the law itself and the shifting of inferences of
fact, as evidence is tendered, which may cause negligence to be inferred
unless further evidence is adduced and, in that sense only, may raise a
presumption that needs to be rebutted (see p. 581, letter I, to p. 582, letter E,
I post).

Appeal dismissed.

[**Editorial Note.** Lord Denning's observations on the shifting of provisional onus of proof should be considered with his statement of the same concept in *Huyton-with-Roby Urban District Council* v. *Hunter* ([1955] 2 All E.R. at p. 400, letter H).

As to the burden of proof and the burden of adducing evidence, see 15 Halsbury's Laws (3rd Edn.) 268, para. 490, and p. 269, para. 492.

As to the burden of proof of causation of injury in an action for damages for negligence, see 28 Halsbury's Laws (3rd Edn.) 27, para. 25; and for cases on the subject, see 36 Digest (Repl.) 140, 141, *735-746*.]

Cases referred to:

Bonnington Castings, Ltd. v. *Wardlaw*, [1956] 1 All E.R. 615; [1956] A.C. 613; [1956] 2 W.L.R. 707; 3rd Digest Supp.

Cavanagh v. *Ulster Weaving Co., Ltd.*, [1959] 2 All E.R. 745; [1959] 3 W.L.R. 262.

Morton v. *William Dixon, Ltd.*, 1909 S.C. 807.

Paris v. *Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.

Qualcast (Wolverhampton), Ltd. v. *Haynes*, [1959] 2 All E.R. 38; [1959] A.C. 743; [1959] 2 W.L.R. 510.

Appeal.

Appeal by John Brown against an interlocutor of the First Division of the Court of Session (Lord Clyde (Lord President), Lord Carmont, Lord Russell and Lord Sorn), pronounced on May 29, 1959, and reported 1958 S.C. 600, reversing an interlocutor pronounced by the Sheriff-substitute at Glasgow (N. M. L. Walker, Esq.) on Sept. 10, 1958, in an action of reparation raised by the appellant against the respondents, Rolls Royce, Ltd. The facts are set out in the opinion of Lord Keith of Avonholm, p. 580, letters D to I, post.

F. C. Watt, Q.C., and *I. R. Hamilton* (both of the Scottish Bar) for the appellant.

M. Kissen, Q.C., and *J. A. Forsyth* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

Feb. 18. The following opinions were read.

LORD REID: My Lords, I have had an opportunity of reading the speeches which my noble and learned friends are about to deliver. I agree with them and I find it unnecessary to add anything.

I move, your Lordships, that this appeal be dismissed.

LORD RADCLIFFE: My Lords, for my own part, I take the same view. I have had the same opportunity of reading the speeches prepared by my noble and learned friends who will deliver them later, and I am in full agreement.

LORD COHEN: My Lords, the appellant contracted industrial dermatitis caused by contact with oil while he was in the employment of the respondents, and he avers that the said dermatitis was caused or aggravated by the fault and negligence of the respondents. He instituted proceedings in the sheriffdom of Lanarkshire at Glasgow claiming £500 damages and, on Sept. 10, 1958, recovered judgment for damages assessed at £300. The respondents appealed to the Court of Session, and the matter came before their Lordships of the First Division. On May 29, 1959, they pronounced their interlocutor reversing by a majority the decision of the Sheriff-substitute. In that interlocutor they found in fact as follows:

> "(i) that from 1952 till 1955 the [appellant] was employed by the [respondents] as a machine oiler; (ii) that owing to the nature of his work his hands were constantly in contact with oil; (iii) that in the spring of 1954, he contracted industrial dermatitis caused by contact with oil; (iv) that the [respondents] supplied ample washing facilities; (v) that they did not supply barrier cream; (vi) that there are strong differences of opinion in the medical profession as to the value of barrier cream in regard to dermatitis; (vii) that the [respondents] relied on their medical officer, Dr. Collier, for advice on the precautions to be taken against dermatitis;

A (viii) that on the advice of the said Dr. Collier the [respondents] did not include barrier cream as one of the precautions required in their system; (ix) that the said Dr. Collier exercised proper care and skill in advising on the precautions to be taken against dermatitis, and was not at fault in so doing; (x) that Rozalex No. 1 barrier cream is commonly supplied by employers to men doing such work as the [appellant] was doing, but there is no evidence B as to what, if any, other precautions their employers take; (xi) that it is not proved that barrier cream is an effective precaution against the contracting of dermatitis by workmen engaged in similar work to the [appellant]; (xii) that it is not proved that barrier cream would probably have prevented the [appellant] from contracting dermatitis; (xiii) that the [appellant] is still suffering from the disease and the prospects of an early recovery are C not good; and (xiv) that he was off work owing to the disease from July 25 to Sept. 19, 1955, and his net loss of wages during that period was approximately £39 . . ."

They then proceeded to find in law that the respondents were not at fault in not supplying barrier cream, and they sustained the respondents' second plea-in-law which was that the appellant not having suffered loss, injury or damage through D the fault of the respondents, the respondents should be assoilzied. From that interlocutor the appellant appealed to your Lordships' House.

The first point to be noted is that, since the interlocutor appealed from reviewed the judgment of an inferior court founded on proof allowed and taken, the Court of Session Act, 1825 (6 Geo. 4 c. 120), s. 40, makes it final as to findings of fact; it is subject to appeal only on points of law. Counsel for the appellant E accepts that this is the position but he submits that findings (i), (ii), (iii), (v) and (x) which I have quoted discharge what he calls the preliminary onus of proof of the respondents' negligence which he admits rests on the appellant and alleges that the onus then passed to the respondents to show that they were not negligent. He says that the respondents have not discharged that onus.

I cannot think it is right to take some of the findings of fact in this way apart F from the others and thus create an artificial division in the onus of proof. It seems to me that the authorities clearly show that it is for the pursuer in an action founded on negligence to show that the defenders have been negligent and that their negligence has caused the injury of which the pursuer complains. As LORD KEITH OF AVONHOLM said in *Cavanagh* v. *Ulster Weaving Co. Ltd.* (1):

> G "The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle."

Applying this ruling principle to the facts as found by the First Division, I arrive at the conclusion that the respondents have not failed in their duty to the appellant. Counsel for the appellant relied on the first part of the well-known H rule laid down by LORD PRESIDENT DUNEDIN in *Morton* v. *William Dixon, Ltd.* (2). But that rule is only a prima facie guide and, as LORD PRESIDENT CLYDE said in the present case there is no evidence to prove that barrier cream is effective to prevent dermatitis. Moreover as LORD NORMAND said in *Paris* v. *Stepney Borough Council* (3), the rule

> I ". . . does not detract from the test of the conduct and judgment of the reasonable and prudent man."

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(1) [1959] 2 All E.R. 745 at p. 750.

(2) 1909 S.C. 807 at p. 809. LORD DUNEDIN said: "Where the negligence of an employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

(3) [1951] 1 All E.R. 42 at p. 49; [1951] A.C. 369 at p. 382.

It seems to me impossible in face of findings (vii), (viii) and (ix) to say that the respondents did not pass this test.

I have arrived at my conclusion on the facts found and stated in the interlocutor. If it were permissible to look at the judgments of the majority of the Court of Session, this conclusion would be reinforced by further facts stated by the Lord President and Lord Russell. The Lord President said that, before Dr. Collier came on the scene in 1940, the respondents supplied barrier cream, and Lord Russell said the number of dermatitis cases had fallen from 353 in 1941 to three or four by 1957.

I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, the appellant, who is pursuer in this action, appeals against an interlocutor of the First Division of the Court of Session which recalled an interlocutor of one of the sheriff-substitutes of Lanarkshire at Glasgow, pronounced in the appellant's favour, after proof in the Sheriff Court. The case is thus one to which s. 40 of the Court of Session Act, 1825, applies and appeal to your Lordships' House is competent only on points of law. It is unnecessary to refer to the record in the action further than to say that the action is one of damages by the appellant against his employers for negligence in failing to supply him with barrier cream as a protection against the risk of getting industrial dermatitis through contact with oil, in the course of his employment. The interlocutor of the First Division, so far as material, is in the following terms:

> "Edinburgh, May 29, 1959. The Lords having considered the record in the appeal: Find in fact (i) that from 1952 till 1955 the [appellant] was employed by the [respondents] as a machine oiler; (ii) that owing to the nature of his work his hands were constantly in contact with oil; (iii) that in the Spring of 1954, he contracted industrial dermatitis caused by contact with oil; (iv) that the [respondents] supplied ample washing facilities; (v) that they did not supply barrier cream; (vi) that there are strong differences of opinion in the medical profession as to the value of barrier cream in regard to dermatitis; (vii) that the [respondents] relied on their medical officer, Dr. Collier, for advice on the precautions to be taken against dermatitis; (viii) that on the advice of the said Dr. Collier the [respondents] did not include barrier cream as one of the precautions required in their system; (ix) that the said Dr. Collier exercised proper care and skill in advising on the precautions to be taken against dermatitis, and was not at fault in so doing; (x) that Rozalex No. 1 barrier cream is commonly supplied by employers to men doing such work as the [appellant] was doing, but there is no evidence as to what, if any, other precautions their employers take; (xi) that it is not proved that barrier cream is an effective precaution against the contracting of dermatitis by workmen engaged in similar work to the [appellant]; (xii) that it is not proved that barrier cream would probably have prevented the [appellant] from contracting dermatitis; (xiii) that the [appellant] is still suffering from the disease and the prospects of an early recovery are not good; and (xiv) that he was off work owing to the disease from July 25 to Sept. 19, 1955, and his net loss of wages during that period was approximately £39; Find in law that the [respondents] were not at fault in not supplying barrier cream; Sustain their 2nd plea-in-law, recall the interlocutor of the Sheriff-substitute dated Sept. 10, 1958, except in so far as it certifies witnesses and the employment of counsel, allow the appeal, assoilzie them from the crave of the initial writ and decern."

The findings of fact contained in this interlocutor are, in my opinion, fatal to the success of this appeal. The argument for the appellant was that findings (i), (ii), (iii), (v) and (x) necessarily raised a presumption of negligence which the respondents had to rebut. The keystone in this argument seemed to be the finding of common practice to supply barrier cream stated in finding (x). But I can draw no such inference from this finding. A common practice in like circumstances not followed by an employer may no doubt be a weighty circumstance to be considered by judge or jury in deciding whether failure to comply with this practice, taken along with all the other material circumstances in the case, yields an inference of negligence on the part of the employers. Reference was made to Lord Dunedin's well-known dictum in *Morton* v. *William Dixon, Ltd.* (4). As has been said before in this House, Lord Dunedin was laying down no proposition of law; nor did he say that, if a practice was averred and proved which might have avoided the accident, this was necessarily conclusive of negligence on the part of an employer who had not followed the practice. The ultimate test is lack of reasonable care for the safety of the workman in all the circumstances of the case. That there were other material circumstances in this case is clear from findings (vi) to (ix) inclusive, with, in addition, findings (xi) and (xii). Your Lordships are not entitled to go beyond these findings, but it is clear from the opinions of the majority of the judges of the First Division, which were read to your Lordships, that these findings were not reached without a most careful examination of the evidence in the case. No doubt, as urged by counsel for the appellant, it is not the care and skill of Dr. Collier that is directly in issue, but the care of the respondents for the safety of the appellant. But absence of proper care on the part of Dr. Collier might have involved the respondents in vicarious liability. To put it at its lowest, their employment of Dr. Collier and reliance on his advice was material evidence to be weighed on the question of the care exercised by the respondents for the safety of their workmen.

The appellant's counsel also challenged findings (xi) and (xii) as having placed the onus on the wrong party. It was not for the appellant, he said, to prove the efficacy of barrier cream, but for the respondents to disprove its efficacy. Here again his submission turned on the finding with reference to common practice by other employers. But it is impossible, in my opinion, to affirm that this finding per se must shift the onus. It is an element to be considered with the whole other evidence in the case. The whole evidence was before their Lordships of the First Division, and it was for them to draw conclusions on how matters of onus lay. The appellant's action was based on negligence and the primary onus lay on him. The findings in question have a direct bearing on the question of negligence and, in my opinion, cannot be disturbed by your Lordships. The findings in fact in the interlocutor appealed against, in my opinion, amply support the finding in law that the respondents were not in fault in not supplying barrier cream.

I would dismiss the appeal.

LORD DENNING: My Lords, the difference between the judges of the Court of Session turned on the onus of proof. The majority of them (the Lord President (Lord Clyde), Lord Russell and Lord Sorn) thought that the burden was on the appellant to prove that the respondents were negligent and that, looking at the case at the end of the day, the appellant had not discharged that burden. The minority (Lord Carmont) thought that, once the appellant proved that the respondents had not followed the common practice of the trade in supplying barrier cream, the burden shifted to the respondents so that they would not escape liability unless they proved (not as a mere probability but as matter of reasonable certainty) that, even if they had adopted the common practice and supplied barrier cream, it would have done no good. This difference of opinion shows how important it is to distinguish between a *legal* burden, properly so called, which is imposed by the law itself, and a *provisional* burden which is raised by the state of the evidence. The *legal* burden in this case was imposed by law on the appellant. In order to succeed, he had to prove that the respondents were negligent and that their negligence caused the disease: see *Bonnington Castings, Ltd.* v. *Wardlaw* (5) by LORD REID and by LORD TUCKER. In order to discharge the burden of proving negligence, the appellant proved that

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(4) 1909 S.C. 807 at p. 809, see footnote (2) on p. 579, ante.

> " barrier cream is commonly supplied by employers to men doing such work as the [appellant] was doing."

This was a cogent piece of evidence and raised no doubt a " presumption " or a " prima facie " case, in this sense, that, if nothing more appeared, the court might well infer that the respondents were negligent, and in that sense it put a burden on the respondents to answer it. But this was only a *provisional* burden which was raised by the state of the evidence as it then stood. The respondents might answer it by argument, as, indeed, they did, by pointing out that " there is no evidence as to what, if any, other precautions these employers take "; or the respondents might answer it by calling evidence themselves, as, indeed, they did, by proving that they " relied on their medical officer, Dr. Collier, who exercised proper care and skill " and they carried out the precautions advised by him. In this way a provisional burden may shift from one party to the other as the case proceeds or may remain suspended between them. But it has no compelling force. At the end of the day, the court has to ask itself—not whether the provisional burden is discharged—but whether the legal burden has been discharged, that is to say: Has the pursuer proved that the defenders were negligent?

If the view of LORD CARMONT were right, it would mean that, once the pursuer proved that the defenders had not followed a precaution usually observed in the trade, there was a compelling presumption that they were negligent and there was a legal burden on the defenders to rebut it. This would introduce a new proposition of law for which I find no warrant in the judgment of LORD DUNEDIN in *Morton* v. *William Dixon, Ltd.* (6). As my noble and learned friend, LORD KEITH OF AVONHOLM, said in *Cavanagh* v. *Ulster Weaving Co., Ltd.* (7), LORD DUNEDIN was laying down no principle of law but stating the factual framework within which the law would fall to be applied. Nor do I find any warrant for it in the speech of LORD NORMAND in *Paris* v. *Stepney Borough Council* (8). LORD NORMAND there said that:

> " If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances."

That is not a proposition of law at all, but only a proposition of good sense. It is on a par with the propositions about protective clothing discussed by your Lordships in *Qualcast (Wolverhampton), Ltd.* v. *Haynes* (9). If defenders do not follow the usual precautions, it raises a prima facie case against them in this sense, that it is evidence from which negligence *may* be inferred, but not in the sense that it *must* be inferred unless the contrary is proved. At the end of the day, the court has to ask itself whether the defenders were negligent or not. It is sufficient if there is a greater probability on one side or the other; but if, at the end of the case, the evidence is so evenly balanced that the court cannot come to a determinate conclusion, the *legal* burden comes into play and requires the court to reject the case of negligence alleged against them. The majority of the Court of Session here held that the respondents were not at fault in not supplying barrier cream; and I can see no error of law in their findings.

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(5) [1956] 1 All E.R. 615 at pp. 618, 621; [1956] A.C. 613 at pp. 620, 624.

(6) 1909 S.C. 807.

(7) [1959] 2 All E.R. at p. 751.

(8) [1951] 1 All E.R. at p. 49; [1951] A.C. at p. 382.

(9) [1959] 2 All E.R. 38; [1959] A.C. 743.

I would, therefore, dismiss the appeal.

Appeal dismissed.

Solicitors: *Evill & Coleman*, agents for *L. & L. Lawrence*, Glasgow, and *Thos. J. Addly, Son & Co.*, Edinburgh (for the appellant); *Claremont, Haynes & Co.*, agents for *Gartshore Scott, Sons & Co.*, Glasgow, and *Simpson & Marwick*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

DIAMOND *v.* CAMPBELL-JONES AND OTHERS.

[CHANCERY DIVISION (Buckley, J.), January 19, 20, 21, 22, 26, 27, February 4, 1960.]

Sale of Land—Contract—Breach—Damages—Measure—Repudiation of contract by vendor—Intention of purchaser to convert property—Purchaser a dealer in real estate—Whether knowledge of these matters to be imputed to vendor.

In July, 1956, the defendants agreed to sell to the plaintiff for £6,000 a leasehold interest for a term expiring in the year 2003 in property in Mayfair comprising a basement and ground floor and four upper floors. The agreement was expressed to be subject to and with the benefit of a contract for the grant of a new lease, which contract required works of conversion of the property into ground floor office accommodation and residential maisonettes above to be carried out by the lessee. The agreement also stated that the permitted use for the purposes of the Town and Country Planning Act, 1947, was that stated in a letter by which permission was given for office use of the ground floor until a date in 1970 and from which it appeared that permission for multiple residential use of the rest of the premises would probably be given if requested. The defendants repudiated the contract and an inquiry as to damages was ordered. The plaintiff contended that the proper measure of damages was the profit that he would have realised if he had converted the upper floors into maisonettes and the ground floor into offices, and if he had disposed of the premises when so converted. The plaintiff was a dealer in real property, but it was neither pleaded nor shown in evidence that the defendants knew what his occupation was or that he intended to carry out a conversion of the premises. The market value of the property at the date of the breach of contract, without having been converted, substantially exceeded £6,000.

Held: (i) the plaintiff was not entitled to damages measured by reference to the profit obtainable by converting the property, because special circumstances were necessary to justify imputing to a vendor of land knowledge that the purchaser intended to use it in a particular manner, and the mere facts that the property was ripe for conversion and that everyone recognised this were not sufficient to impute to the defendants knowledge that the plaintiff intended to convert the property for profit; therefore, the damages should be assessed by reference to the difference between the purchase price and the market value at the date of the breach of contract.

Dictum of LORD WRIGHT in *Monarch S.S. Co., Ltd.* v. *Karlshamns Oljefabriker (A.B.)* ([1949] 1 All E.R. at p. 14) considered.

Dictum of the Court of Appeal in *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* ([1949] 1 All E.R. at p. 1003) explained.

(ii) since the damages recovered by the plaintiff were liable to attract income tax as part of the profits or gains of his business, he should be awarded a gross sum in damages (equal to the excess of the market value over the purchase price at the relevant date), not merely a net sum equivalent to the profit remaining after deduction of income tax.

British Transport Commission v. *Gourley* ([1955] 3 All E.R. 796) distinguished.

[As to measure of damages in contract, see 11 HALSBURY'S LAWS (3rd Edn.) 241-243, paras. 409, 410; and for cases on the subject, see 17 DIGEST (Repl.) 91, 92, *99*, *100* and 3rd DIGEST Supp.]

Cases referred to:

Bain v. *Fothergill*, (1874), L.R. 7 H.L. 158; 43 L.J.Ex. 243; 31 L.T. 387; 39 J.P. 228; *affg.* (1870), L.R. 6 Exch. 59; 40 Digest (Repl.) 287, *2392*.

British Transport Commission v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41; 3rd Digest Supp.

Engell v. *Fitch*, (1869), L.R. 4 Q.B. 659; 10 B. & S. 738; 38 L.J.Q.B. 304; 40 Digest (Repl.) 285, *2369*.

Hadley v. *Baxendale*, (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

London Investment and Mortgage Co., Ltd. v. *I.R. Comrs.*, *London Investment and Mortgage Co., Ltd.* v. *Worthington* (*Inspector of Taxes*), [1958] 2 All E.R. 230; [1959] A.C. 200; [1958] 2 W.L.R. 842; 28 Digest (Repl.) 37, *168*.

Monarch S.S. Co., Ltd. v. *Karlshamns Oljefabriker* (*A.B.*), [1949] 1 All E.R. 1; [1949] A.C. 196; [1949] L.J.R. 772; 2nd Digest Supp.

West Suffolk C.C. v. *W. Rought, Ltd.*, [1956] 3 All E.R. 216; [1957] A.C. 403; 120 J.P. 522; [1956] 3 W.L.R. 589; 3rd Digest Supp.

Wertheim v. *Chicoutimi Pulp Co.*, [1911] A.C. 301; 80 L.J.P.C. 91; 104 L.T. 226; 17 Digest (Repl.) 81, *36*.

Vaughan v. *Archie Parnell & Alfred Zeitlin, Ltd.*, (1940), 23 Tax Cas. 505; 28 Digest (Repl.) 29, *130*.

Victoria Laundry (*Windsor*), *Ltd.* v. *Newman Industries, Ltd.*, [1949] 1 All E.R. 997; [1949] 2 K.B. 528; 17 Digest (Repl.) 92, *100*.

Adjourned Summons.

This was a summons to proceed on the order made in the action for an inquiry as to damages. Judgment in the action was delivered by HARMAN, J., on Apr. 24, 1958, and by the order entered on June 10, 1958, the court declared that the defendants had wrongfully repudiated an agreement dated July 11, 1956, for the sale by the defendants to the plaintiff of the leasehold property No. 44, Green Street, London, W.1, for £6,000, and it was ordered that an inquiry be made as to what damages (if any) the plaintiff had suffered as a result of the repudiation.

It was agreed by the parties that the inquiry as to damages should be taken before a judge as it was to be argued that the measure should be the profit which it was reasonable to suppose that the plaintiff would have made had he converted the property into maisonettes, etc., and disposed of it so converted.

G. A. Rink, Q.C., and *M. Browne* for the plaintiff, the purchaser.

H. Heathcote-Williams, Q.C., and *Arthur Bagnall* for the defendants, the vendors.

Cur. adv. vult.

Feb. 4. **BUCKLEY, J.:** In this case I have to determine the amount of damages payable by the defendants to the plaintiff under a judgment of HARMAN, J., delivered on Apr. 24, 1958. By that judgment it was declared that the defendants had wrongfully repudiated an agreement dated July 11, 1956, for the sale by the defendants to the plaintiff of a leasehold property, No. 44, Green Street, Mayfair, for £6,000, and an inquiry was directed as to what damages (if any) the plaintiff had suffered as a result of such repudiation. HARMAN, J., having directed that inquiry, the plaintiff in due course took out a summons to proceed under the judgment, and that summons now comes before me.

A By agreement between the parties, as I understand it, the inquiry was reserved to be taken before the judge. Consequently the master has done no more than see that the evidence filed on the inquiry is in order. Normally the inquiry would be taken in chambers. I am not complaining in the present case about the course that matters have taken because, as will appear, one point of law of some interest has arisen for decision which is not directly covered by authority.
B It ought not to be supposed, however, that in the normal course a summons of this nature should be adjourned into court instead of being dealt with in chambers, even though cross-examination may be required and all the parties so agree.

The property to which the agreement for sale relates, No. 44, Green Street, Mayfair, was held under a lease from the Grosvenor Estate for a term expiring on Sept. 29, 2003, at a yearly rental of £280 until Sept. 29, 1975 and thereafter
C of £150. The house consists of a basement, a ground floor and four upper floors, and, in common with other houses adjoining a garden at the back, it has access (which is gained through the ground floor room at the rear of the house) to a large private garden, which gives all the rooms that look out to the south a very attractive and secluded outlook. The property is expressed by the contract, para. G, to be sold

D

> " subject to and with the benefit of:—(a) A contract dated Sept. 21, 1955 and made between the reversioners and the vendors for the grant of a new lease. (b) An agreement for an underlease dated Sept. 21, 1955 and made between the vendors of the one part and Anthony Victor Deane of the other part. (c) A surrender of the lease dated Dec. 1, 1916, referred to in the particulars which will be completed immediately before the completion
> E of the said new lease referred to in cl. G (a) hereof."

The contract also provided in para. J:

> " The property is sold on the footing that the permitted use thereof for the purposes of the Town and Country Planning Act, 1947, is indicated in the letter from the Minister of Housing and Local Government to the vendor's
> F solicitors dated Feb. 15, 1954."

The contract referred to in para. G (a) of the contract for sale was, in fact, held by HARMAN, J., at the trial to be unenforceable for reasons that I need not now go into, and consequently it is now irrelevant except in so far as it tends to show what was in the contemplation of the parties at the time that they entered into the contract for sale. The agreement for an underlease mentioned in para. G (b)
G is also now only relevant in the same way because before the contract for sale was entered into the plaintiff had acquired all Mr. Deane's interests under that agreement for an underlease. There seems to have been some dispute as to the effectiveness of the transaction between the plaintiff and Mr. Deane, but that has not been gone into before me and I am not concerned with it.

The contract referred to in para. G (a) is contained in a letter dated June 29,
H 1955, from Messrs. Boodle, Hatfield & Co., solicitors for the Grosvenor Estate, addressed to the defendants, which contained an offer which was accepted on behalf of the defendants on Sept. 20 or 21, 1955. The letter is as follows:

> " In answer to your application we beg on behalf of the special executors of the late Duke of Westminster to make the following offer, namely, you
> I to show a title to the term of years granted by the existing head lease, including the reversion on any existing underleases and/or agreements for tenancy of No. 44, Green Street, London—and duly surrender such head lease to the special executors subject to any existing underleases and/or agreements for tenancy, and to carry out the works set out overleaf and other matters mentioned below (all to their satisfaction) and thereupon a new lease to be granted to you of the same premises upon the following terms . . ."

The terms were for the grant of a new lease for a term of years to determine on

Michaelmas Day, 2003, at a rental until Sept. 29, 1975, of £280 a year and thereafter £150 a year. The letter again expressly states:

> " You [the defendants] to carry out the works mentioned in the schedule hereto to the satisfaction of the lessors or their estate surveyor."

The works referred to are the following:

> " 1. Clean down the external brickwork and repair and re-decorate the whole of the premises internally and externally. 2. Carry out the appropriate works for the conversion of the ground floor and basement into self-contained office accommodation and the remainder of the premises into one self-contained maisonette in accordance with the plans to be first submitted to and approved in writing by the Grosvenor Estate Surveyor. 3. Carry out such sanitary works as may be necessary having regard in particular to such male and female staff as may be employed in the ground floor office."

That arrangement is relied on before me as showing that it was clear, at the time that the parties entered into the contract for sale with which I am concerned, that this property was one which could be appropriately exploited by converting it from a single domestic occupation to more than one unit of occupation. It is perhaps to be noted that this scheme was one which provided for the upper floors above the ground floor to be converted into one self-contained maisonette.

The agreement for an underlease made between the defendants and Mr. Deane on Sept. 21, 1955, provided in cl. 4 that

> " the lessee should at his expense prior to the commencement of the said underlease [to be granted to Mr. Deane] execute the works required by the superior landlord as set out in the second schedule hereto."

The works set out in the second schedule to the agreement are the same as the works set out in the letter I have already read. That agreement is again relied on in the same sort of way that the arrangement between the Grosvenor Estate and the defendants is relied on.

The letter from the Minister of Housing and Local Government, which is referred to in the contract for sale, is dated Feb. 15, 1954, and was the outcome of an application made by the defendants for town planning consent to convert the whole of this house to use as business premises. In that letter written on behalf of the Minister, the writer says as follows:

> " I am directed by the Minister of Housing and Local Government to say that he has considered the report of his inspector, Mr. R. A. Hudson, M.T.P.I., following the local inquiry into the appeal by the trustees of the marriage settlement of Mervyn Campbell-Jones against the London County Council's refusal to permit the use of No. 44, Green Street, Westminster, for office purposes on the grounds that such use does not accord with the council's planning proposals for the area which are for residential user and that the premises are capable of occupation in their existing state and are reasonably capable of conversion into satisfactory self-contained residential lettings. At the inquiry it was stated on behalf of your client, that the property is no longer suitable for use as a single family dwelling and that it could not be converted into self-contained flats without a major alteration and reconstruction of the staircase. It was contended that the return to be expected from such conversion would not justify the heavy expenditure which would be incurred. For the council it was stated that the appeal premises are situated in an area which is intended solely for residential user under the provisions of the Administrative County of London Development Plan, 1951. While it was agreed that the building is no longer suitable for use as a single family dwelling, it was considered that its conversion into self-contained flats could be carried out as a reasonable proposition. Although the use of the ground floor for residential purposes might produce some

> difficulties, it was stated that no objection would be raised to the use of this floor as consulting rooms. The Minister has carefully considered the facts of this case and the representations made at the inquiry, and he is not satisfied that, with the exception of the ground floor, the premises cannot reasonably be converted for multiple use. The Minister agrees, however, that the ground floor could not readily form part of such use, and he thinks, therefore, that he would not be justified in withholding permission for its use as an office for a limited period subject to a condition designed to protect the residential amenities of the area. Accordingly, the Minister has decided to allow the appeal to the extent that he hereby grants permission for the use of the ground floor of No. 44, Green Street, Westminster, as offices, subject to the following conditions:—(i) The windows of the premises shall be kept curtained and shall not be used for the purposes of display. (ii) The said use hereby permitted shall cease on Dec. 31, 1970. The Minister hereby refuses permission for the use of the basement, first, second, third and fourth floors of the building for office purposes. This letter is issued as the Minister's formal decision."

Although the only effect of that letter was to grant permission to use the ground floor for office purposes, for a limited period, the letter clearly indicates that permission to use the property for what it calls "multiple residential use" would be likely to be granted.

It is common ground that there would be no difficulty in obtaining the consent of the Grosvenor Estate to a modification of the covenant contained in the lease which requires the property to be used as a single private dwelling-house, so as to permit the four top floors to be used as two self-contained maisonettes and, subject to the business user permitted until the end of 1970 by the letter already referred to, the ground floor and basement to be used as a self-contained maisonette. It is also common ground that if the Grosvenor Estate were asked to agree to a modification of the covenant to which I have referred, they would require an increase in the rent to a figure of the order of £400 a year, at any rate while the business user of the ground floor continues.

The plaintiff carries on and has for some years carried on business as a dealer in real estate, and in the course of that business he has bought and converted a number of houses in the centre of London. In his affidavit he says as follows:

> "I am a fellow of the Real Estate Institute and have had many years of experience of dealing in and the management of real estate in all its forms. For some years prior to the last war, I was actively engaged in dealing in real estate including both the building of new premises, the development of estates and the conversion of old houses into flats. During the war I served in the Royal Navy, and immediately after the cessation of hostilities, I again became active in this field. During the past twelve years or so, I have effected repairs and conversions to some thirty or forty buildings, within a radius of two miles around Mayfair. In most cases, the whole of the works were carried out by myself or through sub-contractors, and for some two years of this period, I controlled a building company which employed about one hundred men who were engaged on my work and government work."

In para. 2 he says:

> "The purpose of my acquiring the lease of No. 44, Green Street, as the defendants at all material times well knew, was to obtain vacant possession so that I could develop the same by sub-division thereof. It was obvious that the premises were far too big for any person in present conditions to be able to occupy them as a single private residence."

Although the plaintiff there states that his purpose in acquiring the lease was that he should convert the property, his first endeavours were to dispose of the property for single occupation, either for use by an embassy or to a company requiring what is sometimes called a prestige address for a senior executive. In cross-examination the plaintiff very frankly said that he would have liked to have disposed of the property without doing any works of conversion if he could have done so at a satisfactory profit. He had negotiations with or inquiries from at least four possible purchasers for a sale of this character. In para. 4 of his affidavit he says:

> "I am of the opinion that the proper market value of my interest in the premises as they stood, with the benefit of the town planning permission [viz., the letter dated Feb. 15, 1954, see p. 586, letter G, ante], but the said schedule of works not having been carried out, is £15,000 but that the suitability of the premises for an embassy or as the headquarters of an American Television Company would have justified the payment of £17,250."

In my judgment the plaintiff is not entirely correct when he says:

> "The purpose of my acquiring the lease of No. 44, Green Street, as the defendants at all material times well knew, was to obtain vacant possession so that I could develop the same by sub-division thereof."

Conversion by the plaintiff was only one of alternative possible methods of turning the bargain to account which he had in mind when he bought it. Notwithstanding what the plaintiff says in that paragraph of his affidavit with regard to the defendants' knowledge of his purpose (which has not been elaborated, reinforced or explained in any other part of the evidence) I am not satisfied that the defendants had any knowledge at the date of the contract of how the plaintiff proposed to deal with the property. At that time the plaintiff himself did not know whether he would convert it, or sell it unconverted.

These matters are relevant to a point which has been argued about the proper measure of damages to be applied in this case. The plaintiff contends that the proper measure of damages is the profit which it is reasonable to suppose he would have made had he converted the four upper floors into two maisonettes, the ground floor into offices, and the basement either into a self-contained flat or into subsidiary accommodation such as lavatories and storage for the ground floor offices, and had he disposed of them as so converted. The defendants, on the other hand, contend that the proper measure is the difference between the sale price and the market value of the property at the date of their breach of contract.

The general rule of common law is that where a party has sustained a loss by reason of a breach of contract he is, so far as money can do it, to be placed by way of damages in the same position as if the contract had been performed (*Engell* v. *Fitch* (1)). In the case of a contract for the sale of land this rule is, of course, subject to the well-known qualification established by the decision of the House of Lords in *Bain* v. *Fothergill* (2), which applies in any case in which the breach arises from the vendor's inability to perform the contract on account of a defect in his title. I am not concerned with a breach of that kind. I therefore have to consider how the general rule ought to be applied in this case.

It will be convenient for me to read a very well-known passage from the judgment of Alderson, B., in *Hadley* v. *Baxendale* (3). He says (4):

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special

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(1) (1869), L.R. 4 Q.B. at p. 666.

(2) (1874), L.R. 7 H.L. 158.

(3) (1854), 9 Exch. 341.

(4) (1854), 9 Exch. at p. 354.

A circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if B these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the C parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."

In *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* (5), the Court of Appeal cited six propositions in six numbered paragraphs as follows (6):

D "(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: *Wertheim* v. *Chicoutimi Pulp Co.* (7). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, E however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence, (2): In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. (3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, F by the party who later commits the breach. (4) For this purpose, knowledge 'possessed' is of two kinds—one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of the contract in that ordinary course. This is the subject-matter of the 'first rule' in *Hadley* v. *Baxendale* (8), but to this knowledge, which a contract-breaker is assumed G to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional H loss also recoverable. (5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was I liable to result: see certain observations of LORD DU PARCQ in *Monarch S.S. Co., Ltd.* v. *Karlshamns Oljefabriker (A.B.)* (9). (6) Nor, finally, to make a particular loss recoverable, need it be proved that on a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is enough, to borrow from the language of LORD DU PARCQ in the same case, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy."

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(5) [1949] 1 All E.R. 997; [1949] 2 K.B. 528.
(6) [1949] 1 All E.R. at p. 1002; [1949] 2 K.B. at p. 539. (7) [1911] A.C. 301.
(8) (1854), 9 Exch. 341. (9) [1949] 1 All E.R. at p. 19; [1949] A.C. at p. 232.

I was also referred by counsel for the plaintiff to *Monarch S.S. Co., Ltd.* v. *Karlshamns Oljefabriker (A.B.)* (10), mentioned in the case which I have just read. LORD WRIGHT, discussing this subject, says (11):

> "The court will, however, assume that the parties, as business men, have all reasonable acquaintance with the ordinary course of business."

Later he says (12):

> "As reasonable business men each must be taken to understand the ordinary practices and exigencies of the other's trade or business. That need not generally be the subject of special discussion or communication."

LORD DU PARCQ says (13):

> "I do not doubt the wisdom of the judges who, in *Hadley* v. *Baxendale* (14) and the many later cases which interpreted or explained that classic decision, have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend, LORD WRIGHT, and LORD HALDANE in the passage cited by him have emphasised—that in the end what has to be decided is a question of fact, and, therefore, a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or, perhaps, an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties."

Founding himself on these authorities, counsel for the plaintiff says that the damage to the plaintiff consequent on the defendants' repudiation of their contract which the defendants could reasonably have foreseen at the date of the contract depends on the circumstances of which knowledge at the date of the contract ought to be imputed to the defendants. This imputed knowledge, he says, includes the general conditions of everyday life and the general circumstances of the business of the parties. He says that the subject-matter of the contract was a house which everyone considered to be fit only for conversion and no longer to be suited to single occupation. He says that it was at least "on the cards" that a purchaser would convert the house before disposing of it. It follows, he says, that if the purchaser in fact intended to do this, and can show that by doing so it was reasonable to suppose that his profit would have been greater than if he had sold the property for its market value at the date of the breach of contract, he is entitled to damages measured by that probable profit.

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(10) [1949] 1 All E.R. 1; [1949] A.C. 196.
(11) [1949] 1 All E.R. at p. 13; [1949] A.C. at p. 222.
(12) [1949] 1 All E.R. at p. 14; [1949] A.C. at p. 224.
(13) [1949] 1 All E.R. at p. 19; [1949] A.C. at p. 232. (14) (1854), 9 Exch. 341.

At this point I should observe that not only do the pleadings in the present case contain no allegation that the plaintiff was what I may term a professional converter of town houses, and of course no allegation that the defendants knew that that was his profession, but also (apart from para. 2 of the plaintiff's affidavit to which I have already referred) I have had no evidence at all of any such knowledge or of any actual knowledge by the defendants that the plaintiff either intended or was likely to carry out the conversion of the property himself. Had the pleadings contained such allegations, and had those allegations been proved, it may be that the ordinary common law rule as to the measure of damages to which I have made reference would operate differently from its operation in a case in which those facts are not alleged or proved, notwithstanding that the claim was only for general damages. I cannot believe, however, that when LORD WRIGHT said what he did in the *Monarch S.S. Co., Ltd.* case (15), he meant that anyone entering into a contract must be treated as having constructive notice of the nature of the other party's business, or of its probable bearing on the loss which that other party might suffer in consequence of a breach of contract.

In some cases the nature or the subject-matter of a contract or of its terms may be such as to make it clear that one of the parties is entering into the contract for the purpose of a particular business, and the circumstances may be such that the court will infer that the other party must have appreciated that this was so. It seems to me, however, that this can rarely be the case where the contract is for the sale of land. The vendor of a shop equipped for use as a butcher's shop would not, in my judgment, be justified by that circumstance alone in assuming, and ought not to be treated as knowing, that the purchaser would intend to use it for the business of a butcher rather than that of a baker or candlestick-maker, at any rate in the absence of covenants or other forms of restriction confining its use to butcher's business. Special circumstances are necessary to justify imputing to a vendor of land a knowledge that the purchaser intends to use it in any particular manner. In my judgment neither the fact that No. 44, Green Street was ripe for conversion, nor indeed the fact that everybody recognised this, was sufficient ground for imputing to the vendors knowledge that the purchaser was a person whose business it was to carry out such conversions, or that he intended, or was even likely, to convert the house himself for profit.

In this connexion I would point out that when using the expression "on the cards" in *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* (16), the Court of Appeal is referring not to possible circumstances which might be relevant to assessing the loss likely to arise from a breach of contract, but to the reasonable probability of a foreseeable loss on a given state of knowledge, that is to say, an established state of knowledge of actual relevant circumstances.

For these reasons, in my judgment, the plaintiff is not entitled to damages measured by reference to the profit obtainable by converting the property. The damages should be assessed in accordance with the principle normally applicable to cases of breach of contract for the sale of land, where the breach does not arise from a defect in the vendor's title, that is to say, by reference to the difference between the purchase price and the market value at the date of the breach of contract. [HIS LORDSHIP then proceeded to consider the evidence as to the market value in February, 1956, of No. 44, Green Street and continued:] I hold that the market value of the property at the relevant date was £14,500. The difference between this figure and the purchase price is accordingly £8,500.

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(15) [1949] 1 All E.R. at p. 14; [1949] A.C. at p. 224.
(16) [1949] 1 All E.R. at p. 1003; [1949] 2 K.B. at p. 540.

A Such a profit in the hands of the plaintiff would undoubtedly have attracted income tax, and counsel for the defendants claims that in accordance with the decision in *British Transport Commission* v. *Gourley* (17), the defendants should only be liable for damages equivalent to the net profit the plaintiff would have retained after paying tax. In *Gourley's* case (17), however, it was conceded that no part of the sum awarded as damages would be subject to tax. Similarly, the B decision in *West Suffolk C.C.* v. *W. Rought, Ltd.* (18), where the principle of *Gourley's* case (17) was applied to an assessment of loss of profit as part of the compensation on a compulsory purchase, proceeded expressly on the basis that such compensation would not be liable to income tax.

In the present case, on the other hand, it appears to me that any damages recovered by the plaintiff are liable to attract tax as part of the profits or gains of C his business (*London Investment and Mortgage, Co., Ltd.* v. *I.R. Comrs.*, *London Investment and Mortgage Co., Ltd.* v. *Worthington* (*Inspector of Taxes*) (19)). I was also referred in this connexion to *Vaughan* v. *Archie Parnell & Alfred Zeitlin, Ltd.* (20). If the damages would be taxable in the hands of the plaintiff, in order to give him the degree of indemnity to which he is entitled, I must, I think, award him a gross sum in damages equal to the gross amount of the profit which he D would be likely to have made, had there been no breach of contract. Accordingly, I hold that the plaintiff is entitled to receive £8,500 damages.

Order accordingly.

Solicitors: *Sampson & Co.* (for the plaintiff); *Thorold, Brodie, Bonham-Carter & Mason* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(17) [1955] 3 All E.R. 796; [1956] A.C. 185.
(18) [1956] 3 All E.R. 216; [1957] A.C. 403.
(19) [1958] 2 All E.R. 230; [1959] A.C. 200.
(20) 23 Tax Cas. 505.

CORFE *v.* CORFE.

[COURT OF APPEAL (Hodson, Willmer and Harman, L.JJ.), February 1, 2, 1960.]

Divorce—Evidence—Cross-examination—Adultery—Questions tending to show guilt of adultery—Answer denying adultery—Denial sworn to in affidavit verifying answer—No denial in respondent's oral evidence in chief—Whether respondent liable to be cross-examined as to adultery—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 32 (3).

A party to divorce proceedings who has sworn an affidavit verifying a denial of adultery contained in a pleading has thereby " given evidence in the same proceedings in disproof of the alleged adultery " within the meaning of s. 32 (3) of the Matrimonial Causes Act, 1950*, and so is not thereby protected against being asked and being " bound to answer any question tending to show that he or she has been guilty of adultery."

Appeal allowed.

[**Editorial Note.** Rule 17 (1) of the Matrimonial Causes Rules, 1957, requires an answer or subsequent pleading containing " more than a simple denial " of facts stated in the petition, etc., to set out the facts relied on. The facts so set out must be verified by affidavit, but the rule does not require that that part of the pleading which is a bare denial of adultery should be verified by the affidavit in support. If, therefore, the pleading contains a bare denial of adultery, the denial need not be verified by affidavit and if it is not so verified the deponent will not thereby expose himself or herself to cross-examination as to adultery.

As to protection from questions as to adultery in divorce proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 372-375, paras. 812, 813, 815; and for cases on the subject, see 27 DIGEST (Repl.) 519-521, *4617-4640*.

For the Matrimonial Causes Act, 1950, s. 32 (3), see 29 HALSBURY'S STATUTES (2nd Edn.) 417.]

Appeal.

The respondent wife appealed from the decision of WALLINGTON, J., on Feb. 11, 1959, at Liverpool Assizes, that she was guilty of adultery and desertion, and that the husband petitioner was not guilty of desertion. WALLINGTON, J., had exercised his discretion in favour of the petitioner and awarded him a decree nisi on the grounds of the respondent's adultery and desertion. By her notice of appeal the respondent asked that the judgment and order be set aside, and that she be awarded a decree nisi on the ground of the petitioner's desertion.

The petition alleged adultery and desertion by the respondent. The answer stated that: " The respondent in answer to the petition filed herein says: (1) She denies that she has committed adultery as alleged or at all ". By her affidavit verifying this answer the respondent swore " that the statements contained in my above answer are true ".

The respondent did not deny adultery in her evidence-in-chief but despite objection raised by her counsel the trial judge allowed her to be asked, in cross-examination about certain letters, questions tending to show that she had been guilty of adultery. The case is reported only on the point whether the allowance of such questions was or was not contrary to s. 32 (3) of the Matrimonial Causes Act, 1950.

A. A. Edmondson for the respondent.
N. A. Miscampbell for the petitioner.

HODSON, L.J., stated the facts and continued: The respondent did not, in her evidence-in-chief, deny the adultery at all; and when she was cross-examined about the letters objection was taken on her behalf that she, not having given evidence in denial of her adultery, could not be cross-examined, by reason of the provisions of the statute. That objection was not sustained before A the learned judge, and it now appears to me that it would not have been sustainable, for this reason: although the respondent did not give any evidence-in-chief of her own denial of adultery, she had, in answer to the petition for divorce, sworn an affidavit verifying the denial of adultery, and that, to my mind, is evidence " in the proceedings ", so that the statute is not contravened. I should read the provision, which is sub-s. (3) of s. 32 of the Matrimonial Causes B Act, 1950:

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* Section 32 (3) is printed in full at p. 594, letter B, post.

> " The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery C unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery."

The wife, having sworn the affidavit, had given evidence in the same proceedings denying the adultery. [HIS LORDSHIP then considered the other questions arising on the appeal, and concluded that the decree in favour of the husband D should be set aside, but that the wife should not be granted a decree and that the petition should therefore be dismissed.]

WILLMER, L.J.: I agree; and I add some words of my own only out of respect for the learned judge from whom we are differing.

Counsel, in arguing the case on behalf of the respondent, sought in the first instance to get rid of the finding of adultery which the learned judge made E against the respondent. In that I do not think that he was successful. Objection was taken to the learned judge having allowed the wife to be cross-examined about the letters which she had received from this man " Bill "—on the ground that the answers to those questions might or would be such as to tend to show that she had committed adultery. The respondent had not in examination-in-chief given any evidence in denial of adultery. The learned judge, however, F allowed that cross-examination to take place, and it has been contended before us that he was in error in doing so. It seems to have been overlooked, however, that the respondent had, by swearing to the truth of the statements made in her answer, already denied on oath the charge of adultery; and in those circumstances (although that is not the reason given by the learned judge) I find it hard to see how it would have been right to exclude that line of cross-examination. G In the result, the wife having been so cross-examined, the learned judge came to the conclusion that she was not a witness of truth, and he did not accept her evidence. [HIS LORDSHIP then discussed the other grounds of appeal and, concluding that on them the respondent wife was entitled to succeed, continued:] I agree, therefore, that this appeal succeeds, to the extent that the decree in favour of the petitioner should be set aside, but not that the respondent herself H should be entitled to any relief.

HARMAN, L.J.: I agree, and have nothing to add.

Appeal allowed accordingly. Decree nisi set aside: Petition dismissed.

Solicitors: *Baines & Baines*, agents for *Edward A. Simans*, Birkenhead (for the respondent, the wife); *Gibson & Weldon*, agents for *S. Leslie Black*, Liverpool (for the petitioner, the husband).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

LEGGE AND ANOTHER *v.* MATTHEWS AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, Pearce and Upjohn, L.JJ.), February 9, 10, 11, 12, 1960.]

Rent Restriction—Sub-tenancy—Sub-tenant of part of premises with rateable value below £40—Whole premises decontrolled by Rent Act, 1957*—Whether landlord entitled to recover possession—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5 *c.* 17), *s.* 15 (3)*—Housing Repairs and Rents Act,* 1954 (2 *&* 3 *Eliz.* 2 *c.* 25), *s.* 41*—Rent Act,* 1957 (5 *&* 6 *Eliz.* 2 *c.* 25), *s.* 11 (1), (3), *Sch.* 4*—Landlord and Tenant (Temporary Provisions) Act,* 1958 (6 *&* 7 *Eliz.* 2 *c.* 68), *s.* 3 (1).

The statutory tenant of a dwelling-house whose rateable value was over £40 had lawfully sub-let the ground floor to the sub-tenant. The rateable value of the ground floor was £16. By reason of s. 11 (1) of the Rent Act, 1957, the whole dwelling-house became decontrolled. The landlords served on the statutory tenant a notice under para. 2 (2) of Sch. 4 to the Act of 1957, to expire on Oct. 6, 1958. After expiry of the notice the landlord claimed possession of the whole house from the tenant and sub-tenant. The county court judge made an order for possession against the tenant, suspended under s. 3 of the Landlord and Tenant (Temporary Provisions) Act, 1958, and refused an order against the sub-tenant on the ground that the sub-tenant was entitled to the protection afforded by s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On appeal by the landlords,

Held: s. 41 of the Housing Repairs and Rents Act, 1954, applied, with the result that the ground floor was brought within the ambit of the Rent Acts; thus the sub-tenant was deemed, by virtue of s. 15 (3) of the Increase of Rent, etc., Act, 1920, to have become the tenant of the landlords who, therefore, were not entitled to possession as against him.

Earl Cadogan v. *Henthorne* ([1956] 3 All E.R. 851) approved.

Appeal dismissed.

[As to the protection under the Rent Acts of a sub-tenant of premises forming part of a superior letting, see 23 HALSBURY'S LAWS (3rd Edn.) 827, para. 1611, note (e), and 828, para. 1611, notes (p), (q), (r), (s); and for cases on the subject, see 31 DIGEST (Repl.) 711-714, *7974-7988* and 3rd DIGEST SUPP.

For the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), see 13 HALSBURY'S STATUTES (2nd Edn.) 1019.

For the Housing Repairs and Rents Act, 1954, s. 41, see 34 HALSBURY'S STATUTES (2nd Edn.) 369.

For the Rent Act, 1957, s. 11 (1), Sch. 4, para. 2, see 37 HALSBURY'S STATUTES (2nd Edn.) 561, 587.

For the Landlord and Tenant (Temporary Provisions) Act, 1958, s. 3, see 38 HALSBURY'S STATUTES (2nd Edn.) 599.]

Cases referred to:

Cadogan (Earl) v. *Henthorne*, [1956] 3 All E.R. 851; [1957] 1 W.L.R. 1; 3rd Digest Supp.

Cow v. *Casey*, [1949] 1 All E.R. 197; [1949] 1 K.B. 474; [1949] L.J.R. 565; 31 Digest (Repl.) 713, *7984*.

Dunnachie v. *Urwin*, [1951] N.Z.L.R. 79.

Moodie v. *Hosegood*, [1951] 2 All E.R. 582; [1952] A.C. 61; 3rd Digest Supp.

Appeal.

This was an appeal by the landlords from a decision of His Honour JUDGE REGINALD CLARK at Clerkenwell County Court, given on Dec. 4, 1959, whereby he dismissed their action for possession against the second defendant, a sub-tenant, on the ground that by reason of s. 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the sub-tenant had become the tenant of the landlords and was entitled to the protection of the Rent Acts.

C. B. Priday for the landlords.

R. E. Megarry, Q.C., and *P. G. Mason* for the sub-tenant.

Cur. adv. vult.

Feb. 12. **PEARCE, L.J.**, read the judgment of the court: The first defendant became tenant of the whole house in 1953 and in that year lawfully sub-let the ground floor to the second defendant. In April, 1957, the first defendant became a statutory tenant owing to the service of a notice of increase. On July 6, 1957, the whole house was decontrolled by s. 11 of the Rent Act, 1957, since the rateable value is over £40. The rateable value of the ground floor, however, is only £16. The judge made an order for possession against the first defendant, suspended under the terms of the Landlord and Tenant (Temporary Provisions) Act, 1958, and the question before us is whether the judge was right in holding that the second defendant was protected by other Acts as sub-tenant, and in refusing to make an order against her for possession.

The effect of s. 11 of the Rent Act, 1957, was to decontrol the whole house, but to allow the tenant to continue in possession for a certain transitional period. The house, therefore, became decontrolled on July 6, 1957 (see s. 27 (2)) and thereafter the tenant was only protected in a transitional status in accordance with Sch. 4. Subsections (1) and (7) of s. 11 of the Rent Act, 1957, read:

> " (1) The Rent Acts shall not apply to any dwelling-house the rateable value of which on Nov. 7, 1956, exceeded, in the Metropolitan Police District or the City of London £40, elsewhere in England or Wales £30, and in Scotland £40.
>
> " (7) The transitional provisions contained in Sch. 4 to this Act shall have effect in relation to dwelling-houses which cease to be subject to control by virtue of sub-ss. (1) or (3) of this section . . ."

Schedule 4 to the Act reads as follows:

> " 1. In this schedule ' the time of decontrol ' means the time at which the Rent Acts cease to apply to a dwelling-house by virtue of s. 11 (1) or (3) of this Act.
>
> " 2 (1) Where immediately before the time of decontrol the dwelling-house was the subject of a statutory tenancy or of a controlled tenancy which would or might come to an end within fifteen months of that time by effluxion of time or notice to quit, the tenant under that tenancy shall be entitled until the date hereinafter mentioned, and subject to the following provisions of this schedule, to retain possession of the dwelling-house in the like circumstances, to the like extent and subject to the like provisions (including in particular provisions as to recovery of possession by the landlord) as if the Rent Acts had not ceased to apply to the dwelling-house."

The landlords served on the first defendant the appropriate notice expiring on Oct. 6, 1958, and as from that date they became entitled to an order for possession against her.

At common law the sub-tenant would cease to have any right to possession when the tenant's rights determined. Section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided certain protection for the sub-tenant. This protection was inapplicable where the head tenancy was not protected by the Acts: *Cow* v. *Casey* (1). Accordingly s. 41 was inserted into the Housing Repairs and Rents Act, 1954. Its effect was notionally to carve out of the unprotected larger tenancy the smaller part that was sub-let, so that the sub-tenancies might be protected. It is conceded that these are the only sections that could avail the sub-tenant here and the question is whether or not she is protected by either of those sections or by their joint effect.

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(1) [1949] 1 All E.R. 197; [1949] 1 K.B. 474.

Section 15 (3) of the Rent Act of 1920 is as follows:

> " Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

Section 41 of the Housing Act of 1954 reads:

> " Where a dwelling-house to which the Act of 1920 applies (hereinafter referred to as ' the sub-let part ') forms part of premises, not being such a dwelling-house, which have been let as a whole on a superior letting, then from the coming to an end of the superior letting the operation of the Rent Acts in relation to the sub-let part shall be the same as if in lieu of the superior letting there had been separate lettings of the sub-let part and the remainder of the premises, for the like purposes as under the superior letting, and at rents equal to the just proportion of the rent under the superior letting."

Each side relied on an argument as to the general intention of the legislature. For the landlords it was said that since the Rent Act, 1957, was a decontrolling Act and contained no word about the protection of sub-tenants, it appeared that sub-tenants in houses decontrolled by the Act were not intended to have any protection. For the sub-tenant it was argued (and as it seems to us with greater force) that it was hard to believe that the legislature while specifically protecting sub-tenants where the head tenancy remained controlled (s. 15 (3) of the Act of 1920) and sub-tenants where the head lease was never controlled (s. 41 of the Housing Act of 1954) should treat as a special unprotected class those sub-tenants whose head tenancy happened to be in the class decontrolled by the Act of 1957, namely where the premises were of a rateable value between £100 and £40. Moreover not all who were in that special class would be unprotected; for some might be sub-tenants whose head tenant's interest was a tenancy with more than fifteen months to run, and it was conceded that in such a case the head tenant received no transitional protection under Sch. 4 and when the head tenancy determined the sub-tenants would still be protected. Anomalous as some of the results of the Rent Acts have proved to be, it is difficult to believe that such an arbitrary anomaly as that was intended. We approach the matter on the footing that it is unlikely that such a result was intended, and that it is far more likely that the legislature omitted from the Act of 1957 any clause for the protection of sub-tenants in the belief that existing enactments already sufficed for that purpose. Nevertheless, if such a result is of necessity produced by terms of the various Acts, general intention is irrelevant.

If one leaves out of account for the moment the transitional period, the effect of the decontrol of this house in July, 1957, was to destroy the statutory tenancy immediately. This was so decided in *Dunnachie* v. *Urwin* (2), a case in New Zealand where statutes similar to our Rent Acts are in force. ADAMS, J., there said (3):

> " The evidence shows that the rights of the defendant after the determination of the lease . . . rested wholly on the statute, there being no ground for holding that any new tenancy was created; and I think it is clear that, when he ceased to be entitled to the protection of the statute, he was

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(2) [1951] N.Z.L.R. 79.

(3) [1951] N.Z.L.R. at p. 81.

> relegated to the same position as would have been his on the termination of the lease if no such statute had been in force.

If we may say so respectfully, that decision was clearly right. The statutory tenancy having been thus determined, s. 15 (3) of the Act of 1920 according to the sub-tenant's argument would apply to protect him since all its requirements are fulfilled. " The interest of a tenant of a dwelling-house to which this Act applies is determined " and the sub-tenant to whom a part of the premises has been lawfully sub-let is deemed to become tenant of the landlord on the same terms as those of his sub-tenancy.

The landlords argue that the transitional tenancy makes all the difference. By reason of it there is never any moment at which " the interest " of a tenant of a dwelling-house to which the Act applies is determined, since the interest is not determined until the end of the transitional period, and by then the Act no longer applies since it ceased to apply at the beginning of the transitional period. Therefore both conditions are not fulfilled simultaneously as s. 15 (3) of the Act of 1920 requires. The sub-tenant's argument (which the learned judge accepted) is that the tenant's interest was in fact determined at the beginning of the transitional period, whereupon s. 15 (3) of the Act of 1920 came into operation; and that the tenant's transitional rights thereafter, although they enabled him to

> " retain possession of the dwelling-house in the like circumstances, to the like extent and subject to the like provisions "

were not " the interest of the tenant " as it had been heretofore.

Counsel for the landlords has argued that the statutory tenancy under the Rent Acts was prolonged by Sch. 4 for the transitional period. But the schedule, deliberately as it seems, avoids so doing. It gives him in place of it " a right to retain possession " which is so described throughout the schedule. The former tenant if asked his status during the transitional period could no longer truthfully describe himself as a statutory tenant, but only as a former statutory tenant who had a right to remain for not less than fifteen months until the expiry of a properly served notice. Moreover, although his right to remain is defined as " to the like extent and subject to the like provisions " as if the Rent Acts still applied, it differs from his rights as a statutory tenant in various respects which counsel for the sub-tenant pointed out to us. He may pay a different rent since his rent cannot (except as regards an increase in rates) be increased as can that of a statutory tenant (para. 3). He is, unlike a statutory tenant, liable to lose his rights and to be dispossessed on notice expiring after fifteen months from the commencement of his transitional rights (para. 2 (2)). His right to remain apparently does not cease to exist as do the rights of a statutory tenant on the grant of a tenancy unless it be for three years or more (para. 4). He has rights of compensation (para. 5) which are not posssessed by a statutory tenant. Finally, rights are expressly given by para. 14 to his widow and others corresponding to those given to a tenant under s. 12 (1) (g) of the Rent Act of 1920; this would be unnecessary if he remained a statutory tenant.

Whether this alteration in the terms of the head tenant's occupation amounts to a determination for the purposes of s. 15 (3) or is more properly regarded as a variation not amounting to determination we need not finally decide for reasons which will appear. Assuming that it does amount to a determination, the problem arises how, if at all, the tenancy between the landlord and the sub-tenant which is thereby deemed to exist can exist during the transitional period of the former tenant. Counsel for the sub-tenant says that it can be treated as the grant of a concurrent lease to take effect in reversion expectant on the tenant's transitional " period of grace ": see WOODFALL ON LANDLORD AND TENANT (25th Edn.), p. 285, para. 704. He also submits that the case is analogous to the decision in the House of Lords in *Moodie* v. *Hosegood* (4), where it was held that the right of the deceased husband's estate to a contractual tenancy of controlled premises could be suspended or dormant until the widow's statutory tenancy (s. 12 (1) (g) of the Rent Act, 1920) came to an end.

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(4) [1951] 2 All E.R. 582; [1952] A.C. 61.

There is, we think, a further difficulty in applying s. 15 (3) to this case without the aid of s. 41 of the Housing Repairs and Rents Act, 1954. The interest of a tenant is determined simply because the Act of 1920 ceases to apply to the house. How, then, can it be said that this is a case where " the interest of a tenant of a dwelling-house to which this Act applies is determined " ? For it is difficult to see how both those conditions can exist simultaneously in this case. At one moment of time it is a case where the interest of a tenant of a dwelling-house to which this Act applies is *not* determined. At a later moment it becomes a case where the interest of a tenant of a dwelling-house to which this Act does *not* apply is determined. Can it be said that there is any stage at which the two necessary conditions co-exist? However, it is not necessary finally to decide this point because we think that, when combined with s. 41, s. 15 (3) clearly protects the sub-tenant.

It is contended for the landlords that s. 41 can have no application to this case since it only applies to contractual lettings and not to statutory tenancies. We cannot accept that argument. The section deals with the position where a superior tenancy was uncontrolled, and, therefore, the sub-tenant was unprotected, as in *Cow* v. *Casey* (5). The words, however, are general, and are not confined to a situation where the superior letting has never been of a controlled dwelling-house. Provided that the superior letting is of a dwelling-house which at that moment is not controlled, the section applies. It seems irrational to suppose that sub-tenants should lose the benefit of its protection merely because at an earlier period of time the head tenancy had ceased to be contractual and had become statutory. The words " let " and " sub-let " are used without differentiation. The word "sub-let" is clearly from the terms of the section intended to cover statutory as well as contractual sub-letting. It would be wrong to read into the word "let" an artificial connotation that limits it to contractual letting while reading the word " sub-let " in a wider sense that includes a statutory tenancy. Moreover the words " sub-let " and " let " are used throughout the section in the past tense. At some time every letting or sub-letting has been contractual; but the section does not exclude those that have at a later stage become statutory.

In our opinion, s. 41 does apply to the facts of this case.

> " A dwelling-house to which the Act . . . applies [namely the ground floor] . . . forms part of premises, not being such a dwelling-house [namely the whole house now decontrolled by the Act], which have been let as a whole on a superior letting [namely the original letting to the tenant in this case] . . ."

The section then provides that the operation of the Rent Acts shall be the same as if the landlords, instead of letting the house as a whole, had let the ground floor to the tenant under one letting and the rest under another, with the result that the ground floor comes within the ambit of the Acts, and s. 15 (3) comes into operation and deems the sub-tenant to become the tenant of the landlord. This is in accordance with the interpretation of the subject by HALLETT, J., in *Earl Cadogan* v. *Henthorne* (6) and we accept his reasoning. In our opinion the learned county court judge came to a correct conclusion and the appeal fails.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Pennington & Son* (for the landlords); *Compton & Co.* (for the sub-tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(5) [1949] 1 All E.R. 197; [1949] 1 K.B. 474.

(6) [1956] 3 All E.R. 851.

ROSSAGE *v.* ROSSAGE AND OTHERS.

[COURT OF APPEAL (Hodson, Ormerod and Willmer, L.JJ.), January 21, 1959.]

Affidavit—Striking out—Hearsay—Interlocutory proceedings—Application to suspend access to child—Whether " interlocutory " so as to make statements of information and belief admissible—Affidavit containing large proportion of inadmissible material—Whether whole affidavit should be removed from the file—R.S.C., Ord. 38, *r.* 3.

The mother of a child applied to strike out certain affidavits, filed on the child's father's application to suspend her access to the child, on the ground that the affidavits were scandalous and irrelevant. Three of the affidavits contained much hearsay evidence as well as some relevant material. The trial judge ruled that the hearsay was irrelevant and inadmissible, but refused the application to strike out on the ground that he was quite capable of shutting his mind to the irrelevant matter. On appeal by the wife the husband contended, inter alia, that as the proceeding was interlocutory an affidavit might contain, by virtue of the proviso to R.S.C., Ord. 38, r. 3*, " statements of information or belief with the sources and grounds thereof ".

Held: as the application to suspend access, although interlocutory in form, was an application to decide the rights of the parties, it was not an " interlocutory proceeding " within the meaning of the proviso (*Gilbert* v. *Endean* ((1878), 9 Ch.D. 259) applied); the hearsay evidence was therefore inadmissible and irrelevant, and, as the proportion of that material to the relevant material was so high, the three affidavits should be removed from the file.

Appeal allowed.

[**Editorial Note.** This case should be read with *Re J.* (*an infant*), p. 603, post, and *Hull* v. *Hull*, see at pp. 380, 384, ante.

As to proceedings considered interlocutory for the purpose of the rule excluding hearsay from affidavits, see 15 HALSBURY'S LAWS (3rd Edn.) 468, para. 845; and for a case on the subject, see 22 DIGEST (Repl.) 541, *6092*.]

Case referred to:

Gilbert v. *Endean*, (1878), 9 Ch.D. 259; 39 L.T. 404; 22 Digest (Repl.) 541, *6092*.

Interlocutory Appeal.

The mother of a child appealed from the order of BARNARD, J., dated Dec. 17, 1958, refusing her application to remove certain affidavits, filed by the child's father on his application to suspend the mother's access to the child. The facts are stated in the judgment of HODSON, L.J.

S. Terrell for the mother.

G. H. Crispin for the father.

HODSON, L.J.: This is an appeal from an order of BARNARD, J., dated Dec. 17, 1958. The learned judge on that occasion had before him an application by a wife, the mother of the child concerned, to have removed from the file certain affidavits, the ground of the application being that those affidavits were scandalous and irrelevant to the issue before the court. The issue before the court was whether the mother's access to this child (she not being the custodian of the child) should be suspended. The learned judge did not accede to the application.

The position with regard to affidavits is covered by the Rules of the Supreme Court. Order 38, r. 3, provides:

> " Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove. The costs of every affidavit which shall unnecessarily

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* R.S.C., Ord. 38, r. 3, is printed supra and at p. 601, letter A, post.

> A set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same. Provided that on interlocutory proceedings or with leave under [certain orders] an affidavit may contain statements of information and belief, with the sources and grounds thereof."

B There are five affidavits, which the court has read, and as to the last two there is, I think, no ground for saying that the contents of those affidavits are irrelevant. The gist of the application really relates to the three other affidavits—an affidavit by the father of the child and two affidavits by the managing clerk to the firm of solicitors instructed by him. Those affidavits contain material which is relevant, but contain also a great deal of material which is irrelevant—pure hearsay C evidence which the court cannot take into account in the form in which it stands. The proportion of that material to the relevant material is so high that if this matter is to be disposed of with any regard to convenience it is clearly right that the whole of those affidavits should be removed from the file rather than by seeking, by expunging irrelevant matter, to put the affidavits in order.

This rule has been construed by the Court of Appeal in a way which draws a D distinction between interlocutory proceedings generally and interlocutory proceedings where an issue has to be determined, such as arises in this case. The authority for that is contained in *Gilbert* v. *Endean* (1), a decision of the Court of Appeal, which contains a passage from Cotton, L.J.'s judgment which is in point. Dealing with an earlier form of this rule (2) Cotton, L.J., said (3):

> ". . . for the purpose of this rule those applications only are considered E interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the court on F motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause. In my opinion, therefore, on such G applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, 'You have in fact admitted this by not denying it, and therefore the court may act upon the admission'. But I must add this: where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against whom it is read does not H object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief. I have said this because I think that the matter I is one of very considerable importance, and that the habit of introducing into applications to decide the rights of parties evidence on information and belief has done great injury in many ways in the Chancery Division."

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(1) (1878), 9 Ch.D. 259.

(2) Before it was amended by R.S.C. (No. 2), 1933, the rule provided that affidavits should be confined to such facts as "the witness is able of his own knowledge to prove, *except on interlocutory motions, on which statements as to his belief, with grounds thereof, may be admitted*". The words here printed in italics have now been replaced by the proviso printed at letter A, supra.

(3) (1878), 9 Ch.D. at p. 268.

In my judgment, the standard to be applied is indicated by the rule as explained by the passage to which I have referred; and the learned judge quite clearly, from what we have been told of the matter, recognised that the material to which I have drawn attention (without saying what it is) was matter which he could not consider for the purpose of arriving at a decision in this case. However, he said he was not going to remove it from the file because he was quite capable of shutting his mind to the irrelevant matter. I do not think that that is a sufficient answer to the application in this case. The peril of leaving the affidavits on the file is indicated by the passage in COTTON, L.J.'s judgment which I have read; and indeed it makes it almost impossible for the mother in this case to answer the affidavits unless they are purged of the irrelevant and indeed scandalous matter.

There has been some discussion as to what is meant by "scandalous". It is quite clear that we cannot strike out matters in a pleading or an affidavit simply because they are scandalous, because scandalous matter may be relevant, and may be the very matters which have to be investigated by the court. If, however, the matters are plainly irrelevant, as they are here, there is no doubt that the court can strike them out, either by virtue of its inherent power or by virtue of the power contained in R.S.C., Ord. 38, r. 11:

> "The court or judge may order to be struck out from any affidavit any matter which is scandalous, and may order the costs of any application to strike out such matter to be paid as between solicitor and client."

Within the meaning of those two rules, I am clearly of opinion that these matters are irrelevant and scandalous, and therefore they ought to be struck out. The court ought not to be embarrassed by their presence on the file; nor ought the party whom these statements tend to implicate to be embarrassed by having to deal with them.

I, therefore, would allow this appeal so far as the three first affidavits are concerned.

ORMEROD, L.J.: I agree, and there is nothing that I wish to add.

WILLMER, L.J.: I, too, am of the same opinion.

Appeal allowed.

Solicitors: *Victor Mischon & Co.* (for the mother); *Nordon & Co.* (for the father).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

Re J. (an infant).

[Chancery Division (Cross, J.), January 26, February 4, 1960.]

Affidavit—Striking out—Hearsay—Proceedings not interlocutory—Discretion.
Ward of Court—Application for leave to take out of jurisdiction—Whether an interlocutory proceeding within R.S.C., Ord. 38, *r.* 3, *proviso.*

A summons asking for leave to take a ward of court out of the jurisdiction is not an interlocutory proceeding within the meaning of the proviso to R.S.C., Ord. 38, r. 3, which permits an affidavit in such proceedings to contain statements of information and belief, with the grounds thereof. If an affidavit or exhibit filed on a proceeding that is not interlocutory contains hearsay evidence the court has complete discretion whether the inadmissible matter should or should not be struck out.

[**Editorial Note.** In the recent case of *Hull* v. *Hull* (see p. 384, ante) Sachs, J., stated that the Divorce Court when deciding custody proceedings was bound by the usual rules as to admissibility of evidence. Certain paragraphs of an affidavit had been struck out by the registrar on the ground that they were hearsay (see p. 379, ante, last line), and others were struck out on appeal to the judge, the appeal being on other grounds.

As to contents of affidavits in interlocutory proceedings, see 15 Halsbury's Laws (3rd Edn.) 468, para. 845; and for cases on the subject, see 22 Digest (Repl.) 540-543, *6081-6107.*]

Cases referred to:

Gilbert v. *Endean*, (1878), 9 Ch.D. 259; 39 L.T. 404; 22 Digest (Repl.) 541, *6092.*

Rossage v. *Rossage*, (1959), ante p. 600.

Procedure Summons.

On Nov. 19, 1959, the mother of a ward of court took out a summons asking that she should be at liberty to take the child out of the jurisdiction to live with her abroad. The summons was served on the father of the ward and on another person. In support of her application the mother, on Nov. 26, 1959, swore an affidavit, para. 2 of which read as follows: " The signed statement now produced and shown to me marked ' B.J.1 ' is in so far as the same consists of matters of fact true to my knowledge and in so far as it consists of matters of information or opinion true to the best of my knowledge and belief ". On Nov. 30, 1959, the father applied to the court by summons for an order (a) that the words in para. 2 above and (b) a number of passages in the exhibited statement, should be struck out on the grounds that they were " scandalous, irrelevant and argumentative or otherwise oppressive and are in breach of the Rules of the Supreme Court." The summons also asked for similar relief in connexion with an affidavit sworn in support of the mother's application by another deponent and a statement exhibited to it. The master refused to make an order on the father's application and at his request adjourned it into court as a procedure summons.

S. Terrell for the father, the applicant.

C. A. Settle for the mother, the respondent.

Cur. adv. vult.

Feb. 4. **CROSS, J.**, having recited the facts, read the following judgment: It is common ground between the parties that the exhibited statements in question contain " hearsay " evidence which would be inadmissible at the trial of an action raising issues between father and mother as evidence of the truth of the facts alleged. On that basis I have been asked by counsel for both sides to decide two questions of principle before considering in detail the statements to parts of which objection is taken.

The first question is whether the mother's summons is an interlocutory proceeding within the meaning of the proviso to R.S.C., Ord. 38, r. 3. If it is, then there would be no objection to the inclusion of hearsay evidence in the affidavits or exhibited statements provided that the sources and grounds were given. R.S.C., Ord. 38, r. 3, is in the following terms:

> " Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove . . . Provided that on interlocutory proceedings or with leave . . . an affidavit may contain statements of information and belief, with the sources and grounds thereof."

Counsel for the applicant admitted that for some purposes an application such as the mother's application in this case was an interlocutory proceeding. He agreed, for example, that an order made on it would be an interlocutory and not a final order for the purposes of appeal. Directions given in infancy cases are never irrevocable but are always liable to be varied in the light of changed circumstances. The only final order in such proceedings would be one directing that the child should cease to be a ward of court. But he argued that a proceeding might well be interlocutory for the purposes of appeal while not being interlocutory for the purposes of the admission of hearsay evidence. In this connexion he referred me to a passage in the judgment of COTTON, L.J., in *Gilbert* v. *Endean* (1), where the lord justice said in connexion with an earlier form of a rule in question (2):

> ". . . for the purpose of this rule those applications only are considered interlocutory which do not decide the rights of parties, but are made for the purpose of keeping things in statu quo till the rights can be decided, or for the purpose of obtaining some direction of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties. Now many of the cases which are brought before the court on motions and on petitions, and which are therefore interlocutory in form, are not interlocutory within the meaning of that rule as regards evidence. They are to decide the rights of the parties, and whatever the form may be in which such questions are brought before the court, in my opinion the evidence must be regulated by the ordinary rules, and must be such as would be admissible at the hearing of the cause."

Counsel for the applicant pointed out that the mother's application here was not made for the purpose of keeping matters " in statu quo " or for the purpose of obtaining directions as to procedure. Therefore, he submitted, it should not be considered to be an interlocutory proceeding for the purpose of the admission of evidence. Counsel for the respondent, on the other hand, argued that, while it was true that the mother's application was not made for the purpose of keeping things in statu quo, or for directions with regard to procedure, it was not an application on which any rights of any parties would be decided. The only question to be decided would be what, in all the circumstances, would be in the best interests of the infant who is not himself a party at all. The parties in such a case are not asserting rights but merely submit to the judge what, in their view, is for the infant's benefit. The observations of COTTON, L.J., therefore, said counsel for the respondent, do not touch such a case as this, and as the proviso to the rule (which up to 1933 was confined to motions) now extends to all forms of proceeding, there is no reason why such an application as the mother's in this case should not be considered to be interlocutory for the purposes of evidence as well as for the purposes of appeal. He submitted that it was desirable that the judge who had to decide what, in all the circumstances, was in the best interests of the child should be able to consider any material which either side chose to put before him and that he could safely be trusted not to attribute to any part of it more weight than it deserved.

I have set out the rival contentions because the point is one of some general importance and the case may go further, but, so far as I am concerned, the question is, I think, answered by the recent decision of the Court of Appeal in *Rossage* v. *Rossage* (3), to which counsel for the applicant called my attention, and I have been supplied with a transcript of the judgment. In that case the Divorce Court had granted the custody of the child of the marriage to the father and granted the mother certain rights of access. Later the father applied to the court to have the mother's rights of access suspended, and in support of his application certain affidavits were filed which contained hearsay evidence. The Court of Appeal took the view that such evidence was inadmissible and ordered the affidavits to be removed from the file. Counsel for the respondent suggested that I need not consider that decision to be binding on me in this case because proceedings in the Divorce Division relating to the custody of and access to the children of the parties to the divorce proceedings can more easily be viewed as contests between parties claiming adverse rights than can wardship proceedings in this division. I cannot accept this suggestion. I have always understood—and counsel for the respondent did not refer me to any decision suggesting the contrary—that in custody proceedings in the Divorce Division, just as in wardship proceedings in this division, the paramount consideration is always the welfare of the child. It would be curious if the rules as to the evidence admissible in such cases were different in the two divisions, and, if any such distinction is to be drawn, it should, I think, be drawn by the Court of Appeal, not by me. On the first point, therefore, I hold that counsel for the applicant is right.

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(1) (1878), 9 Ch.D. 259.

(2) (1878), 9 Ch.D. at p. 268.

On the footing that the mother's application in this case is not an " interlocutory proceeding " within the meaning of the proviso to R.S.C., Ord. 38, r. 3, the other question which has been argued is how the court should deal with any matter which has been improperly included in the affidavits or exhibited statements. In *Rossage* v. *Rossage* (3) Barnard, J., while holding that the passages in the affidavits to which objection was taken were not admissible in evidence, refused to strike them out, as he considered that he would be able to put them out of his mind when he heard the application. The Court of Appeal reversed his decision, and as in that case the proportion of inadmissible material in the affidavits was very high, the court did not simply strike out the inadmissible passages but directed the affidavits to be taken from the file. The matter objected to in that case was not only inadmissible and so irrelevant, but was also " scandalous " in the sense that it contained allegations of misconduct by the mother. The Court of Appeal, however, I think, took the view that even if hearsay evidence improperly contained in an affidavit is not " scandalous " in the ordinary sense of that word, the court nevertheless can, if it thinks fit, strike it out either under R.S.C., Ord. 38, r. 11, or under its inherent jurisdiction. Counsel for the applicant submitted to me not only that the court has jurisdiction to strike irrelevant matter out of an affidavit (which, indeed, counsel for the respondent did not dispute) but that it ought always to strike out any matter the irrelevancy of which consists in the fact that it is inadmissible in evidence, however trivial the matter in question may be. He argued that if the records of the court are, as he put it, " defiled " by the presence of statements which are inadmissible in evidence, the court, on its attention being called to the fact, cannot properly refrain from striking it out. Counsel for the respondent in his argument on this point placed some reliance on the fact that in this case the evidence is in the form of statements exhibited to formal affidavits and that such statements may be said not themselves to form part of the record of the court. I do not propose to deal with the argument of counsel for the applicant on any such narrow ground. Whether the material to which objection is taken on the ground that it is not admissible in evidence is contained in a statement exhibited to an affidavit, or in the affidavit itself, the court has, in my judgment, a complete discretion whether or not to strike it out, and a judge cannot be said to be exercising his discretion improperly merely because he decides not to strike out the matter in question. None of the cases cited by counsel for the applicant appear to me to support his submissions on this part of the case, and *Rossage* v. *Rossage* (4) tells against it. In that case when the father's counsel pointed out that Barnard, J., had refused to strike out the passages in question because he thought that he was capable of putting them out of his mind when he came to decide the issue, Hodson, L.J., said: "That is the ordinary way of doing it but this is a bit extreme." The hearsay evidence to which objection was there taken was most damaging to the mother, and one can well understand that the Court of Appeal should have thought that in the particular circumstances of that case it was desirable that it should be struck out altogether. But I find nothing in his judgment which suggests to me that Hodson, L.J., went back on the view which is implicit in the interlocutory observation which I have quoted, namely, that there may be cases where the proper course for a judge to follow is to refuse to strike out hearsay evidence improperly included in an affidavit. It would, I think, be unfortunate if the law was otherwise. Inadmissible hearsay evidence may relate only to matters which are of little or no importance, even to matters the truth of which the other side may not dispute. Yet if the submission of counsel for the applicant is right, the court would be bound to accede to an application to strike such matter out, and, I suppose, to give the applicants the costs of it even though the application was quite unnecessary for the purpose of achieving justice in the case.

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(3) ante p. 600.

I propose, therefore, to deal with the present application on the basis, first, that the mother's summons is not an interlocutory proceeding within the meaning of the proviso to R.S.C., Ord. 38, r. 3, and, secondly, that I can properly refuse to strike out any of the passages to which objection is taken by the father if I consider that that course is not necessary for the purpose of enabling the mother's summons to be properly heard.

Summons adjourned to chambers.

Solicitors: *Victor Mishcon & Co.* (for the applicant); *Jaques & Co.* (for the respondent).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

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(4) ante p. 600.

JUDD *v.* BOARD OF GOVERNORS OF THE HAMMERSMITH, WEST LONDON AND ST. MARK'S HOSPITALS AND ANOTHER.

[QUEEN'S BENCH DIVISION (Finnemore, J.), February 3, 1960.]

Damages—Measure of damages—Loss of earnings—Pension—Pension payable from superannuation fund to which employee and employer contributed—Whether pension should be excluded when assessing damages.

The plaintiff was injured in an accident for which the defendants were liable. Because of the injuries that he sustained the plaintiff retired from his work as a local government officer with Hammersmith Borough Council before he would otherwise have done so; he was aged fifty-nine when he retired. He had worked for the borough council for thirty-two years during which he contributed compulsorily to the superannuation fund maintained by the council. On his retirement, in consequence of his superannuation rights, the plaintiff received certain benefits including a pension of £300 a year which was calculated to take into account his thirty-two years of service.

Held: in assessing the damages attributable to the plaintiff's future loss of earnings the pension should not be taken into account, because the plaintiff received the pension owing to his having made a contract providing for the contingency of his disability and that contract, not the accident, was the cause of his receiving the pension.

Payne v. *Railway Executive* ([1951] 2 All E.R. 910) applied.

British Transport Commission v. *Gourley* ([1955] 3 All E.R. 796) distinguished on the question of remoteness.

[As to collateral benefits in assessing damages in tort, see 11 HALSBURY'S LAWS (3rd Edn.) 240, para. 408.]

Cases referred to:

Bradburn v. *Great Western Ry. Co.*, (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 17 Digest (Repl.) 108, *222*.

British Transport Commission v. *Gourley*, [1955] 3 All E.R. 796; [1956] A.C. 185; [1956] 2 W.L.R. 41; 3rd Digest Supp.

Payne v. *Railway Executive*, [1951] 2 All E.R. 910; [1952] 1 K.B. 26; 36 Digest (Repl.) 201, *1061*.

Action.

In this action by Frank Judd, the plaintiff, for damages for personal injuries and consequent loss caused by the negligent driving, on Nov. 18, 1957, of the second defendant, Ernest Albert Treby, the servant of the first defendants, the Board of Governors of Hammersmith, West London and St. Mark's Hospitals, FINNEMORE, J., held that the defendants were liable for the plaintiff's accident. At the time of the accident the plaintiff, who was then aged fifty-eight, was a local government officer employed by Hammersmith Borough Council, and he had worked in local government service since 1926. The plaintiff contributed to the superannuation fund maintained by the borough council under the Local Government Superannuation Act, 1937, but he had elected to retain his previous superannuation rights under the Shoreditch and Other Metropolitan Borough Councils (Superannuation) Acts, 1922 to 1951. In consequence, when he retired from work on Jan. 5, 1959, as a result of the injuries which he had suffered, the plaintiff received a superannuation allowance comprising a pension of £300 11s. 11d. a year and a lump sum of £901 15s. 9d. In calculating those benefits, the plaintiff's service in local government from 1926 to January, 1959, was taken into account. If he had not been disabled he would have continued in work until he was sixty-five and his pension would have been £416 yearly. The question arose whether in assessing damages for the plaintiff's future loss of earnings, i.e., from the date of this action until he reached the retirement age of sixty-five, the pension of £300 11s. 11d. which he was now A receiving should be taken into account. The case is reported only on this point.

Michael Lee for the plaintiff.
J. D. May for the defendants.

FINNEMORE, J., having referred to the facts, held that the accident was caused by the negligence of the second defendant. HIS LORDSHIP continued: B One point of law which has arisen is the question of the pension. In January, 1959, when the plaintiff was no longer able to do his work—and he has never done any since his accident and never will—he was granted a pension of £300 a year under the statutory scheme (1) which applied to him as a local government officer for the borough council. Ought that pension to be taken into account, and between now and his retirement age of sixty-five be set off against his loss C of wages? I was referred to *British Transport Commission* v. *Gourley* (2). While that case was about taxation and is, therefore, somewhat removed from the present one, it dealt with the general question whether, when a person is injured through somebody else's fault and is entitled to claim damages by way of compensation, tax must be taken into account and the amount of damages must be reduced by the amount which would have been paid by the successful plaintiff D by way of tax to the Inland Revenue, based on the principle that a person must not make a profit out of his accident but must be compensated only for the actual loss which relates to him. LORD GODDARD made the point (3) in his speech, referred to by counsel for the defendants, that the principle of remoteness has to be applied, and we shall see in a moment how that may affect the present case. It was held there that tax deduction was not too remote to be E considered and to be applied in the reduction of damages.

Counsel for the plaintiff cited to me as supporting his contention (4), *Payne* v. *Railway Executive* (5). In that case the plaintiff, who was a petty officer in the Royal Navy, was seriously injured in a railway accident. Liability was admitted —that does not matter—and he was invalided out of the service very much as the plaintiff in this case was retired from his service. The plaintiff in *Payne* v. F *Railway Executive* was given a disability pension, and the plaintiff in this case, on his disability and consequent inability to carry on his work, was granted a pension of some £300 a year. The scheme under which the plaintiff became entitled to his pension was a contractual scheme to which the plaintiff paid contributions, and to which the council also made contribution.

Counsel for the defendants took the point that one ought to divide the pension G into two, but I think that that is based on a fallacy. If an employee is within a contributory pension scheme, though the employee may make a contribution and the employer (in this case the council) makes one, the amount which the employer contributes has to come from somewhere and, as a matter of commonsense, the wages or the salary paid would have to take into account and reflect the payments made by the employer, at all events, in some degree. It is not H just a case of the employee paying so much and the employer paying so much, because the position is almost bound to be, one would think, that the actual wages or salary paid will be less than the notional sum which the employee might get if there were no such scheme in operation. This is not, however, the point on which the legal decision goes. Counsel for the plaintiff makes the submission in law that the whole of the pension must be disregarded: whether I because it is res inter alios acta, or whether it is too remote, or whether because it is wrong to allow a tortfeasor or wrongdoer to benefit by what somebody else has done by way of provision for his future, matters not, nor does it matter, if it be the fact, or if it be the result, that the plaintiff benefits to this extent by having his pension and having also his compensation for his loss of earnings.

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(1) I.e., under the Shoreditch and Other Metropolitan Borough Councils (Superannuation) Acts, 1922 to 1951.

(2) [1955] 3 All E.R. 796; [1956] A.C. 185.

(3) [1955] 3 All E.R. at p. 805; [1956] A.C. at p. 207.

(4) I.e., that the plaintiff's pension must be ignored in assessing the damages recoverable by him.

(5) [1951] 2 All E.R. 910; [1952] 1 K.B. 26.

Payne v. *Railway Executive* (6), subject to one matter to which I will refer at the end, is very much in line with the present case. There it was argued that the pension ought to be taken into account. SELLERS, J., tried the case (7) and applied the principle adumbrated in *Bradburn* v. *Great Western Ry. Co.* (8) in 1874, long before modern social legislation had to be considered. That was a case where the tortfeasor claimed that insurance money which the plaintiff received as a result of his injury, for which, of course, he had paid his premiums, ought to be taken into account, and it was held that that was money received because of res inter alios acta. SELLERS, J., considered that principle and applied it, saying (9):

> "The plaintiff has become entitled to the pension by reason of his naval service, it being one of the benefits such service affords. The pension would have been paid if the accident had been without any negligence on the part of the railway company. It was argued for the plaintiff that a pension must be disregarded in making the assessment just as insurance is to be disregarded, and that as a matter of principle a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was serving in the Royal Navy at the time and had consequently received a pension. I agree with that contention. Just as the wrongdoer cannot appropriate to himself the benefit of the premiums paid by the injured party to cover accident risks, so he cannot, I think, appropriate the benefits accruing from the injured party's service which similarly entitles him to those benefits."

It is quite clear that the contributions were compulsorily made by the plaintiff during his thirty-two years' service, and entitle him to the money which he is now enjoying. In the Court of Appeal, COHEN, L.J., after quoting the passage that I have just read, continued (10):

> "I respectfully agree with the judge's conclusion and his reasoning. It seems to me that the accident in this case was not the causa causans of the receipt by the first plaintiff of the disability pension, but the causa sine qua non. The causa causans was his service in the Royal Navy."

In this case the causa causans of the pension was the service of the plaintiff with the borough council and, incidentally, his payment of contributions towards the scheme. COHEN, L.J., goes on to say (10) that he is the more ready to arrive at the conclusion reached by SELLERS, J., because of the difficulty for the Minister of Pensions in that case—and the borough council in this case does not have the right—in assessing pensions, to take into account damages which might be awarded.

It is also true that SINGLETON, L.J., made the same point, but it seems to me that the ratio decidendi is in the conclusion that I have just quoted from the judgment of COHEN, L.J., and SINGLETON, L.J., equally accepted that. First of all, SINGLETON, L.J., quoted from PIGOTT, B.'s judgment (11) and said (12):

> "And, from another point of view, I draw attention to the words of PIGOTT, B.: '. . . there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him.' Equally, it can be said that the pension awarded to the plaintiff in the present case is due to his contract, or to his terms of

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(6) [1951] 2 All E.R. 910; [1952] 1 K.B. 26.

(7) [1951] 1 All E.R. 1034.

(8) (1874), L.R. 10 Exch. 1

(9) [1951] 1 All E.R. at p. 1036.

(10) [1951] 2 All E.R. at p. 912; [1952] 1 K.B. at p. 36.

(11) In *Bradburn* v. *Great Western Ry. Co.* (1874), L.R. 10 Exch. at p. 3.

(12) [1951] 2 All E.R. at p. 914; [1952] 1 K.B. at p. 39.

> service, with the Admiralty. In certain circumstances a man serving in the Navy may become entitled to a pension. That is a factor which enters into the question of his pay. If there were no pension rights, it is reasonable to assume that the pay would be higher. Why, then, should the pension enure for the benefit of a wrongdoer? I myself should be prepared to adopt the reasoning of Pigott, B., and to hold that the plaintiff does not receive the pension because of the accident 'but because he has made a contract providing for the contingency'."

That seems to me to be exactly this case. Possibly, though I do not think it affects the principle, it is a little stronger in this case because the plaintiff has obviously contributed to the fund for his future pension.

Singleton, L.J., went on to say (13): "None the less, I prefer to base my judgment in this case on another ground" and he deals with the point of the Minister of Pensions taking into account the question of damages awarded in a successful action brought for negligence.

I think, therefore, that on the authority of the Court of Appeal in *Payne* v. *Railway Executive* (14) I am bound to hold and I think that it is right that the pension in this case should not be taken into account in favour of the defendants as against the plaintiff.

[His Lordship, in assessing damages, awarded the plaintiff £3,500 in respect of the following matters: loss of earnings down to the date of this action; the difference between the lump sum gratuity paid to the plaintiff on his retirement in January, 1959, and the lump sum he would have received on retirement at the age of sixty-five, i.e., in March, 1964; the reduction in the pension payable to the plaintiff at sixty-five; his future loss of earnings, ignoring the pension of £300 a year he was now receiving, down to the retiring age of sixty-five. In respect of the damages recoverable for pain and suffering and loss of amenities of life (15), His Lordship, having said that the plaintiff could not now walk or dress himself properly and required help in all other matters of living, awarded him the sum of £5,500. The total award was thus £9,000.]

Judgment for the plaintiff.

Solicitors: *J. G. Haley* (for the plaintiff); *Richard Newton* (for the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

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(13) [1951] 2 All E.R. at p. 914; [1952] 1 K.B. at p. 40.

(14) [1951] 2 All E.R. 910; [1952] 1 K.B. 26.

(15) The plaintiff suffered a fracture of the right femur and bruising of the left leg in the accident. At the time of the accident the plaintiff was suffering from rheumatoid arthritis but it was in a quiescent condition; the injuries he sustained caused a severe and permanent aggravation of this condition resulting in his present disability.

LOWE *v.* LOMBANK, LTD.

[COURT OF APPEAL (Lord Goddard, Upjohn, L.J., and Diplock, J.) February 3, 9, 1960.]

Hire-Purchase—Condition—Implied condition—Fitness for purpose for which goods are required—Exclusion of condition by express provision of agreement—Agreement signed but not read by hirer—Whether provision brought to the notice of the hirer—Whether hirer impliedly made known purpose for which goods were required—Estoppel—Hire-Purchase Act, 1938 (1 & 2 *Geo.* 6 *c.* 53), *s.* 8 (2), (3).

Contract—Promise and representation distinguished—Acknowledgment made in clause of contract—Whether it had contractual force.

On June 8, 1958, the plaintiff, a widow aged sixty-five, agreed to purchase a second-hand car from a motor dealer for £200, he arranging hire-purchase for her. She had not seen the car but was told that it was in perfect or almost perfect condition. On June 9 the plaintiff signed at her home a printed hire-purchase agreement form issued by the defendants and brought to her by the dealer's brother. She did not read the form. The agreement required (among other requirements) the hirer to keep and maintain the goods in good condition and to pay punctually all licence duties, taxes and registration charges in respect of the goods and the user thereof. Clause 8 purported to exclude both conditions and warranties, whether express or implied, where the hire-purchase price exceeded £300, but did not purport to exclude any conditions, as distinguished from warranties, where the hire-purchase price did not exceed £300. Clause 9 (ii) of the agreement was: " The hirer acknowledges that he has examined the goods prior to the signing of this agreement and that there are no defects in the goods which such examination ought to have revealed and that the goods are of merchantable quality. The hirer further acknowledges and agrees that he has not made known to the owners expressly or by implication the particular purpose for which the goods are required, and that the goods are reasonably fit for the purpose for which they are in fact required." Clause 8 and cl. 9 were never brought expressly to the plaintiff's notice. On the evening of June 9 she saw the car for the first time when it was brought to her house, but it was taken away again immediately allegedly for some minor adjustment. At a later date the car was handed over to the plaintiff and she signed a printed document supplied by the defendants and headed " Delivery Receipt ", which bore the date June 9, 1958, the same date as the hire-purchase agreement. The delivery receipt contained this statement: " I . . . confirm that I . . . have examined the goods described in the schedule to the agreement and acknowledge that the same is/are in good order and condition, and to my . . . satisfaction in every respect . . ." The car supplied to the plaintiff was in fact completely unroadworthy, the engine, steering and brakes all being defective. The defects were latent and would not have been apparent to a layman on inspection.

Held: the plaintiff was entitled to damages for breach of the condition of fitness stated in s. 8 (2) of the Hire-Purchase Act, 1938, for the following reasons—

(i) the condition was implied in the hire-purchase agreement because (a) the hirer did by implication make known to the defendants within s. 8 (2) of the Act of 1938, that she required the car as a means of transport, particularly having regard to the terms of the hire-purchase agreement as to maintenance and punctual payment of licence duties etc., and to the acknowledgment in the delivery receipt that the goods were in good order and condition; and (b) cl. 8 was not " brought to the notice of the hirer " nor was " its effect made plain to " her within s. 8 (3) of the Act of 1938, so that the defendants could not rely on the exclusions for which cl. 8 provided.

even if the clause had, on its true construction, purported to exclude the implied condition.

(ii) the plaintiff was not estopped, by any representation in the delivery receipt, from relying on the implied condition of fitness because (a) the statement in the delivery receipt was not clear and unambiguous and did not extend clearly, at any rate, to latent defects, such as were the defects in the car; and, on the facts, (b) a reasonable man in the position of the defendants would not have believed that the plaintiff meant him to act on any representation contained in the delivery receipt by taking steps to enter into a hire-purchase agreement and (c) the defendants did not in fact sign the hire-purchase agreement on faith that the representation in the delivery receipt as to the condition of the car was true.

Held further: clause 9 (ii) of the hire-purchase agreement did not contain a contractual promise though it might, in other circumstances than those of this case, give rise to an estoppel.

Appeal allowed.

[As to an implied condition in a hire-purchase agreement that the goods are fit for the purpose for which they are required, see 19 HALSBURY'S LAWS (3rd Edn.) 532, para. 858.]

Case referred to:

Citizens' Bank of Louisiana v. *First National Bank of New Orleans*, (1873), L.R. 6 H.L. 352; 43 L.J.Ch. 269; 21 Digest 309, *1130*.

Appeal.

The plaintiff appealed from a judgment of His Honour JUDGE BROWN, given at Southport County Court on Oct. 13, 1959, whereby he dismissed her claim against the defendants, a hire-purchase finance company, with whom the plaintiff had entered into a hire-purchase agreement in regard to a second-hand motor car. In her particulars of claim, the plaintiff alleged (among other allegations) that the car was not reasonably fit for the purpose for which it was required, and she claimed (i) rescission of the agreement and the return of all moneys paid by her (a) as the initial payment and rentals under the agreement, and (b) for repairs to the car, and, alternatively (ii) damages. The county court judge found that the car, when it was delivered to the plaintiff, was utterly unroadworthy. He held that the hire-purchase agreement was subject to the implied condition that the car should be reasonably fit for the purpose for which it was required, but that, as the plaintiff had signed a delivery receipt stating that she had examined the car and that it was in good order and condition, she was estopped as against the defendants from complaining of the condition of the car.

R. M. Bingham, Q.C., and *J. Jaffé* for the plaintiff, the hirer.

T. G. Roche, Q.C., and *S. Terrell* for the defendants, the hire-purchase finance company.

Cur. adv. vult.

Feb. 9. **DIPLOCK, J.**, read the following judgment of the court: This is an appeal by the plaintiff from a judgment of JUDGE HAROLD BROWN in the Southport County Court dismissing her claim against the defendants, a hire-purchase finance company, for damages for breach of the statutory condition, enacted in s. 8 (2) of the Hire-Purchase Act, 1938, that a car which she acquired on hire-purchase from the defendants was reasonably fit for the purpose for which it was required.

The plaintiff, who was a widow aged sixty-five, was minded to buy a second-hand car to replace an ancient vehicle which she then owned. She got in touch through her son with a motor dealer, Charles Brown, who owned a 1947 Standard car. On June 8, 1958, George Brown, Charles Brown's brother who was acting on his behalf, offered the Standard car to her at the price of £200 and told her that he could get hire-purchase and would allow £45 for the car which she then owned. He assured her that the Standard car was in perfect or almost perfect condition, and on this assurance she agreed to proceed with the transaction. The name of the hire-purchase finance company with whom the hire-purchase was to be arranged was not at this stage mentioned. She gave George Brown, at his suggestion, £10 to clinch the bargain. On the following day, June 9, George Brown came when the plaintiff was busy preparing lunch. She did not see the car but was presented by George Brown with a printed form of hire-purchase agreement issued by the defendants, which, no doubt like many other hirers, she signed without reading. It will be necessary for this court to read it with some care later. She paid him £40, which, together with the £10 already paid and the allowance of £45 on her old car, made up the initial payment of £95 referred to in the hire-purchase agreement, and undertook to pay the balance of £158 by twenty-four monthly instalments. On the same evening the Standard car was brought round by George and Charles Brown to the plaintiff's house, when she saw it for the first time. They did not leave it with her but took it away on the excuse that some minor adjustment was required. It was handed over to her at some later date, which the county court judge was not able to fix with certainty, and the plaintiff then signed a document headed "Delivery Receipt", which was presented to her for signature by one of the Browns. This document, which bears the date, June 9, 1958, although it was signed at a later date, will also require careful scrutiny.

The learned judge accepted the evidence of a motor engineer, called by the plaintiff, that, so far from being "perfect" or "almost perfect", the car was utterly unroadworthy and, indeed, a danger to its occupiers and other road users at the time of this transaction. The principal defects were in the engine, steering and brakes. There was evidence that these were defects which would not be apparent to a layman on inspection and, although there is no specific finding to this effect, it would appear from the fact that the learned county court judge acquitted George Brown of fraud that he accepted this. These defects became progressively apparent after the car had been delivered, but it was not until Nov. 6, 1958, that the plaintiff, through her solicitors, complained to the defendants, to be met with the reply (1) that the defendants were

> ". . . acting purely as bankers, and have at no time either expressed or implied any warranty in respect of the condition of the vehicle concerned in our contract."

They concluded with a demand for continued payment of current instalments.

On Jan. 5, 1959, the plaintiff started proceedings against the defendants claiming damages for fraud, based on the misrepresentations of George Brown, or, alternatively, for breach of the implied condition of fitness under s. 8 (2) of the Hire-Purchase Act, 1938. She claimed in the alternative rescission of the hire-purchase agreement of June 9, 1958, but this claim, in view of the delay, was not pressed at the trial. The county court judge was not prepared to find that George Brown was fraudulent. He described him as a "careless optimist", and we have not been asked to reverse this finding. The only questions on this appeal are (i) whether the hire-purchase agreement was subject to the implied condition that the car should be reasonably fit for the purpose for which it was required, that is, for use as a means of transport, and (ii) if so, whether the plaintiff is estopped from relying on the defects, which in fact existed in the car, as constituting a breach of that implied condition. The county court judge answered the first question in the affirmative, and the second also in the affirmative; and accordingly gave judgment for the defendants, but, in case he were wrong, assessed the damages at £160.

The common law, as counsel for the defendants points out, subject to some restrictions based on public policy, permits persons to make whatever contractual bargains they please and will enforce those bargains. This general principle, of which the underlying assumptions are that persons entering into contracts are of equal bargaining power and read and understand what they sign, ignores the fact that under modern conditions many transactions, particularly of hire-purchase, are entered into by ignorant persons whose only choice is either not to enter into the transaction at all or to enter into it on the terms of a standard agreement, drafted by the hire-purchase company, and containing numerous clauses printed in miniscule characters which the hirers do not in fact read and, if they did, would be incapable of understanding. To meet this abuse of bargaining power by hire-purchase finance companies, Parliament in 1938 enacted the Hire-Purchase Act, 1938, containing a number of provisions for the protection of the small hire-purchaser, that is, the hire-purchaser of goods whose hire-purchase price did not exceed £100 (2). In 1954, with the fall in the value of money, this protection was extended to goods whose hire-purchase price did not exceed £300 (3). It applies, therefore, to the hire-purchase agreement under consideration in the present appeal. Section 8 (2) of the Act of 1938 reads:

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(1) In a letter dated Nov. 12, 1958.

> " Where the hirer expressly or by implication makes known the particular purpose for which the goods are required, there shall be an implied condition that the goods shall be reasonably fit for such purpose."

Section 8 (3), so far as is relevant, reads:

> ". . . the owner shall not be entitled to rely on any provision in the agreement excluding or modifying the condition set out in sub-s. (2) of this section unless he proves that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him."

The learned judge found as a fact—indeed, it was undisputed on the evidence—that no provision in the hire-purchase agreement excluding or modifying the implied condition was brought to the notice of the plaintiff. Prima facie, therefore, if the hirer did expressly or by implication make known that she required the Standard car for use as a means of transport, the statutory condition applied and, on the facts as found by the county court judge, was manifestly breached.

The first contention of counsel for the defendants, a contention which does not appear to have been advanced before the county court judge, so that no cross-examination was directed to it, is that the plaintiff did not make known, either expressly or by implication, to the defendants that she required the Standard car for use as a means of transport. She made it known expressly to Mr. Brown, the dealer, but the county court judge held, in our view rightly, that, in view of an express clause in the hire-purchase agreement, Mr. Brown was not the agent of the defendants for the purpose of receiving this information.

It is at first sight a bold contention that, when a widow, for she is so described in the hire-purchase agreement, negotiates with a motor dealer for the hire-purchase of a second-hand car, she does not by implication make known that she requires it as a means of transport, and such contention is even bolder when the hire-purchase agreement proferred by the defendants for her signature requires her, by cl. 2:

> "(d) To keep and maintain the goods and all parts thereof in good order repair and condition and to replace all missing or unfit parts of the goods.
>
> "(j) To pay punctually all licence duties, taxes, fees, registration charges and all other payments in respect of the goods or the user thereof . . ."

—and, by cl. 3, provides that the hirer may terminate the hiring on returning with the goods

> ". . . all necessary licences, registration books or certificates, insurance policy and certificate, and other documents relating to the goods."

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(2) See s. 1 (c) of the Hire-Purchase Act, 1938. Under s. 1 (a) the Act applied to motor vehicles only if the hire-purchase price did not exceed £50, but para. (a) was repealed by s. 1 (1) of the Hire-Purchase Act, 1954.

(3) See s. 1 (1) (b) of the Hire-Purchase Act, 1954; 34 HALSBURY'S STATUTES (2nd Edn). 758.

Furthermore the delivery receipt, of which more anon, which on their own evidence the defendants require their hirers to sign before they themselves sign the hire-purchase agreement, contains an acknowledgment that the goods are in good order and condition. We agree with the county court judge that the plaintiff in fact plainly made known to the defendants by implication that she required the car for the purpose of driving about.

Notwithstanding this, it is contended by counsel for the defendants that cl. 8 and cl. 9 of the hire-purchase agreement negative this implication. Clause 8 reads:

> "The owners do not let or supply the goods or any part thereof with or subject to any condition or warranty express or implied by statute or otherwise, as to the capacity, age, quality, description, state, condition or fitness for any purpose or otherwise whatsoever save in the case of the hire-purchase price in the schedule hereto not exceeding £300 when the only warranties shall be those implied under the Hire-Purchase Acts, 1938 and 1954, in respect of hire-purchase transactions within the provisions of those Acts but subject to the exclusion of warranties by reason of cl. 9 hereof."

This clause draws a distinction between condition and warranty. It excludes both, whether express or implied by statute or otherwise, where the hire-purchase price in the schedule exceeds £300, but does not purport to exclude any conditions, as distinguished from warranties, where the hire-purchase price in the schedule does not exceed £300. Section 8 of the Hire-Purchase Act, 1938, draws a like distinction between conditions, referred to in sub-s. (1) (b) and (d), and sub-s. (2) to be implied by statute, and warranties, referred to in sub-s. (1) (a) and (c), to be implied by statute, and cl. 8 of the hire-purchase agreement does not, on its true construction, purport to exclude the condition implied by s. 8 (2) of the Act of 1938, on which the plaintiff in this case relies. Even if it did, it would be ineffective to do so, because it was never brought to the notice of the plaintiff.

Clause 9 of the hire-purchase agreement, so far as is relevant, reads:

> "If the hire-purchase price shown in the schedule hereto does not exceed £300 (but not otherwise) the following provisions shall take effect . . . (ii) The hirer acknowledges that he has examined the goods prior to the signing of this agreement and that there are no defects in the goods which such examination ought to have revealed and that the goods are of merchantable quality. The hirer further acknowledges and agrees that he has not made known to the owners expressly or by implication the particular purpose for which the goods are required, and that the goods are reasonably fit for the purpose for which they are in fact required."

This curiously drafted clause was never brought to the notice of the plaintiff and its effect was not made clear to her. Nor, despite the efforts of counsel for the defendants, has it been made clear to us. It is expressed to be an acknowledgment, that is to say, a representation, by the plaintiff that she had not made known by implication that the car was required for a particular purpose, that is, as a means of transport, and also an agreement that she had not made that purpose known to the defendants. In so far as it was a representation, it could operate only as an estoppel preventing the plaintiff from asserting the contrary, but counsel for the defendants expressly disclaims reliance on it as an estoppel, no doubt for the very good reason that there was no evidence (and it is difficult to see how there could have been truthful evidence) that the defendants believed in the truth of the representation. To call it an agreement as well as an acknowledgment by the plaintiff cannot convert a statement as to past facts known by both parties to be untrue into a contractual obligation, which is essentially a promise by the promisor to the promisee that acts will be done in the future or that facts exist at the time of the promise or will exist in the future. To say that the hirer "agrees" that he has not done something in the past means no more than that the hirer, at the request of the owner, represents that he has not done that thing in the past. If intended by the hirer to be acted on by the person to whom the representation is made, believed to be true by such person and acted on by such person to his detriment, it can give rise to an estoppel: it cannot give rise to any positive contractual obligation. Although contained in the same document as the contract, it is not a contractual promise.

There lies the fallacy in the contention of counsel for the defendants. Whether or not the plaintiff made known to the defendants by implication the particular purpose for which she required the car is a pure question of fact as to the state of knowledge of the defendants to be inferred in the light of all the circumstances, including the terms of the contract itself. On this issue the rule of construction relied on by counsel for the defendants, that one cannot imply in a contract a promise which is inconsistent with an express promise, is irrelevant, for the inference to be drawn from the terms of the contract that the defendants knew the particular purpose for which the plaintiff required the car is not an implied promise, nor is the representation in cl. 9 (ii) of the contract an express promise. We reach this conclusion without reluctance, for cl. 9 (ii) is clearly an attempt, which only the size of the print in which it is set out prevents one calling blatant, to evade the provisions of s. 8 (2) and s. 8 (3) of the Hire-Purchase Act, 1938.

We turn now to the defence based on estoppel. As already mentioned, the plaintiff, on some date after June 9, 1958, signed a so-called " delivery receipt " at the request of Mr. Brown, which was forwarded in due course by him to the defendants. It reads:

> " Delivery Receipt.
>
> " Lombank, Ltd., Lombard House, Curzon Street, Park Lane, London, W.1.
>
> " I/We acknowledge and agree that I/we have read the hire-purchase agreement made between us and fully understood the terms and conditions thereof before signing it. I/We confirm that I/we have examined the goods described in the schedule to the agreement and acknowledge that the same is/are in good order and condition, and to my/our satisfaction in every respect, and that I/we have taken delivery of the said goods at this date."

At the foot of the form there are the words:

> " This form should not be signed until delivery of the goods has been taken."

This form, says counsel for the defendants, when signed by the plaintiff constitutes a representation by her that the car was in good order and condition on delivery, and the defendants are entitled to rely on that representation as an estoppel.

In order to found an estoppel on this statement in the delivery receipt, which is in a printed form drafted and supplied by them, the defendants must show: (i) that it is clear and unambiguous; (ii) that the plaintiff meant it to be acted on by the defendants or, at any rate, so conducted herself that a reasonable man in the position of the defendants would take the representation to be true and believe that it was meant that he should act on it (see *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (4)); (iii) that the defendants in fact believed it to be true and were induced by such belief to act on it.

In our view the alleged estoppel fails to satisfy any of these requirements. It is not clear and unambiguous. Indeed, on its true construction, an acknowledgment that goods are in good order and condition following immediately on the statement that the person so acknowledging has examined the goods seems to us to be, at the very lowest against the defendants, at least capable of meaning that the goods are in good order and condition so far as such inspection is reasonably capable of revealing, that is, free from patent defects. The defects relied on by the plaintiff were latent, not patent, and thus not clearly covered by the representation.

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(4) (1873), L.R. 6 H.L. at p. 361.

As regards (ii), it is not suggested that the plaintiff herself, who was described by the judge as being of " a very trustful disposition and not very business-like ", had any idea of the mechanics of hire-purchase or intended the defendants to take any action as a result of the signature of the delivery receipt. Did she then so conduct herself that a reasonable man would believe that it was meant that he should act on the representation as to the condition of the goods contained in the delivery receipt? The action in fact taken by the defendants after the delivery receipt had been sent to them was to affix their signature to the hire-purchase agreement of June 9, 1958, and to purchase the car from Mr. Brown. The courts, both civil and criminal, are becoming familiar with the mechanics of hire-purchase, though the legal relationship between the hirer, the dealer and the hire-purchase company at various stages in the transaction still involves many problems which have not been authoritatively solved; but no one would suppose that the ordinary small hirer like the plaintiff was aware of the mechanics of the transaction as between the dealer and the hire-purchase company or of the legal relationships involved; nor, indeed, were the defendants themselves, unless their letter of Nov. 12, 1958, in which they said " in this instance we are acting purely as bankers ", was dishonest and not, as we prefer to think, merely ignorant.

The representation by the plaintiff as to the condition of the car was made in a document prepared by the defendants, addressed to them, and referring expressly to a hire-purchase agreement made between them and the plaintiff—not in an offer by the plaintiff which was yet to be accepted by them—and acknowledging receipt of the goods the subject-matter of the hire-purchase agreement. There is much to be said for the view that, in authorising the dealer to proffer on delivery of the goods a document couched in these terms, the defendants, when the goods are in fact delivered against signature of the delivery receipt, accept by conduct the plaintiff's offer constituted by her signature of the hire-purchase agreement, so that a binding contract is thereupon made; or at least that the defendants by their conduct are estopped from denying that such a contract then exists. If so, there is no further action apart from what they are already contractually bound to do that the defendants can take on the faith of the representation. It is not, however, necessary to reach a final decision on this point. It is sufficient for the purposes of the present case to say that, having regard to the terms of the delivery receipt with its reference to a hire-purchase agreement already made by the defendants, and to the fact, known to the defendants, that it was obtained on delivery of the goods, a reasonable man in the position of the defendants would not believe that the representation as to the condition of the goods contained in the delivery receipt was meant to be acted on by him by entering into the very agreement referred to as having been already concluded, or by taking steps to acquire from the dealer a right to possession of or title to the goods of which possession had already been delivered up to the plaintiff.

Finally, the defendants have, in our view, failed to establish that they in fact signed the hire-purchase agreement on the faith of the truth of the plaintiff's representation as to the condition of the car. The defendants' area manager, who was called, never said so. He did give evidence that this hire-purchase agreement was not in fact signed until after the delivery receipt had been forwarded to the defendants and that that was the usual practice. Counsel for the defendants, however, relies on a finding by the county court judge that

> ". . . the defendants would not have made any advance to the dealer or executed the hire-purchase agreement unless and until the delivery receipt had been signed by the plaintiff."

We will assume, since the notes of evidence are compressed, that there was evidence to justify this finding. But it is far from being a finding that the defendants acquired the car from the dealer or executed the hire-purchase agreement because they believed the representation as to the condition of the goods in the delivery receipt was true. It is consistent with the view, which we regard as much more probable, that the defendants required the delivery receipt to be signed by the plaintiff before the hire-purchase agreement was executed by them because of their belief that the obtaining of such a receipt enabled them to evade the provisions of s. 8 (2) and s. 8 (3) of the Hire-Purchase Act, 1938, irrespective of whether the statement in it as to the condition of the car was true or not.

For all these reasons, we are of opinion that the learned county court judge was right in holding that the hire-purchase agreement was subject to the implied condition that the car was reasonably fit for use as a means of transport, and that there was in fact a breach of such condition, but that he was wrong in holding that the plaintiff was estopped from relying on that breach. The appeal will be allowed and, in lieu of judgment for the defendants, judgment will be entered for the plaintiff for £160, being the damages as assessed by the county court judge.

Appeal allowed.

Solicitors: *Mawby, Barrie & Letts*, agents for *John P. Bonney & Adler*, Southport (for the plaintiff); *Victor Mischcon & Co.* (for the defendants).

[*Reported by* F. GUTTMAN, Esq., *Barrister-at-Law.*]

Re ALFRED HERBERT, LTD. PENSION AND LIFE ASSURANCE SCHEME TRUSTS.

ALFRED HERBERT, LTD. *v.* HANCOCKS AND OTHERS.

[CHANCERY DIVISION (Cross, J.), February 12, 16, 17, 1960.]

Superannuation—Scheme—Amendment—Employees' pension and life assurance scheme—Provision for change of scheme reserving the right to employers to discontinue the scheme in the event of " unforeseen circumstances "—Whether amendments changing beneficial interests validly made.

H. joined an employees' pension and life assurance scheme on its inauguration by his employers, a company, in 1939. The pension scheme was a contributory scheme, but the company paid the whole cost of the life assurance benefits. Benefits included a life assurance benefit which became payable, as events happened in the case of H., on his death. In addition, according to the scheme in 1939, the amount of H.'s contributions would be repayable with the life assurance benefit. The booklet issued to employees and setting out the scheme contained a clause " Change of Scheme. While the company has every hope of maintaining its contributions to the scheme, the right is reserved in the event of unforeseen circumstances to discontinue the scheme after six months' notice, or suspend or amend it from time to time on any anniversary of the starting date . . . ". H. paid contributions until 1951, when he attained normal pension age. Thereafter no further contributions were payable by him, but he continued in employment. In 1955, with a view to obtaining estate duty advantage, the company purported to amend the scheme so as to provide that the life assurance benefit should be paid if an employee died while in the service of the company after attaining normal pension age together with cash equivalent to five years' pension payments, and so as to include the following new clause: " Nomination of Beneficiary. An employee may nominate a beneficiary to whom the death benefit . . . is to be payable, and if the beneficiary survives the employee, the benefit will be so paid. If the employee leaves no nominated beneficiary surviving, the death benefit will be payable to the employee's

A widow or widower. If the employee leaves neither nominated beneficiary nor widow or widower surviving, the death benefit will be payable to the employee's estate ". H. was given a copy of the amendment but was not asked to sign a form of consent adopting it. He did not nominate a beneficiary. H. died in 1958, while in the employment of the company, and on his death life assurance benefit of £1,100 and a sum of £2,040, being B cash equivalent of five years' pension payments that had not been made while he continued in employment after 1951, became payable. This latter sum exceeded the amount of H.'s contributions. He left a widow from whom he was estranged. On the question whether she or his personal representatives were entitled to the £3,140,

Held: the 1955 amendment was not validly made because the clause C providing for change of the scheme was confined, on its true construction, to changes for causes (viz., "unforeseen circumstances") affecting the company's part of the contract and did not enable the company to change beneficial interests of employees participating in the scheme; and, therefore, H.'s widow was not entitled to the £1,100 life assurance benefit or to so much of the £2,040 as equalled H.'s contributions.

D QUAERE whether so much of the £2,040 as exceeded H.'s contributions was payable in accordance with the 1955 amendment, on the ground that H. could not both approbate and reprobate those amendments.

[For the Finance Act, 1947, s. 21 (1), see 12 HALSBURY'S STATUTES (2nd Edn.) 768; and for the corresponding s. 388 of the Income Tax Act, 1952, see 31 ibid., 369. For further restriction on alienability if income tax relief is to be obtained, E see the Finance Act, 1956, s. 22 (2), 36 HALSBURY'S STATUTES (2nd Edn.) 425.]

Case referred to:

Bibby (J.) & Sons, Ltd., Pensions Trust Deed, Re, Davies v. *Inland Revenue Comrs.*, [1952] 2 All E.R. 483; 3rd Digest Supp.

Adjourned Summons.

F Alfred Herbert, Ltd. formed a contributory pension and life assurance scheme for their employees in 1939. They issued a booklet dated February, 1939, to their employees, in which were set out the benefits to be derived from the scheme and particulars of it. In the event of death before retirement the amount of life assurance set out therein would be paid and the whole of the employee's contributions would be returned. The company agreed under the G scheme to contribute to the cost of future pensions and to pay the whole cost of the life assurance benefits. Employees who wished to join the scheme were to fill up a form of application. Under "Provision of Benefits" the booklet said:

> "In order to provide the foregoing benefits the company will apply the members' and its own contributions to effect group policies [with a certain insurance company] and a copy of the conditions of these policies may be seen H at the offices of the company on application . . . The company will hold in trust for the benefit of members the group policies and all benefits payable thereunder. . . . Each member will receive a signed certificate of membership."

Under the heading "Change of Scheme" was the following provision:

> I "While the company has every hope of maintaining its contributions to the scheme, the right is reserved in the event of unforeseen circumstances to discontinue the scheme after six months' notice, or suspend or amend it from time to time on any anniversary of the starting date, without prejudice, however, to the pension benefits secured by contributions already paid. Should the scheme be discontinued no part of the benefits secured by the group policies shall be retained by the company."

The certificate of membership was headed "Group Scheme" and read, so far as is material:

> " This is to certify that, in pursuance of the scheme, we have effected A
> with the [insurance company] group policies for the benefit of our employees,
> and that you, having deposited an application for membership of the scheme,
> are entitled, subject to the conditions of the policies and to their continuance
> in force, to the benefits and options under such policies corresponding to the
> benefits and options under the scheme."

The certificate was signed and sealed by the company. At the top of the page B
there was the heading " Group Policies " with the numbers and " Booklet
dated February, 1939 ". On the back of the certificate were five paragraphs
relating to benefits and options, all of which contained a reference to the booklet.
With regard to life assurance benefit it provided:

> " In the event of death while in the active employment of the employer C
> or while on leave on account of sickness or disablement . . . and before
> going on pension, life assurance of the amount shown in the booklet will be
> payable to the member's legal representatives."

From time to time after 1939 the company amended the scheme. In 1949 the
following amendment among others was made:

> " An employee shall not be entitled to assign, charge, or dispose of his D
> beneficial interest in the scheme except by will, so long as he or she is a
> member of the scheme."

It was stated in evidence by affidavit that the reason for making that amendment
was the provisions of s. 21 (1) (e) of the Finance Act, 1947, under which, if tax
relief was to be obtained on the contributions, it was necessary to provide that E
the benefits should be non-assignable.

In 1955 the following further amendments were made:

> " If an employee dies while in the service of the company, at or after
> normal pension age and before going on pension, the life assurance benefit
> applicable immediately prior to normal pension age will be paid, together
> with a cash sum equivalent in value to five years' payments of the pension F
> which would have been payable had the employee retired on the date of
> death "

and

> " Nomination of Beneficiary. An employee may nominate a beneficiary
> to whom the death benefit . . . is to be payable, and if the beneficiary G
> survives the employee, the benefit will be so paid. If the employee leaves
> no nominated beneficiary surviving, the death benefit will be payable to the
> employee's widow or widower. If the employee leaves neither nominated
> beneficiary nor widow or widower surviving, the death benefit will be
> payable to the employee's estate. The beneficiary must, for this purpose,
> be one or more of the following persons, namely, the employee's wife,
> husband, ancestors or descendants, or such other persons as the company H
> may consider to have a moral claim on the employee. Nominations and
> revocations or alterations thereof are subject to the consent of the company
> and must be made on a special form, which will be supplied on request."

When these 1955 amendments were adopted all employees who were members
of the scheme were given copies of them. No employee was asked to sign a I
form of consent adopting the 1955 amendments.

Mr. Laurence Ambrose Hancocks joined the scheme in 1939 and received a
certificate of membership. He had married Annie Manilla Hancocks, the first
defendant, in 1907 but they became estranged and in May, 1931, she obtained
an order against him for restitution of conjugal rights. When the 1949 amendment
was made, Mr. Hancocks was still in the employment of the company and
had not reached retiring age. He received a copy of the amendment and
continued to pay contributions. On Mar. 1, 1951, he attained the normal

pension age but continued to work for the company. He made no further contributions to the scheme. At that date the position with regard to his life assurance benefit was that the company were bound under the scheme if he died in their employment to pay £1,100 to his legal representative and to return to his legal representative the contributions that he had paid. After the 1955 pension amendment, the position of an employee dying in service would have been that, instead of getting back his contributions his estate would receive five years' payments of the pension which would have been payable at the date of his death, which would usually be (and in the case of Mr. Hancocks, was) a larger sum than the amount of his contributions. Mr. Hancocks did not nominate a beneficiary. On Dec. 31, 1957, he stopped working for the company but it was agreed he should be regarded as remaining in the company's employment until Mar. 31, 1958. On Feb. 3, 1958, he made a will appointing the second and third defendants as his executors. On Mar. 28, 1958, he died. A sum of £3,140 (viz., £1,100 life assurance benefit and £2,040, five years' pension) became available under the scheme on his death.

By originating summons dated May 5, 1959, to which the widow of Mr. Hancocks was the first defendant and his executors were the only other defendants the company applied for the determination of the following questions, among others—(i) whether on the true construction of the booklet of February, 1939, setting out the original rules of the scheme and in particular of the paragraph thereof headed " Change of Scheme " and in the events which had happened the rules of the scheme had been validly amended in accordance with the 1955 amendments and (ii) whether if the rules of the scheme had not been validly amended the benefits were on the true construction of the original rules of the scheme payable to the first defendant or to the second defendants.

E. F. R. Whitehead for the plaintiffs, the company.

P. R. Oliver for the first defendant, the widow.

Charles Sparrow for the second and third defendants, the executors.

CROSS, J.: This originating summons raises the question whether under the trusts of the Alfred Herbert Pension and Life Assurance Scheme, and in the events which have happened, a sum of £3,140 is payable to the first defendant, who is the widow of the late Laurence Ambrose Hancocks, or, alternatively, is payable to the second and third defendants, who are his executors, as part of his estate. [His Lordship recited the relevant facts and continued:] The effect of the 1955 amendment " Nomination of Beneficiaries " was that death benefit, instead of inevitably going to the estate of the employee would go to one of the class to whom he has nominated it if he has made a nomination. In default of that it will go to his widow in the case of a male employee. If he makes no nomination and leaves no widow, it goes to his estate. It precludes the employee from leaving the death benefit to somebody outside the class of possible nominees if he leaves a widow. If, for example, he wanted to leave the money to a charity, he could not do so if he left a widow. It is agreed that the reason for that change lies in the estate duty position. In 1955—partly, I think, in consequence of the decision of the court in *Re J. Bibby & Sons, Ltd., Pensions Trust Deed, Davies* v. *Inland Revenue Comrs.* (1) the company realised that, if they made a change in the scheme on these lines, the result would be that the part of the death benefit which resulted from the company's contribution would not be subject to estate duty if the deceased made a nomination or left a widow, because the deceased would not be competent to dispose of it, and there would be no benefit purchased or provided by the deceased accruing on his death under s. 2 (1) (d) of the Finance Act, 1894. A further reason for the change was that under the practice of the Estate Duty Office, even that part of the death benefit which had been purchased or provided by the deceased would not be aggregable with the rest of the estate in the event of his making a nomination or leaving a widow. When the 1955 amendments were adopted, or intended to be adopted, all the employees who were members of the scheme, including those members who had passed the normal pension age—and that, of course, in 1955 was true of Mr. Hancocks—were given copies of the 1955 amendments. Each such copy was over-printed: " If you have any QUERY please refer to Mr. Hillyer ". He was the member of the pension staff who dealt with the company's scheme. Neither Mr. Hancocks nor any other employee was asked to sign a form of consent adopting the 1955 amendments. At the date of the 1955 amendments, Mr. Hancocks was no longer liable to contribute to the scheme. He never asked for a form of nomination and did not express to the company either his assent or dissent from the adoption of the 1955 amendments but simply did nothing in the matter whatsoever. [His Lordship stated the facts regarding the ending of Mr. Hancocks's employment, his will and his death, and that a total of £3,140 was payable under the scheme (see p. 621, letter A, ante), and continued:] The problem which I have to consider is whether the amendment in 1955 with regard to the nomination and widows was binding on Mr. Hancocks. Counsel for the executors first argued that the scheme, that is to say, the contractual arrangement between the employees and the company, did not include the part of the booklet headed " Change of Scheme ". He argued that the terms of the scheme were to be found exclusively in the certificate to which I have referred, and that only those parts of the booklet were incorporated in the scheme which are in fact referred to in the certificate. I cannot accept that argument. I cannot attach such paramount importance to the certificate which is merely evidence of the fact that the employee had become a member of the scheme. It is quite natural, I think, that it should have indorsed on the back of it some of the main provisions of the scheme. The mere fact that there is no reference on the back of the certificate to the " Change of Scheme " clause in the booklet does not seem to me to be very striking or very important. After all, when the chairman and governing director sent out the booklet, he asked the employees to study it and fill in their forms of application after reading it. It seems to me that as there is no contradiction between the certificate and the booklet there is no reason whatever for saying that the " Change of Scheme " provision in the booklet was not part of the scheme. Had there been a contradiction, had one found something in the certificate which contradicted the booklet or if one found something in the policy which contradicted the booklet, very different considerations would have arisen, but, as things are, I see no reason for not holding that the " Change of Scheme " provision applied to and bound Mr. Hancocks.

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(1) [1952] 2 All E.R. 483.

On that footing one has to consider whether on the true construction of this " Change of Scheme " provision this amendment with regard to nominations and widows was binding on members who did not assent to it. It is to be remembered that the power of amendment under the " Change of Scheme " provision was only to arise " in the event of unforeseen circumstances ". It might be, I suppose, argued on a strict construction of those words that the realisation by the company in 1955 that they could obtain estate duty benefits for the employees by making that change was not an unforeseen circumstance. It was not something new which had happened since 1939 but was a possibility which always existed though the company did not realise it. Counsel for the executors, however, did not contend that the realisation that this estate duty advantage could be obtained was not an unforeseen circumstance. His argument on this branch of the case was that, though in the abstract it was an unforeseen circumstance, it was not the sort of unforeseen circumstance which is envisaged by the " Change of Scheme " provision. He argued that those provisions really were inserted for the benefit of the company and were only intended to reserve a right to the company to get out of its obligations to continue the scheme or to contribute as much to the scheme if it became unable or unwilling to go on. He says they were not intended at all on their true construction to enable the company to vary the beneficial interest of the employees or the destination of their benefits against their will. The clause is loosely drawn, and the point is not entirely an easy one, but on the whole my view is that counsel for the executors is right on this. I will read the clause again. It starts: "While the company has every hope of maintaining its contributions to the scheme"—that seems to me to strike the keynote of the clause. The company are saying: "We hope we shall be able to carry on with the scheme and to go on contributing but perhaps we shall not be able or willing to do so". The clause goes on: "the right is reserved . . ." I attach some importance to those words. It seems to me that those words are more apt to point to a right that the company is retaining for its benefit than a power of amendment in the general interests of the beneficiaries which is what counsel for the first defendant says is covered by this provision. It proceeds: "the right is reserved in the event of unforeseen circumstances to discontinue the scheme after six months' notice, or suspend or amend it from time to time". Counsel for the first defendant says that those words are wide enough to cover, for example, not only the reduction of the company's contributions but also an amendment in the beneficial interest. If one concentrates on the word "amend" alone, that is true enough; but the clause goes on "amend it from time to time on any anniversary of the starting date, without prejudice, however, to the pension benefits secured by contributions already paid". That again seems to me to strike the same note as the opening words. The company are saying that anything that has been earned up to date for the employee either by his contributions or theirs—at all events anything that can be called pension benefit—is to remain secured to him notwithstanding the amendment. The insertion of those words to which I have just referred again suggests to me that the scope of the proposed change is limited to the company's part of the contract, and that it was not intended by this clause to enable the company to change the beneficial interests however much it thought that such changes would be in the interests of the beneficiaries. Counsel for the first defendant conceded, of course, that, even on his construction, the company could not change the beneficial interests in any way. They could not, for example, say that half the death benefit should be paid to the chairman of the company or anything like that. But he says that any change of beneficial interest which the company bona fide considered was in the interests of the workpeople could be made. I think that he was prepared to say that in this case, if the company had thought that the estate duty position required it, they could even have omitted the power of nomination and have provided that if a man left a widow the death benefit should inevitably go to the widow and only to the estate if he did not leave a widow. The company might assume that ninety-nine men out of a hundred, if they left widows, would want the widows to get the money, and so it would not be unreasonable to make that change. I cannot myself give so wide a construction to this clause.

Assuming that I was against counsel for the executors on this point, there would come the further question whether, even so, the amendment could be valid against Mr. Hancocks in view of the words "without prejudice, however, to the pension benefits secured by contributions already paid". On that counsel for the first defendant submits that here the amount of the benefits is not being changed but only their destination, and that those words do not assist counsel for the executors. Alternatively, he submits that "pension benefits" mean simply the pension and do not cover any part of the death benefit—either the life assurance part, or the returned contributions, or a sum equivalent to five years of pension. If I had been in favour of counsel for the first defendant on the main point, I think that there would be a great deal to be said for his argument on this point. But it is not necessary for me to arrive at any definite conclusion on that because I have decided on the main point that this amendment was not capable of binding Mr. Hancocks without his consent, and no one has suggested that he became bound by it by consenting to it in any way.

There is left over another point which I do not think that the evidence enables me to determine. It is this. If the amendment had not been made, then under the scheme as it stood Mr. Hancocks' estate would only have been entitled to the life assurance benefits of £1,100 provided by the company and a return of Mr. Hancocks' contributions. It is agreed that the sum of £2,040, five years' pension, the changed figure introduced by the 1955 amendments, is substantially more than the return of the contributions. Counsel for the first defendant argues that, even if he is wrong on the main point, counsel for the executors cannot have it both ways. He cannot both reject the 1955 amendments, so far as they relate to nominations and widows, and claim the benefit of the difference between the contributions and the five years' pension benefit. At first blush I think that there is considerable force in that argument, but it may depend to some extent on what the practice of the company was before the 1955 amendments were made, whether these additional payments were covered by the insurance policy, when they became so covered and whether the company paid any increased premiums in respect of them. This was not a point envisaged on the taking out of the summons, and I do not think that the evidence is sufficient to enable me to decide it. If the parties cannot arrive at any agreement about this extra money, the question will have to be restored on further evidence to enable me to determine it.

Declaration that the 1955 amendments were not binding on Mr. Hancocks.

Solicitors: *Warren, Murton & Co.*, agents for *Pinsent & Co.*, Birmingham (for the plaintiffs, the company); *Joynson-Hicks & Co.*, agents for *R. A. Rotherham & Co.*, Coventry (for the first defendant, the widow); *Julius White & Bywaters*, agents for *Penman, Johnson & Ewins*, Coventry (for the second and third defendants, the executors).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

JODLA *v.* JODLA (otherwise CZARNOMSKA).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hewson, J.), February 8, 9, 10, 1960.]

Nullity—Wilful refusal to consummate marriage—Just excuse—Religious ceremony not arranged—Marriage at register office—Mutual intention to have subsequent church ceremony—Parties being Roman Catholics knew that consummation could only follow after church ceremony.

The parties were married at a register office. At that time they, being Roman Catholics, agreed that they would also have a church ceremony of marriage, and it was understood that consummation of the marriage would follow after that church ceremony. The marriage was never consummated. The wife made several requests to the husband to arrange a church ceremony but he refused to do so. The husband never expressly requested the wife to have sexual intercourse with him. Each party now alleged that the other had wilfully refused to consummate the marriage.

Held: the wife would be granted a decree of nullity because the wilful refusal to consummate the marriage was the husband's, as he had failed to arrange for a church ceremony, which would have been just cause for the wife, having regard to their faith, to have refused intercourse if it had ever been requested.

[As to wilful refusal to consummate, see 12 HALSBURY'S LAWS (3rd Edn.) 232, para. 434; and for cases on the subject, see 27 DIGEST (Repl.) 280, 281, *2252-2259*.

For the Matrimonial Causes Act, 1950, s. 8 (1) (a), see 29 HALSBURY'S STATUTES (2nd Edn.) 397.]

Case referred to:

Horton v. *Horton*, [1947] 2 All E.R. 871; [1948] L.J.R. 396; 27 Digest (Repl.) 281, *2256*.

Petition.

In this case the husband prayed that the marriage between himself and the wife be declared null and void owing to her wilful refusal to consummate the marriage. The wife denied wilful refusal to consummate the marriage, alleged that she had been willing to consummate it and prayed nullity on the ground that it had not been consummated owing to the husband's wilful refusal. She also alleged that the husband never attempted or offered to consummate the marriage.

Both the husband and the wife were of Polish nationality and members of the Roman Catholic Church. The husband settled in England after the Second World War with the intention of residing here permanently. In October, 1957, the husband met the wife in England while she was on a visit to this country from Poland. The wife did not wish to return to Poland. On Nov. 23, 1957, at a time when the wife's visa would soon expire, the parties discussed marriage. They consulted a Roman Catholic priest who informed them that no church wedding would be possible within the few days remaining and suggested that they should be married in a register office, and that as soon as convenient after that they should arrange a church ceremony. On Nov. 28, 1957, the parties were married at the Hendon register office. That night the wife stayed at her brother's house; the following night she stayed in the house where the husband lived, but in a different room. On Nov. 30, 1957, the wife went to the house of a friend of the husband where she stayed for about two months. Although the parties met frequently at first, the marriage was never consummated and no church ceremony ever took place. Thereafter they gradually drifted apart.

D. N. Keating for the husband.
N. Lermon for the wife.

HEWSON, J., stated the facts, considered the evidence and continued: The real point in the present case is that each party says that the other wilfully refused to consummate the marriage. To be a wilful refusal there must, in my view, be a refusal without just excuse, and for this proposition I was referred by both counsel to *Horton* v. *Horton* (1). Unfortunately, neither counsel has been able to refer me to any authority that would help me in deciding this point, and I must do the best that I can, as I see it, on the realities of the particular circumstances of the present case.

I find that the marriage was not consummated. I find that before the register office wedding the husband had promised that a church ceremony would follow. They had discussed the matter. The matter was raised by the priest when they both met, and the husband made no sign of dissent from it. He told the wife's brother immediately after the register office wedding that there would be a church ceremony, and I am convinced that such a course was at the time of the marriage intended by each one and was known to the other. I am further satisfied in this case that each of them being a professed Roman Catholic well knew that consummation could only follow after a church ceremony, and I am also satisfied that if there had been a church ceremony, the wife would have been perfectly willing to consummate the marriage.

Therefore, it seems to me that by his refusal to proceed with the church ceremony, the necessity for which was understood by both, in the particular circumstances of this case, which I must underline, he made it impossible for her, with a good conscience, to live with him as his wife, and this refusal, or this failure to proceed with the church ceremony was, in this case, a reasonable and just cause for her to refuse intercourse, even if it had ever been requested.

Now there is no evidence that he ever requested intercourse in terms, though it may have been implied by his suggestions on certain occasions that she should come to live at his place. It seems to me, on the facts as I see them, that it is really unnecessary to make a finding on that point, because if he had, or if it could be implied that he had requested intercourse she, nevertheless, had a just cause for refusing until there had been this church ceremony.

I will now turn to the other side of the picture. By his own refusal to proceed with the church service, the husband put it out of the power of the wife to request intercourse. He expressed no intention of ever making it possible. She, as I have found, on several occasions requested him to do something about the church service, after which it follows on her evidence, which I accept, that she would have been willing to have intercourse, and they would have lived together as man and wife in the fullest sense. Such requests in the circumstances of this case in my view include an implied request for intercourse, and to live wholly as man and wife. As I have said, these requests were refused without any reasonable or just cause on his part.

Whatever the husband's feelings may be now, or whatever his attitude to his church may be now, or may have been a year or two ago, I have no doubt that at the material time when he married the wife he intended to proceed with a church service, and, therefore, it follows from what I have found that I must reject his prayer and accede to the wife's prayer for nullity on the ground of wilful refusal on the husband's part to consummate the marriage.

Order accordingly.

Solicitors: *S. Z. Kmiecik* (for the husband); *Martin, Nicholson, Hortin & Nash* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(1) [1947] 2 All E.R. 871.

EDWARD RAMIA, LTD. *v.* AFRICAN WOODS, LTD.

[PRIVY COUNCIL (Lord Tucker, Lord Denning and Mr. L. M. D. de Silva), December 10, 1959, January 19, 1960.]

Privy Council—West Africa—Gold Coast—Concession of timber rights—Failure to comply with statutory requirements—Whether concession invalid—Concessions Ordinance (Laws of the Gold Coast (1951) *c.* 136), *as amended, s.* 12 (2), (3), (4), *s.* 13 (11).

Statute—Construction—Concession invalid unless obtained in accordance with procedure laid down by statute—Imperative words of statute—Whether waiver possible.

R., Ltd. was granted a concession of timber rights relating to land in Ashanti by the Stool of Bekwai. By the Gold Coast Concessions Ordinance, s. 12, any person desiring to obtain a concession in respect of an area of land of which either the whole or the greater part is situate in Ashanti must make application to the chief or chiefs concerned who may grant such concession, and by sub-s. (2) " Any person who has made application as aforesaid (hereinafter called the applicant) shall give notice in writing to the Chief Regional Officer of Ashanti " who, under sub-s. (3), " shall instruct the chief or chiefs concerned to appear before him or before a government agent, and . . . shall ascertain from them, in the presence of the applicant or his agent, whether they are willing to grant the concession applied for, and shall make such other inquiries touching the grant of the concession as he shall consider necessary . . ." By sub-s. (4), " The terms of the agreement reached between the applicant and the chief or chiefs concerned after the aforesaid appearance . . . shall be embodied by the applicant in a concession which shall contain full particulars of the boundaries and which shall be executed by the interested parties in the presence of the Chief Regional Officer or a government agent [who] shall certify to the due execution of such concession by such party ". By s. 13 (11), no such concession is to be certified as valid unless the concession has been obtained in accordance with the provisions of s. 12. R., Ltd. failed to comply with the provisions of sub-s. (2), sub-s. (3) and sub-s. (4) of s. 12.

Held: the concession granted to R., Ltd. was invalid because the words of s. 12 and s. 13 (11) were clearly imperative, being designed to protect the grantor in the public interest, and there could be no waiver of any of the conditions of s. 12.

Appeal dismissed.

[As to mandatory and directory statutes, see 31 HALSBURY'S LAWS (2nd Edn.) 529-531, para. 692; and for cases on the subject, see 42 DIGEST 710-713, *1278-1315*.]

Case referred to:

Caldow v. *Pixell*, (1877), 2 C.P.D. 562; 46 L.J.Q.B. 541; 36 L.T. 469; 41 J.P. 647; 42 Digest 712, *1296*.

Appeal.

Appeal by Edward Ramia, Ltd. from an order of the West African Court of Appeal (COUSSEY, P., KORSAH, J.A., and BAKER, Ag. J.A.), dated Mar. 19, 1956, setting aside a judgment of the Supreme Court of the Gold Coast, Concessions Division Land Court, Kumasi, Ashanti (QUASHIE-IDUN, J.), dated Jan. 13, 1955, whereby the Land Court dismissed the opposition of the respondent, African Woods, Ltd., to the grant of a certificate of validity in respect of a concession granted by the Stool of Bekwai and the Bekwai Local Council to the appellant. The facts are set out in the judgment of the Board.

Anthony Cripps, Q.C., and *M. B. Smith* for the appellant.

Dingle Foot, Q.C., and *T. O. Kellock* for the respondent.

LORD TUCKER: This appeal concerns two Concession Inquiries numbered 447 and 450 in the Concessions Division Land Court, Kumasi, Ashanti. In Concession Inquiry No. 447, the present appellant, Edward Ramia, Ltd., was the claimant, and in Concession Inquiry No. 450 the present respondent, African Woods, Ltd., was claimant. On Jan. 13, 1955, the Land Court dismissed the opposition of African Woods, Ltd. as opposer in Inquiry No. 447 to the grant of a certificate of validity to Edward Ramia, Ltd. in respect of a concession, notice of which was filed on July 20, 1953. The claim of African Woods, Ltd. to a concession in Inquiry No. 450 in respect of land, part of which is the same as that claimed by Edward Ramia, Ltd. in Inquiry No. 447, was not dealt with by the court having regard to the view it took adverse to African Woods, Ltd. as to the rights of the parties under their competing concessions. The parties will be referred to hereafter as “ Ramia ” and “ African Woods ”.

The claimant Ramia in Inquiry No. 447 on July 20, 1953, filed notice of a concession dated May 26, 1953, granted to it by the Stool of Bekwai. On Mar. 30, 1954, Ramia filed a supplementary document dated Feb. 26, 1954, between the same parties in support of the said concession. By notice dated Nov. 20, 1953, African Woods gave notice of a concession dated Oct. 3, 1953, granted to it by the same Stool of Bekwai covering a large part of the land comprised in the concession claimed by Ramia. By notice filed on June 4, 1954, African Woods entered opposition to the grant of a certificate of validity to Ramia in respect of the concession the subject-matter of Inquiry No. 447 in so far as it purported to coincide with the grant claimed by it by virtue of the concession the subject-matter of Inquiry No. 450. The principal ground of opposition was that the provisions of s. 11 (now s. 12) of the Concessions Ordinance (c. 136) had not been complied with. It will be convenient at this stage to set out the material sections of the ordinance.

> “ 2. In this ordinance—‘ Concession ’ means any instrument whereby any right title or interest in or to land, or in or to minerals, timber, rubber or other products of the soil in or growing on any land or the option of acquiring any such right, title or interest purports to be granted or demised by a native . . .
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> “ 3.—(1) Any agreement whereby any right, interest, or property in, to or over land, in or to minerals, metals, precious stones, timber, rubber or other products of the soil in or growing on any land, or the option of acquiring any such right, interest or property, purports to be granted by a native to a person who is not a native, shall be void unless it is in writing.
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> “ 4.—(1) Every concession shall be held to be under and subject to the operation of this ordinance.
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> “ 6.—The court shall have power, jurisdiction, and authority to inquire into and certify as valid or invalid any concession, except so far as otherwise provided in this ordinance, and shall exercise such power, jurisdiction and authority subject to and in accordance with the provisions of this ordinance . . .
>
> “ 8.—(1) Notice of every concession shall within two months of the date thereof be filed in the court having jurisdiction to inquire into the concession by the person claiming to be entitled to the benefit thereof (hereinafter called the claimant).
>
> “ (3) The notice shall be in form A of the schedule and shall contain the particulars specified in the said form and together with the said notice there shall be delivered a plan of the land comprised in such concession which shall be prepared in accordance with any regulations from time to time made under s. 5.
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> “ (4) The claimant shall also file within the said period of two months such other documents (including a copy of the concession) or duly certified copies thereof as he relies upon in respect of his right to the concession and

together with any such documents there shall be filed a list of such documents in such form as may be provided by rule: Provided that the filing of any such copies shall not be deemed to render unnecessary the due production at the inquiry into any concession or at the trial of any questions relating thereto of the original document so relied upon.

" (5) Every concession, in respect of which compliance has not been made with the provisions of this section, shall on the expiration of two months after the date of the concession, become null and void and all rights of the claimant with respect to the concession shall thereupon determine absolutely: Provided that the court may in its discretion for good cause shown, and upon such terms as to it seem fit, extend the said period of two months for one or more terms not exceeding in all four months.

" 12.—(1) Any person desiring to obtain a concession in respect of an area of land of which either the whole or the greater part is situate in Ashanti shall make application to the chief or chiefs concerned for the grant of such concession and the chief or chiefs concerned may grant such concession.

" (2) Any person who has made application as aforesaid (hereinafter called the applicant) shall give notice in writing to the Chief Regional Officer of Ashanti of such application.

" (3) Upon receipt of any such notice the Chief Regional Officer of Ashanti shall instruct the chief or chiefs concerned to appear before him or before a government agent, and the Chief Regional Officer or government agent shall ascertain from them, in the presence of the applicant or his agent, whether they are willing to grant the concession applied for, and shall make such other inquiries touching the grant of the concession as he shall consider necessary, and shall arrange with the applicant or his agent in the presence of the chief or chiefs concerned the sum which should be paid annually in consideration of the concession.

" (4) The terms of the agreement reached between the applicant and the chief or chiefs concerned after the aforesaid appearance before the Chief Regional Officer or government agent shall be embodied by the applicant in a concession which shall contain full particulars of the boundaries and which shall be executed by the interested parties in the presence of the Chief Regional Officer or a government agent, and the Chief Regional Officer or the government agent before whom any such interested party executes such concession shall certify to the due execution of such concession by such party.

" 13. No concession shall be certified as valid . . . (11) unless, in the case of a concession granted in respect of an area of land of which either the whole or the greater part is situate in Ashanti, the concession has been obtained in accordance with the provisions of s. 12.

" 32.—(1) A certificate of validity shall be good and valid from the date of such certificate as against any person claiming adversely thereto, and shall be effective in respect of the whole area of land contained by the boundaries stated in such certificate, whether or not any discrepancy exists between such area and the area indicated by the notice and plan of the concession referred to respectively in sub-s. (1) and sub-s. (3) of s. 8.

" (2) A certificate of validity . . . shall be conclusive evidence that all the requirements of the ordinance . . . and all matters precedent and incidental thereto have been complied with . . ."

The concessions in question relate to timber rights in land in Ashanti. Section 12 of the ordinance lays down the procedure to be adopted in such cases. It is common ground that Ramia failed to comply with the provisions of sub-s. (2), sub-s. (3) and sub-s. (4) of this section in respect of the concession dated May 26, 1953. The supplementary document dated Feb. 26, 1954, was executed before the government agent but sub-s. (2) and sub-s. (3) of s. 12 had not been complied with, nor was there compliance with s. 8 (4). Furthermore, the document, although expressed to be supplementary to the lease of May 26, 1953, contained a demise from its date, viz., Feb. 24, 1954, and related to an area of land of sixty-four square miles, whereas the lease of May 26, 1953, related to eighty-two square miles.

The trial judge held that the intention of the legislature was purely to protect the grantors of concessions in Ashanti from exploitation and that, when the grantors raised no objection to the terms contained in a lease, as in the present case, it would be inequitable to hold that such lease was null and void. He considered that the court had a discretion in the matter and dismissed African Woods' opposition to the validity of Ramia's concession. He made no finding with regard to inquiry No. 450. On appeal, the West African Court of Appeal allowed African Woods' appeal and declared Ramia's concession invalid. They remitted the case of inquiry No. 450 to the Supreme Court of the Gold Coast for adjudication, and, on May 19, 1956, Benson, J., declared African Woods' concession invalid on the ground that, in granting it, the Bekwai Chiefs had not understood the nature and terms of the grant and were under the impression that the land already leased to Ramia did not include the land leased to African Woods. This judgment was not appealed, and the hearing before their Lordships was confined to inquiry No. 447.

It will be convenient first to dispose of the supplementary grant of Feb. 26, 1954. As already stated, this lease related to a smaller area of land than that comprised in the original grant, and the requirements of sub-s. (2) and sub-s. (3) of s. 12 and of s. 8 (4) were not complied with. It is, therefore, clear that, if the original grant was invalid for non-compliance with s. 12, the supplementary grant will not avail Ramia, whose case must stand or fall on the validity of the original concession.

As to this, the President of the West African Court of Appeal (the late Sir Henley Coussey) in his judgment allowing the appeal of African Woods, after quoting from the judgment of Denman, J., in *Caldow* v. *Pixell* (1) said:

> "Applying these principles, the words of s. 12 and s. 13 (11) are to my mind clearly imperative. [Ramia] could only take a concession under the ordinance and in compliance with s. 12. It is true that there are no negative words in the sections referred to but the affirmative words are absolute, explicit and peremptory and when you find in an ordinance only one particular mode of effecting the object, one train of formalities to be observed, the regulative provisions which the section prescribes are essential and imperative. To render the purpose of s. 12 unmistakable, sub-s. (4) provides that the terms of the agreement can only be embodied in a concession after they have been agreed upon before the official named. The policy of the law clearly insists upon strict observance of the steps already alluded to before there can be a concession. Section 12 and s. 13 (11) are so clearly designed to protect the grantor in the public interest that in my opinion the learned judge erred in holding that a waiver is possible of any of the conditions of s. 12 and that the grantors had waived them. To accede to this proposition would be to entirely ignore the intention of the legislature for the public good and to defeat one of the main purposes of the Concessions Ordinance."

With these words their Lordships are in complete agreement and do not desire to add anything thereto.

Later in his judgment, the learned President, referring to the lease of May 26, 1953, used these words:

> " That deed may be good as a demise of land and the covenants therein no doubt are binding on the parties, but it never came into existence as a

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(1) (1877), 36 L.T. 469 at p. 470.

concession owing to non-observance by the parties of the imperative provisions of s. 12."

Relying on these words, counsel for Ramia invited their Lordships, if against him on the main issue, to vary the order of the West African Court of Appeal by making no order instead of declaring the concession invalid. Their Lordships express no view with regard to the first sentence in the above quoted passage which may raise issues which are not germane to the present proceedings and were not canvassed in the courts below. They find no ground for varying the judgment pronounced by the West African Court of Appeal and will, for the reasons indicated above, humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Knapp-Fishers* and *Blake & Redden* (for the appellant); *Birkbeck, Julius, Coburn & Broad* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

UNIVERSITY OF CEYLON *v.* FERNANDO.

[PRIVY COUNCIL (Viscount Simonds, Lord Tucker, Lord Jenkins, Lord Morris of Borth-y-Gest and Mr. L. M. D. de Silva), January 11, 12, February 16, 1960.]

Privy Council—Ceylon—Tribunal—Commission of inquiry—Natural justice—Student suspended from university examinations—Witnesses at commission of inquiry not questioned in presence and hearing of student—Two witnesses questioned by one member in absence of other members of commission—Two interviews by commission of inquiry with student alone.

Inquiry—Commission of inquiry—Procedure—Freedom to obtain information its own way where no procedure prescribed—Requirements of natural justice.

A General Act of the University of Ceylon provided that, where the vice-chancellor was satisfied that any candidate for examination had acquired knowledge of the nature or the substance of any question or the content of any paper, the vice-chancellor might suspend the candidate from the examination and should report the matter to the Board of Residence and Discipline for such further action as the board might decide to take. When a matter was so reported, the board might suspend the candidate from any university examination indefinitely. The vice-chancellor appointed a commission of inquiry, consisting of himself and two others, to assist him in inquiring into certain allegations which had been made by B., a woman student, and which, if they were true, were explicable only on the footing that F., a student, who was taking a university examination, had acquired knowledge of a German passage in one of the examination papers before taking the examination. F. was informed by letter of the allegation against him and of the appointment of the commission, and was asked to attend before the commission on two occasions. F. attended before the commission, when it was made clear to him, so the court found, what the charge was and he was given opportunity to state his case. When other witnesses, including B., gave evidence before the commission, F. was not present. F. did not ask that he should be allowed to question any of these witnesses. Two witnesses, other than F. and B., were questioned by the vice-chancellor alone, in the absence of the other members of the commission. The commission found that the allegation against F. was true and reported accordingly. The board found F. guilty of an examination offence and suspended him indefinitely from all university examinations. F. brought an action against the university for a declaration to the effect that the decision was null and void on the ground that the inquiry was not conducted in accordance with principles of natural justice. On appeal against an order of the Supreme Court of Colombo granting the declaration, it was not disputed that the inquiry was a quasi-judicial, not an administrative, proceeding.

Held: the fact that the commission did not tender B., or any other witness, for cross-examination by F. was not a failure to comply with the rules of natural justice, but the position might have been different if F. had asked to be allowed to cross-examine B. and had not been allowed to do so; neither was the fact that two witnesses had been questioned by the vice-chancellor alone a failure to comply with the principles of natural justice, and, on the facts of the present case, the finding of the commission had been reached with due regard to those principles (see p. 642, letter **A**, and p. 639, letter E, post).

Dictum of Lord Loreburn, L.C., in *Board of Education* v. *Rice* ([1911] A.C. at p. 182), as stated by Lord Haldane, L.C., in *Local Government Board* v. *Arlidge* ([1915] A.C. at p. 132) applied.

Dictum of Harman, J., in *Byrne* v. *Kinematograph Renters Society, Ltd.* ([1958] 2 All E.R. at p. 599) approved.

Per Curiam: as no special form of procedure was prescribed, it was for the vice-chancellor to determine the procedure to be followed, as he thought best, subject to the obvious implication that some form of inquiry must be made such as would enable him fairly to determine whether he should hold himself satisfied that the charge in question had been made out (see p. 638, letter H, post).

Appeal allowed.

[As to domestic tribunals, see 9 Halsbury's Laws (3rd Edn.) 577, para. 1349.]

Cases referred to:

Board of Education v. *Rice*, [1911] A.C. 179; 80 L.J.K.B. 796; 104 L.T. 689; 75 J.P. 393; 19 Digest 602, *290*.

Byrne v. *Kinematograph Renters Society, Ltd.*, [1958] 2 All E.R. 579; [1958] 1 W.L.R. 762; 3rd Digest Supp.

De Verteuil v. *Knaggs*, [1918] A.C. 557; 87 L.J.P.C. 128; 8 Digest (Repl.) 691, *38*.

General Medical Council v. *Spackman*, [1943] 2 All E.R. 337; [1943] A.C. 627; 112 L.J.K.B. 529; 169 L.T. 226; 2nd Digest Supp.

Local Government Board v. *Arlidge*, [1915] A.C. 120; 84 L.J.K.B. 72; 111 L.T. 905; 79 J.P. 97; 18 Digest (Repl.) 142, *1281*.

Osgood v. *Nelson*, (1872), L.R. 5 H.L. 636; 41 L.J.Q.B. 329; 13 Digest (Repl.) 229, *513*.

Russell v. *Norfolk* (*Duke*), [1949] 1 All E.R. 109; 12 Digest (Repl.) 693, *5321*.

Appeal.

Appeal by the University of Ceylon from a decree of the Supreme Court of Ceylon (Weerasooriya and Fernando, JJ.), dated Dec. 13, 1956, reversing a decree of the District Court of Colombo (Kariapper, A.D.J.), dated Aug. 31, 1954, by which a claim by the respondent, E. F. W. Fernando, for a declaration (and other relief) that the appellant university had wrongfully suspended the respondent, who was a student of the appellant university, from all examinations for an indefinite period was dismissed. The facts are set out in the judgment of the Board.

Dingle Foot, Q.C., and *C. F. Fletcher-Cooke, Q.C.*, for the appellant university. The respondent did not appear and was not represented.

LORD JENKINS: This appeal arises out of an action brought by the respondent, E. F. W. Fernando, as plaintiff against the appellant University of

Ceylon as defendant for (inter alia) a declaration to the effect that a decision of the Board of Residence and Discipline of the University to suspend the plaintiff (a student of the university) from all university examinations for an indefinite period, and the finding of a commission of inquiry set up by the vice-chancellor, on which such decision was based, were null and void. The action was heard in the District Court of Colombo by KARIAPPER, A.D.J., who, by a judgment and decree dated Aug. 31, 1954, dismissed it with costs. The plaintiff appealed to the Supreme Court of Colombo, and that court (WEERASOORIYA and FERNANDO, JJ.), by a decree dated Dec. 13, 1956, giving effect to a judgment delivered on Nov. 28, 1956, allowed his appeal, and granted the declaratory relief claimed with costs. From that judgment and decree the university now appeals to this Board. To their Lordships' regret, the plaintiff, it may be for financial reasons, has not appeared to support the decision in his favour pronounced by the Supreme Court, and, although counsel for the university have done their best to make up for this by presenting the plaintiff's side of the matter as well as their own, their Lordships have felt some anxiety in dealing with this not altogether easy case in the plaintiff's absence.

The circumstances leading up to the plaintiff's suspension from all university examinations, and the unfortunate litigation which has ensued, are as follows. The examinations procedure of the university is prescribed by its " General Act " No. 1, Chapter VIII, Part I, cl. 8 of which Part provides that

> " Where the vice-chancellor is satisfied that any candidate for an examination has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination, or has attempted or conspired to obtain such knowledge, the vice-chancellor may suspend the candidate from the examination or remove his name from any pass list, and shall report the matter to the Board of Residence and Discipline for such further action as the board may decide to take."

By cl. 14,

> " Where any matter is reported to the Board of Residence and Discipline under this Part, the board may (i) remove the name of the candidate from any pass list; or (ii) suspend the candidate from any university examination for such period as the board may decide or indefinitely; or (iii) order that the candidate be suspended from the university for such period as the board may decide, or indefinitely; or (iv) do all or any of these acts."

These clauses may conveniently be referred to as cl. 8 and cl. 14 respectively.

The plaintiff, who had been a student in the faculty of science in the university since 1948, presented himself at the end of March, 1952, as an examinee for the final examination in science, section B, Zoology, for the degree of Bachelor of Science, and completed the full examination in both theory and practical work. There were five papers in theory and two in practical work, and the plaintiff sat for Zoology Paper V, the last theoretical paper, on Apr. 4, 1952. This paper was in two sections consisting of (i) an essay, and (ii) a passage in German and a passage in French, one of which the candidate was required to translate into English with comments thereon, ten marks being allotted for the translation of and comments on the selected passage, and ninety marks for the essay. The plaintiff chose the passage in German for his translation and comments, for which he was awarded eight marks. He appears to have done well in all his papers and to have attained in the examination as a whole a standard which would normally have been held sufficient to place him in the first class. After the examination was over, a woman student, Miss Balasingham, who had also been reading Zoology and had taken the examination at the same time as the plaintiff, made to Mr. Sivaprakasapillai, a lecturer in the engineering faculty and Miss Balasingham's brother-in-law, certain allegations concerning the plaintiff which, if true, were only explicable on the footing that the plaintiff had acquired knowledge of the German passage in Zoology Paper V before the examination.

These allegations were passed on by Mr. Sivaprakasapillai to Sir Ivor Jennings, the vice-chancellor, it would seem in the first instance through Professor Pereira and Mr. Keerthisinghe, the senior lecturer in Zoology, though this is not important. The vice-chancellor took a serious view of Miss Balasingham's allegations, which not only implicated the plaintiff but also suggested the possibility of negligence or misconduct on the part of some member or members of the staff of the university. On this aspect of the matter, some embarrassment was caused by the circumstance that Professor Fernando, who was responsible for the German passage in Zoology Paper V, was the plaintiff's uncle. In these circumstances, the vice-chancellor decided (as their Lordships think quite rightly) that the matter called for action under cl. 8.

To assist him in satisfying himself of the truth or falsity of the allegations, the vice-chancellor set up a commission of inquiry, consisting of himself, Professor Mylvaganam, Dean of the Faculty of Science, and Mr. Keuneman, Q.C., a member of the council of the university, who was to lead the inquiry. This body seems to have met on three occasions, viz., on May 21 and June 3, 1952, and on one other occasion between these two dates. The plaintiff attended on two of these three occasions, viz., on May 21 and June 3. Prior to the first meeting, the vice-chancellor wrote to the plaintiff a letter dated May 16, 1952, which, omitting formal parts, was in these terms:—

> " Dear Mr. Fernando,
>
> " An allegation has been made to me in writing that you had acquired knowledge of the content of one or more of the papers set at the Final Examination of Science, Section B, Zoology, before the date of the examination. Since this is a very serious allegation which may affect not only you but also one or more of the members of the university staff, I have consulted Mr. A. E. Keuneman, Q.C., who agrees that the allegation is sufficiently circumstantial to justify a formal inquiry.
>
> " I have therefore appointed a commission consisting of Mr. Keuneman, the Dean of the Faculty of Science, and myself, and have asked Mr. Keuneman to take the lead in the inquiry. He has asked that a meeting be held in the Board Room, College House, on Wednesday, May 21, at 5 p.m. and that you be requested to attend. I should be glad if you would attend on this occasion and would report to Mr. Blok, who is acting as secretary to the commission.
>
> Yours sincerely,
> Sgd. IVOR JENNINGS,
> Vice-Chancellor."

The reference in this letter to " one or more " of the papers set at the final examination appears to have been due to the fact that Miss Balasingham had alleged fore-knowledge on the part of the plaintiff of the contents of another paper besides Zoology Paper V. At the outset of the inquiry, the commission came to the conclusion that there was no substance in this additional charge, which, accordingly, was not pursued.

In the course of their meetings, the commission questioned (in addition to the plaintiff himself) Miss Balasingham and a number of other persons including Professor Fernando and various lecturers and students, but none of them in the presence or hearing of the plaintiff. The second appearance of the plaintiff before the commission, that is, his appearance on June 3, was in response to a letter from the vice-chancellor inviting him to attend on that day and to bring with him all the exercise books that he had used during his course, which he accordingly did. There seems to have been a good deal of discussion regarding one particular book, in which Dr. Cruze (one of the lecturers in Zoology) had corrected drawings of the veinous system of rats, but in the end the commission decided that it threw no light on the matter. Miss Balasingham appears to have adhered before the commission to the story she had originally told to Mr. Sivaprakasapillai, which, to quote from the report made by them at the conclusion of their inquiry, was to this effect:

> "3. Miss Balasingham states that, owing to Mr. Fernando's behaviour, she suspected that there was something in one of his notebooks which he did not wish the other students to see. On one occasion he left the book on the bench in the Section B laboratory and went out of the room. She seized the opportunity to glance through the book and saw a list of German words, in some cases with English equivalents. There were about thirty words and she copied nine of them into her own notebook, which she produced. She could remember only one of the words which she had not copied, *Zitronensaft*, a word which appeared almost at the end of the list. This word appears at the end of the German passage in Paper V. The other nine words appear in the passage, and in the order in which they are shown in the list in Miss Balasingham's book, except that the order of the eighth and ninth words is changed. The passage, with the ten words underlined, was as follows:— . . ."

After setting out the German passage, with the crucial words underlined, the report continues:

> "4. This list in Miss Balasingham's book was apparently not shown to anyone until our inquiry began. It was then shown to Mr. Sivaprakasapillai and was produced to us at our request. A large part of our inquiry was necessarily directed towards ascertaining whether the list really was in the notebook before the examination began. In our opinion it was. The following factors are relevant: (i) Miss Balasingham was able to describe the copying with a wealth of circumstantial detail, of no direct relevance to the story as such, which carried conviction. If the story was invented, it was a remarkably successful invention. (ii) Another student, Miss Y. de Silva, was sitting next to Miss Balasingham on the occasion when the copying is said to have been done. Miss de Silva denies that she saw Miss Balasingham copying, but she admits that Miss Balasingham told her about the list before the examination. Miss de Silva is a second-year student in Zoology, and we believe that she could have told us more. Another student Mr. C. H. Fernando, also admits that Miss Balasingham told him about the list before the examination."

The report goes on to say:

> "(iii) Miss Balasingham's behaviour immediately after the examination was entirely consistent with her story . . ."

and to give reasons for that view. Satisfied as they were of the truth of Miss Balasingham's story, the commission of inquiry at the end of the report expressed their findings to be to the effect that:—(i) The plaintiff acquired knowledge of the nature or substance of the German question in Zoology Paper V before the date and time of the examination and must, therefore, be reported to the Board of Residence and Discipline under cl. 8; (ii) There was no evidence as to the manner in which this knowledge came to the plaintiff. By a letter dated July 21, 1952, the vice-chancellor informed the plaintiff that the Board of Residence and Discipline had found him guilty of an examination offence in connexion with the final examination in science held in 1952 and had suspended him indefinitely from all university examinations.

After considerable correspondence between the plaintiff and the vice-chancellor in which the plaintiff sought without success a review of the decision of the Board of Residence and Discipline, the plaintiff, on May 19, 1953, began the present action, in which as already mentioned he failed at first instance but succeeded on appeal. In his amended plaint dated July 24, 1953, the plaintiff alleged that the decision of the commission of inquiry was null and void for a number of reasons. He claimed that the decision was contrary to the principles of natural justice on five grounds, two of which consisted of allegations of bias or disqualification against Professor Mylvaganam by reason of his alleged relationship to Miss Balasingham and Mr. Sivaprakasapillai, and the fact that he was a member of the board of examiners and of the scrutinising committee. The third ground was to the effect that, by reason of the first, " the maxim, that justice should not only be done but also appear to be done " had been violated. The fourth ground comprised the substance of the plaintiff's case, and was to the effect that the evidence of the various witnesses who appeared before the commission of inquiry, including the evidence of Miss Balasingham, was taken in the absence of the plaintiff, who was not aware of what evidence was led against him, and that, in the circumstances, one of the essential elements of natural justice was not observed, inasmuch as the plaintiff was not aware of the case he had to meet. The fifth ground was to the effect that the evidence of the various witnesses was not taken entirely before all the three members of the commission of inquiry, and that such evidence was acted on by the commission, and that this circumstance was also a violation of the elementary principles of justice. The plaintiff further alleged that there was no evidence on which the commission of inquiry could reasonably find the charge against the plaintiff proved, that the finding arrived at against the plaintiff was one which had not been arrived at in conformity with cl. 8, and that the finding and decision were, therefore, void and of no effect.

The allegations of bias or disqualification against Professor Mylvaganam as a member of the commission of inquiry were rejected in both courts as without substance. The allegation to the effect that there was no evidence on which the commission could reasonably find the charge against the plaintiff proved was (so far as open to the court) clearly ill-founded. The allegation to the effect that the finding was not arrived at in accordance with cl. 8 turned on the fact that the vice-chancellor appointed two other persons to sit with him as a commission of inquiry to investigate the matter, instead of proceeding to investigate it alone. It was held in both courts that this procedure was not open to objection, inasmuch as this was merely a method, which the vice-chancellor was free to adopt if he chose to do so, of satisfying himself of the truth or falsity of the charge, and the report was a report by him for the purposes of cl. 8 although signed by the two other members of the commission as well as himself. The plaintiff having taken no steps to appeal against the decision of the court below on these matters of complaint, their Lordships need say no more about them.

There remain the complaints to the effect that the evidence, including that of Miss Balasingham, was taken in the absence of the plaintiff who was not aware of the evidence led against him or of the case he had to meet; and that the evidence of certain witnesses was taken by the vice-chancellor in the absence of the other members of the commission. As to these, it is not in dispute that the plaintiff was not present, and was not invited to be present, at the examination of any of the witnesses, or that the vice-chancellor did, in fact, interview two witnesses, namely Professor Fernando and Dr. Cruze, in the absence of the other members of the commission. Their Lordships may add that it is also admitted that the plaintiff did not at any stage question Miss Balasingham and was never offered an opportunity of doing so. On the other hand it is not in dispute that the plaintiff was interviewed and questioned at length about the matter by the three members of the commission on May 21 and June 3, 1952.

Before the learned judge and in the Supreme Court, it was argued for the university that the vice-chancellor's functions under cl. 8 were administrative and not of the kind described, for want of a better term, as " quasi-judicial " and, accordingly, that the vice-chancellor's action in the matter was not open to review by the court. It was, however, argued further that, if contrary to this contention, the vice-chancellor's functions under cl. 8 were quasi-judicial, the vice-chancellor's letter of May 16, 1952, coupled with the information given to the plaintiff at the two interviews, sufficiently apprised him of the nature of the

A complaint, that he was at these interviews given sufficient opportunity to state his case in rebuttal of it, and, accordingly, that there had been no such breach of the so-called principles of natural justice as was necessary to warrant the intervention of the court in such a case. The learned trial judge was of opinion that the functions of the vice-chancellor in the matter were administrative and not judicial, and, consequently, that the court had no jurisdiction to interfere, B but went on to hold that, if he was wrong in this, and such functions were of a quasi-judicial character, the principles of natural justice had been sufficiently complied with by the commission. The Supreme Court took the opposite view, holding that the vice-chancellor's functions were not administrative but quasi-judicial, and that the mode of inquiry adopted had violated the principles of natural justice, with the result that the court could and ought to declare the C report of the commission of inquiry, and the consequential decision of the Board of Residence and Discipline under cl. 14, to be null and void.

At the hearing before their Lordships counsel for the university disclaimed the contention that the vice-chancellor's functions under cl. 8 were administrative and not quasi-judicial, but submitted that, on the footing that these functions were quasi-judicial, the claims of natural justice had been fully satisfied. Accordingly D (apart from a subsidiary question as to the jurisdiction of the courts in Ceylon to grant declaratory relief in such a case), the present appeal resolves itself into the question whether this inquiry was conducted with due regard to the rights accorded by the principles of natural justice to the plaintiff as the person against whom it was directed.

These rights have been defined in varying language in a large number of cases E covering a wide field. Their Lordships do not propose to review these authorities at length, but would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point. As TUCKER, L.J., said in *Russell* v. *Duke of Norfolk* (1):

> F " There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

In the earlier case of *General Medical Council* v. *Spackman* (2) LORD ATKIN G expressed a similar view in these words:

> " Some analogy exists no doubt between the various procedures of this and other not strictly judicial bodies; but I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man. I would, therefore, demur to any suggestion that the words H of LORD LOREBURN, L.C., in *Board of Education* v. *Rice* (3) afford a complete guide to the General Medical Council in the exercise of their duties."

With these reservations as to the utility of general definitions in this branch of the law, it appears to their Lordships that LORD LOREBURN's much quoted statement in *Board of Education* v. *Rice* (4) still affords as good a general definition I as any of the nature of and limits on the requirements of natural justice in this kind of case. Its effect is conveniently stated in this passage from the speech of VISCOUNT HALDANE, L.C., in *Local Government Board* v. *Arlidge* (5), where he cites it with approval in the following words:

> " I agree with the view expressed in an analogous case by my noble and

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(1) [1949] 1 All E.R. 109 at p. 118.
(2) [1943] 2 All E.R. 337 at p. 341; [1943] A.C. 627 at p. 638.
(3) [1911] A.C. 179 at p. 182.
(4) [1911] A.C. at p. 182.
(5) [1915] A.C. 120 at p. 132.

> learned friend Lord Loreburn. In *Board of Education* v. *Rice* (6) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view."

From the many other citations which might be made, their Lordships would select the following succinct statement from the judgment of this Board in *De Verteuil* v. *Knaggs* (7):

> " Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."

The last general statement as to the requirements of natural justice to which their Lordships would refer is that of Harman, J., in *Byrne* v. *Kinematograph Renters Society, Ltd.* (8), of which their Lordships would express their approval. The learned judge said this:

> " What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."

Turning now to the actual terms in which the vice-chancellor is invested with the quasi-judicial function here in question, it is to be observed that all that cl. 8 provides is that where the vice-chancellor is satisfied that any candidate has acquired knowledge of the nature or substance of any question or the content of any paper before the date and time of the examination " the vice-chancellor . . . shall report the matter to the Board of Residence and Discipline . . ." The clause is silent as to the procedure to be followed by the vice-chancellor in satisfying himself of the truth or falsity of a given allegation. If the clause contained any special directions in regard to the steps to be taken by the vice-chancellor in the process of satisfying himself he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed, it is for him to determine the procedure to be followed as he thinks best, but, to adapt to the present case the language of the judgment of this Board in *De Verteuil* v. *Knaggs* (9), subject to the obvious implication that some form of inquiry must be made, such as will enable him fairly to determine whether he should hold himself satisfied that the charge in question has been made out. As was said by Lord Shaw of Dunfermline in *Local Government Board* v. *Arlidge* (10), of the authority there concerned it

> ". . . must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means."

In the present case, no shadow of doubt is cast on the honesty and bona fides of the vice-chancellor or of those who sat with him in the commission of inquiry.

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(6) [1911] A.C. at p. 182.

(7) [1918] A.C. 557 at p. 560.

(8) [1958] 2 All E.R. 579 at p. 599.

(9) [1918] A.C. at p. 560.

(10) [1915] A.C. at p. 138.

So far as the plaintiff is concerned, it appears to their Lordships that he must be taken to have agreed, when he became a member of the university, to be bound by the statutes of the university, including cl. 8, and, in the event of cl. 8 being put in operation against him, could not insist on the adoption by the vice-chancellor of any particular procedure beyond what the clause expressly or by necessary implication requires. In the absence of any express requirement, he is thrown back on the necessary implication that the vice-chancellor's procedure will be such as to satisfy the requirements indicated in the passages from *De Verteuil* v. *Knaggs* (11), *Local Government Board* v. *Arlidge* (12), and *Byrne* v. *Kinematograph Renters Society, Ltd.* (13), to which their Lordships have just referred, and thus to comply with those elementary and essential principles of "fairness" which must, as a matter of necessary implication, be treated as applicable in the discharge of the vice-chancellor's admittedly quasi-judicial functions under cl. 8, or, in other words, with the principles of natural justice. The question, then, is whether the vice-chancellor did, in the course he took, satisfy those principles.

The plaintiff's contention to the effect that he was not adequately informed of the case he had to meet and was not given any adequate opportunity of meeting it, and that the course taken by the vice-chancellor or the commission of inquiry in these respects failed to satisfy the requirements of natural justice, depended almost entirely on the admitted fact that Miss Balasingham and the other witnesses were not questioned in the presence and hearing of the plaintiff, who, consequently, was not able to question them on the statements they made. The further admitted fact that two witnesses were questioned by the vice-chancellor alone and not by all three members of the commission does not, their Lordships think, add anything to this basic complaint. But this did not, in their Lordships' view, in itself involve any violation of the requirements of natural justice. To adapt LORD LOREBURN's words in *Board of Education* v. *Rice* (14), the vice-chancellor was not bound to treat the matter as if it was a trial, had not power to administer an oath, and need not examine witnesses, but could obtain information in any way he thought best. It seems to their Lordships to follow that, inasmuch as the vice-chancellor, when the alleged offence under cl. 8 was brought to his notice, was not bound to treat the matter as a trial but could obtain information about it in any way he thought best, it was open to him if he thought fit to question witnesses without inviting the plaintiff to be present.

But, while there was no objection to the vice-chancellor informing himself in this way, it was undoubtedly necessary that, before any decision to report the plaintiff was reached, he should have complied with the vital condition postulated by LORD LOREBURN, which, adapted to the present case, may be stated as being to the effect that a fair opportunity must have been given to the plaintiff to correct or contradict any relevant statement to his prejudice. The university's contention is that this condition, which resolves itself into the two requirements that the plaintiff should be adequately informed of the case he had to meet, and given an adequate opportunity of meeting it, was complied with in its first branch by the letter of May 16, 1952, and what the plaintiff was told at the first interview on May 21, 1952, and in its second branch by what passed at that interview and at the second interview on June 3. As to what took place at the two interviews, the learned trial judge accepted the evidence of the vice-chancellor in preference to that of the plaintiff. The vice-chancellor's evidence, and, indeed, the plaintiff's own admission, make it abundantly plain that, at the outset of the first interview, the plaintiff was told that Miss Balasingham had made this charge against him and the nature of the charge was explained to him in detail. To quote from the vice-chancellor's evidence:

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(11) [1918] A.C. 557. (12) [1915] A.C. 120. (13) [1958] 2 All E.R. 579.
(14) [1911] A.C. at p. 182.

> " Q.—Did you have with you the book into which those words had been copied?
>
> A.—Yes, we had it in the first meeting.
>
> Q.—Was it shown to the plaintiff?
>
> A.—Yes, it was shown to him at the third meeting. No, I am sorry, it was shown to him at the first meeting.
>
> Q.—And was he questioned in regard to those words?
>
> A.—Yes, he was shown a marked copy of the German question paper with the ten words underlined—the nine words which appeared in Miss Balasingham's book plus the other word which Miss Balasingham said she remembered to have seen in the plaintiff's book, namely Zitronensaft.
>
> Q.—According to Miss Balasingham that was the word she omitted?
>
> A.—That was one of the last words she had omitted.
>
> Q.—As far as the book was concerned there were nine words in it?
>
> A.—Yes.
>
> Q.—Those nine words were underlined in the paper?
>
> A.—Yes.
>
> Q.—Was the plaintiff shown that paper and the book?
>
> A.—Yes, his attention was drawn to the fact that the words appearing in the book were the same as those words underlined in the paper. He was asked whether it was true that Miss Balasingham had copied those words into her book from his book and whether in fact this book was his notebook. His answer was ' no '.
>
> Q.—Then what further steps did you take?
>
> A.—We asked him more questions about the kind of notebooks he used for his lecture courses. We also asked him why he found those questions so easy. Professor Mylvaganam asked him to translate the passage in German which was in the question paper, and then we followed up to find out from him what explanation he could give, if there was any explanation, with regard to the notes that he had made."

The reference here " to the notes which the plaintiff had made " must, their Lordships think, mean the notes which according to Miss Balasingham's story he had made. From the plaintiff's evidence, their Lordships would quote the following:

> "A.—He [that is Mr. Keuneman] said ' We have evidence that you have come to know this question before the examination.'
>
> Q.—Tell us to the best of your recollection, at what stage of his questioning did he make that statement to you?
>
> A.—I cannot understand that question.
>
> Q.—How long after Mr. Keuneman had put that paper into your hands and started questioning you, did he make that statement to you?
>
> A.—After about five minutes.
>
> Q.—Then would it be right to say that it was at the early stage of the inquiry that they told you that?
>
> A.—Yes.
>
> Q.—Then would you recollect any other questions that he put to you?
>
> A.—He asked me ' Did you have these eight or ten German words that were in Miss Balasingham's book in any of your books before the examination? '
>
> Q.—In other words he made it plain to you that according to information which they had Miss Balasingham is supposed to have had these words in her book?
>
> A.—No answer.
>
> (By court: What did you understand when Mr. Keuneman put that question to you?
>
> A.—I could not understand anything in particular.)

> Q.—Did you understand anything in general from that observation of Mr. Keuneman?
>
> A.—Yes.
>
> Q.—What did you understand in general?
>
> A.—I felt that she had reported that I have had these words in one of my books before the examination.
>
> Q.—So that, Mr. Fernando, within a few minutes of the inquiry starting you were made aware that some allegations had been made against you by Miss Balasingham?
>
> A.—Yes."

Their Lordships are satisfied that there is no substance in the complaint made by the plaintiff to the effect that the reference in the letter of May 16, 1952, to "one or more of the papers set at the final examination" left him under the impression that some additional charge was being made against him, the precise nature of which was not sufficiently explained. Apart from the fact that (according to the plaintiff) Mr. Keuneman asked him towards the end of the first day "how he had fared in his practical examination?", nothing was said to suggest that the commission was in any way concerned with anything other than the German translation. It must, therefore, have been clear to the plaintiff (as the fact was) that the only charge which was being pursued related exclusively to that matter.

Their Lordships are accordingly satisfied that the plaintiff was adequately informed of the case he had to meet.

As to the adequacy of the opportunity of meeting the case alleged against him afforded by the two interviews, the plaintiff in his evidence complained that the interviews were not fairly conducted in the respects that he was plied with questions which he was not given a chance of answering fully and was prevented from saying all he wanted to say. The learned trial judge rejected these complaints and accepted the vice-chancellor's evidence to the effect that the two interviews were fairly conducted. Their Lordships see no reason for dissenting from this finding. To quote again from the vice-chancellor's evidence he said on this aspect of the case:

> "A.—. . . He [that is the plaintiff] was given every opportunity at the inquiry. In fact we wanted him to talk but he would not do it. We told him that certain allegations had been made against him by Miss Balasingham. My job was to find out whether this allegation was justified or not and we were anxious for him to place his version.
>
> Q.—And did he state his story?
>
> A.—Yes.
>
> Q.—He says that he was not given a chance of answering questions fully. Is that true?
>
> A.—That is quite untrue."

Their Lordships are, therefore, satisfied that the interviews, so far as they went, were fairly conducted and gave the plaintiff an adequate opportunity of stating his case. But it remains to consider whether, in the course they took, the interviews must be held to have fallen short of the requirements of natural justice on the ground that the plaintiff was given no opportunity of questioning Miss Balasingham. She was the one essential witness against the plaintiff and the charge in the end resolved itself into a matter of her word against his. In their Lordships' view, this might have been a more formidable objection if the plaintiff had asked to be allowed to question Miss Balasingham and his request had been refused. But he never made any such request, although he had ample time to consider his position in the period of ten days or so between the two interviews. There is no ground for supposing that, if the plaintiff had made such a request, it would not have been granted. It, therefore, appears to their Lordships that the only complaint which could be made against the commission on this score A was that they failed to volunteer the suggestion that the plaintiff might wish to question Miss Balasingham or in other words to tender her unasked for cross-examination by the plaintiff. Their Lordships cannot regard this omission, or a fortiori the like omission with respect to other witnesses, as sufficient to invalidate the proceedings of the commission as failing to comply with the requirements of natural justice in the circumstances of the present case. B

Counsel for the university very properly referred their Lordships to passages in *Osgood* v. *Nelson* (15) and in other authorities which tend at first sight to state the requirements of natural justice more favourably to the party charged than do the authorities to which their Lordships have so far referred: see, in particular, the references to cross-examination in *Osgood* v. *Nelson* (16). But their Lordships are satisfied that, when the facts and circumstances of these cases are looked into, C they contain nothing to justify the conclusion that the requirements of natural justice were not sufficiently observed on the facts and in the circumstances of the case now before them.

In conclusion, their Lordships would observe that they are at a loss to understand how the Supreme Court, while apparently accepting the trial judge's favourable assessment of the reliability of the evidence of the vice-chancellor, D found it possible to reach the conclusion that not even the gist of Miss Balasingham's evidence was communicated to the plaintiff. Their Lordships would also venture the criticism that the Supreme Court tended to regard the case much as if it involved an appeal from, or re-hearing of, a trial held before the commission rather than an invocation of the limited jurisdiction of the court to restrain the abuse of quasi-judicial proceedings, where the sole issue is whether the result, E be it right or wrong, was arrived at with due regard to the principles of natural justice. The plaintiff might have fared better if the charge against him had been tried in accordance with the more meticulous procedure of a court of law, which would have included as of course the tendering of Miss Balasingham for cross-examination. But that is not the question. The question is whether, on the facts and in the circumstances of this particular case, the mode of procedure F adopted by the vice-chancellor, in bona fide exercise of the wide discretion as to procedure reposed in him under cl. 8, sufficiently complied with the requirements of natural justice. In their Lordships' opinion, it has not been shown to have fallen short of those requirements.

Their Lordships' conclusion on the merits of the case makes it unnecessary for them to consider the university's submission to the effect that the court had no G jurisdiction to grant the declaratory relief sought by the plaintiff.

For these reasons, their Lordships are of opinion that this appeal should be allowed, the decree of the Supreme Court of Ceylon dated Dec. 13, 1956, set aside and the decree of the District Court of Colombo dated Aug. 31, 1954, restored, and they will humbly advise Her Majesty accordingly. The plaintiff must pay the costs of the present appeal and also the costs of the action in the H District Court and of the appeal to the Supreme Court.

Appeal allowed.

Solicitors: *Stephenson, Harwood & Tatham* (for the appellant university).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(15) (1872), L.R. 5 H.L. 636.

(16) (1872), L.R. 5 H.L. at pp. 646, 650.

GROSVENOR PLACE ESTATES, LTD. *v.* ROBERTS (INSPECTOR OF TAXES).

[Chancery Division (Danckwerts, J.) February 11, 1960.]

Income Tax—Deduction of tax—Failure to deduct tax—Rent on long lease—Liability of recipient to be assessed—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 1, *s.* 122, *s.* 148, *s.* 170 (2), (3), *s.* 177 (2), *Sch. D.*

The National Coal Board held a lease from the taxpayer company for a term of eighty-one years from Mar. 25, 1955, at an annual rent of £96,177 payable quarterly. As the rent was not paid out of profits or gains brought into charge to tax, it was payable subject (by virtue of s. 177 (2)* of the Income Tax Act, 1952) to deduction of income tax at the standard rate under s. 170 (1)* of that Act, and the board was required by s. 170 (2)* to render an account of the payment to the Commissioners of Inland Revenue for the use of the Special Commissioners who were to assess the board to tax thereon. The board did not deduct tax from the rent which it paid and rendered no account to the commissioners. The taxpayer company was charged to tax, on assessment by the Additional Commissioners, in respect of the rent received.

Held: the taxpayer company was properly charged to tax because, although it would be the duty of the Special Commissioners, if assessment were made by them under s. 170 (2) of the Income Tax Act, 1952, to assess and charge the National Coal Board, yet s. 170 (2) was an administrative provision that conferred an additional power of collecting the tax from the payer of the rents and the recipient of them remained liable to direct assessment under the provisions of s. 122, Sch. D.

Glamorgan Quarter Sessions v. *Wilson* ((1910), 5 Tax. Cas. 537) and dictum of Upjohn, J., in *Stokes* v. *Bennett* ([1953] 2 All E.R. at p. 316) applied.

Appeal dismissed.

[As to persons assessable in cases of deduction of tax from sums not payable out of profits or gains brought into charge to tax, see 20 Halsbury's Laws (3rd Edn.) 376, para. 683; and for cases on the subject, see 28 Digest (Repl.) 169-177, *678-709*.

For the Income Tax Act, 1952, s. 1, s. 122, s. 148, s. 170 (2), (3) and s. 177 (2), see 31 Halsbury's Statutes (2nd Edn.) 17, 112, 145, 165 and 175.]

Cases referred to:

Allchin v. *Coulthard*, [1943] 2 All E.R. 352; [1943] A.C. 607; 112 L.J.K.B. 539; 107 J.P. 191; sub nom. *Allchin* v. *South Shields County Borough*, 169 L.T. 238; 25 Tax Cas. 445; 28 Digest (Repl.) 194, *802*.

Glamorgan Quarter Sessions v. *Wilson*, [1910] 1 K.B. 725; 79 L.J.K.B. 454; 102 L.T. 500; 74 J.P. 299; 5 Tax Cas. 537; 28 Digest (Repl.) 163, *646*.

Lord Advocate v. *Magistrates of Edinburgh*, 1905 S.C. 1922.

Rye & Eyre v. *Inland Revenue Comrs.*, [1935] All E.R. Rep. 897; [1935] A.C. 274; 104 L.J.K.B. 401; 152 L.T. 493; 19 Tax Cas. 164; 28 Digest (Repl.) 188, *776*.

Stokes v. *Bennett*, [1953] 2 All E.R. 313; [1953] Ch. 566; 34 Tax Cas. 337; 28 Digest (Repl.) 179, *726*.

Case Stated.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments made on them for 1955-56 and 1956-57 by the Additional Commissioners under Sch. D to the Income Tax Act, 1952, in respect of long lease rents. The question for decision was whether the taxpayers were assessable or whether, as they contended, the person paying such rents was solely accountable A for the tax thereon.

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* The terms of s. 177 (2) and of s. 170 (1), (2), are set out at p. 644, letter H, and p. 645, letters C to F, post.

The National Coal Board was tenant of Hobart House under an underlease for eighty-one years less four days granted from Mar. 25, 1955, by the taxpayers at an annual rent of £96,177. Such underlease was a long lease within s. 177 of the Income Tax Act, 1952. Under the terms of the lease the National Coal Board made payments of rent, without deduction of tax, of £24,044 5s. for each B of the quarters ending on June 24, Sept. 29 and Dec. 25, 1955, and on Mar. 29, June 24 and Sept. 29, 1956. Such payments of rent were chargeable to tax in accordance with s. 177 (2) of the Act under Case VI of Sch. D and were subject to deduction of tax under s. 170 (s. 169 not applying, since the rents were not paid out of profits or gains of the board brought into charge to tax). Under s. 170 the board should have deducted tax on payment and delivered an account C of such payments to the Commissioners of Inland Revenue for the use of the Special Commissioners, who were required by the section to " assess and charge the payment for which an account is so delivered on that person," i.e., the National Coal Board. The board omitted to deduct tax on payment and it was found that no assessment was made on them.

The taxpayers contended that it would be obligatory on the assessing Special D Commissioners under s. 170 to assess the person making the payment, that it must be presumed that such an assessment either had been or would be made by the commissioners in pursuance of their statutory duty and that accordingly no assessment could be made on the taxpayers as payees. The Crown contended that the taxpayers were directly assessable, having received the rents in full without deduction of tax. The Special Commissioners dismissed the appeal and E confirmed the assessments. The taxpayers appealed by way of Case Stated to the High Court.

Heyworth Talbot, Q.C., and *C. N. Beattie* for the taxpayers.
F. N. Bucher, Q.C., and *A. S. Orr* for the Crown.

DANCKWERTS, J.: This is an appeal from a decision of the Special F Commissioners of Income Tax which raises a point of considerable interest. The facts of the case are comparatively simple. The National Coal Board holds a lease from the appellant taxpayers, Grosvenor Place Estates, Ltd., for a term of eighty-one years from Mar. 25, 1955, at an annual rent of £96,177; the rent is paid quarterly, each quarter's instalment amounting to £24,044 5s., and it has been paid by the National Coal Board in the period to which the assessments G relate without any deduction of income tax.

Section 177 (1) of the Income Tax Act, 1952, provides: " This section applies to the following payments, that is to say—(a) rents under long leases ". It is unnecessary to read (b), because this is plainly a case of a rent under a long lease as defined in the Act, i.e., a lease for more than fifty years, putting it shortly. Then sub-s. (2) provides: H

> "Any payment to which this section applies shall, so far as it does not fall under any other Case of Sch. D, be charged with tax under Case VI of Sch. D and be subject to deduction of tax under Chapter I of this Part of this Act as if it were a royalty or other sum paid in respect of the user of a patent."

It is an extraordinarily roundabout way of saying it when dealing with simple I things like the payment of rent, but there it is.

What are really the relevant administrative sections are s. 169, which does not apply, and s. 170 which does apply. Section 169 provides:

> "(1) Where any yearly interest of money, annuity or other annual payment is payable wholly out of profits or gains brought into charge to tax—(a) no assessment shall be made on the person entitled to the interest, annuity or annual payment . . .

> "(3) Where—(a) any royalty or other sum paid in respect of the user of a patent; or (b) any rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax under this Chapter as if it were a royalty or other sum paid in respect of the user of a patent,
>
> is paid wholly out of profits or gains brought into charge to tax, the person making the payment shall be entitled on making the payment to deduct and retain out of it a sum representing the amount of the tax thereon at the standard rate for the year in which the amount payable becomes due."

It is necessary to read that, because that is the provision which is brought in by reference by virtue of s. 177; but in fact in the present case the tax is not paid " out of profits or gains brought into charge to tax ", so that the whole of this provision is not in fact applicable.

Section 170 provides:

> "(1) Where—(a) any interest of money, annuity or other annual payment charged with tax under Sch. D; or (b) any royalty or other sum paid in respect of the user of a patent; or (c) any rent, royalty or other payment which, under any of the provisions of this Act, is declared to be subject to deduction of tax under this Chapter as if it were a royalty or other sum paid in respect of the user of a patent, is not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any payment thereof is made shall, on making the payment, deduct out of it a sum representing the amount of the tax thereon at the standard rate in force at the time of the payment.
>
> "(2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special Commissioners, an account of the payment, or of so much thereof as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the Special Commissioners shall assess and charge the payment for which an account is so delivered on that person."

The words " as if it were . . . paid in respect of the user of a patent " in s. 170 (1) bring in, of course, the final provision of s. 177 (2).

Now, in this case the National Coal Board, for some reason (I do not know why), omitted to deduct the amount of tax in making the payments of rent under its lease to the taxpayers, and, though the board may have informed the commissioners of the payments which had been made, so far as I can tell from the Case, they did not deliver any account; and the Special Commissioners did not assess or charge the payments in any way on the National Coal Board. No assessment in respect of the present matters has been made on the National Coal Board. Instead, the Additional Commissioners, a different body from the Special Commissioners in the administration of these complicated Acts, have made assessments in respect of the rent on the recipients, i.e., the taxpayers. The taxpayers claim that the assessments were not properly made and that there was no power to assess them under the provisions of the Income Tax Acts in respect of these rents at all. That contention has been rejected by the Special Commissioners and accordingly the appeal has been brought.

Now, in his interesting and instructive argument for the taxpayers, Mr. Heyworth Talbot has pointed out that this provision for the payment of tax by deduction and accounting to the Inland Revenue dates back to the Customs and Inland Revenue Act, 1888, s. 24 (3). That subsection provides:

> " Upon payment of any interest of money or annuities charged with income tax under Sch. D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate

> of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly . . ."

It was not until many years after that Act of 1888 that it was discovered (1) that there was a defect in that provision from the point of view of the Inland Revenue in that, in the case of a company which went into liquidation, as the tax was merely a debt to Her Majesty and not an assessed tax, it did not possess the priority given under the provisions of company and bankruptcy legislation (2) to assessed taxes. Accordingly, the law was altered by s. 26 of the Finance Act, 1927, which is in the form in which s. 170 of the Income Tax Act, 1952, is at the present day.

The taxpayers contend that there is no power to make any assessments on the recipients of the rents in the present case, because s. 170 (2) of the Act of 1952 is in peremptory and mandatory form: where the payment is made as described in s. 170, first of all the person by or through whom the payment is made is under a mandatory obligation, it is said, to deduct the tax; and secondly—and this is more important for the purpose of the present case—there is a mandatory requirement to render an account; and further, it is mandatory that the Special Commissioners " shall assess and charge the payment for which an account is so delivered on that person." Therefore it is said that the only provision for assessment is one for assessment on the person who pays; and, if the person who pays does not deduct, he still has to pay the tax. After all, it is his own fault that he has not carried out what the section peremptorily directed him to do. That argument appeals to me very much, if I am not required by authority to take a different view. There may be a possible answer to it on the terms of the statute, but I will refer to that presently.

It is clear from *Lord Advocate* v. *Magistrates of Edinburgh* (3), decided long before the Finance Act, 1927, that a taxpayer who makes payments may be liable to the Crown for tax, although he has failed to deduct the amount from the interest which was payable by him—in that case it was the Corporation of Edinburgh. On the other hand, in *Glamorgan Quarter Sessions* v. *Wilson* (4), BRAY, J., notwithstanding that the points which have been raised in this case had been strenuously argued before him, decided that, although the persons who paid might be liable, the recipients might still be charged and the tax recovered from them. He said (5):

> " The next ground taken is that inasmuch as the Act—I forget which Act it is for the moment—entitles or makes it the duty of the persons receiving a deposit and paying interest, such as the bank here, to deduct the income tax from the interest which they pay, and as they are liable whether they deduct it or not, that must be considered as impliedly repealing sections of the earlier Acts which make the persons receiving the interest chargeable. Now, in my opinion, no such repeal is implied at all. It is not inconsistent with it; it is simply an additional power given to the Inland Revenue to obtain from the person paying as well as from the person receiving; and in this case, where the person paying has not deducted, and where the person receiving has received the whole, I do not doubt for a minute that quarter sessions in this case, having received the interest, are chargeable."

The matter came before FINLAY, J., in *Rye & Eyre* v. *Inland Revenue Comrs.* (6), where FINLAY, J., said that the change in the law—this was after the Act of 1927

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(1) See, e.g., *Glamorgan Quarter Sessions* v. *Wilson* ((1910), 5 Tax Cas. 537).
(2) See, now, Companies Act, 1948, s. 319, and Bankruptcy Act, 1914, s. 33.
(3) 1905 S.C. 1922. (4) 5 Tax Cas. 537. (5) 5 Tax Cas. at p. 544.
(6) 19 Tax Cas. 164.

—was a change in the machinery of collection and no more. By this time, as I pointed out, the law had been altered from providing for a mere debt to the Crown to a provision for assessment on the person who paid. FINLAY, J., said (7):

> "It appears to me to be abundantly clear what is the object of those provisions. The liability to tax was in existence previously, but it is perfectly obvious that until that amendment of the law there was a serious difficulty of collection. The recipient could be effectively assessed only if he or an agent of his could be found in this country. That, obviously, might be difficult. That position was dealt with by an alteration and improvement of machinery of the collection of the tax and it is an alteration and improvement of machinery and nothing else. It is an improvement in the method of collection. It does not, which I suppose is the test, increase the ambit of the tax. It makes it more easy to collect the tax within the ambit already laid down."

Finally, the matter came before UPJOHN, J., in *Stokes* v. *Bennett* (8), where the appellant had obtained a divorce, with an order of the High Court that her husband should pay her maintenance at the rate of £22 per month free of tax, and was receiving that sum from her husband, who was out of the United Kingdom. The main question was whether it was paid out of income from which tax had been deducted. It was held that the appellant should be treated as having received sums from which tax had been deducted and so no further assessments in respect of those sums should be made on her. UPJOHN, J., said (9):

> "The Finance Act, 1927, s. 26 (1), improved the machinery of collection by enabling the Crown to make an assessment on the person who deducted the tax and giving them ancillary rights to enforce collection against him. But, said counsel for the Crown, the power to make an assessment directly on the recipient remained. He relied on *Glamorgan Quarter Sessions* v. *Wilson* (10) in support of that view. Counsel for the wife challenged the binding authority of that case having regard to the passage in LORD SIMON's opinion in the *South Shields* case (11) which I have read and to the alteration of the law in 1927. In my judgment, the Finance Act, 1927, only improved the machinery but was not intended to alter any principle of collection, and the *Glamorgan* case (10) is a direct decision on the point, not directly overruled by anything in the *South Shields* case (12) and is binding on me. I would point out, however, that BRAY, J., in the last paragraph of his judgment (13), made it clear that he was only deciding that a gross sum was chargeable by direct assessment on the recipient. If, therefore, on the true view of the facts of this case and of the law applicable thereto, the wife is to be treated as having a sum of untaxed income in her hands she is, in my view, directly assessable to tax."

Therefore, on the hypothesis which is put in that paragraph, it was UPJOHN, J.'s opinion that the recipient of the payment was liable to be directly assessed. Of course, in the event, he decided that payment was not made out of untaxed income, and therefore the observations which he made were not part of the grounds of his decision and may be regarded as obiter dicta. In his argument, therefore, counsel for the taxpayers submitted that I should not regard myself as bound by *Stokes* v. *Bennett* (8) and the observations of UPJOHN, J., because they were purely obiter dicta, and that I should not feel myself bound by the decision of BRAY, J., in *Glamorgan Quarter Sessions* v. *Wilson* (10) because that decision must be treated as obsolete in view of the subsequent alteration of the law made by the Finance Act, 1927.

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(7) 19 Tax Cas. at p. 168. (8) [1953] 2 All E.R. 313; 34 Tax Cas. 337.
(9) [1953] 2 All E.R. at p. 316; 34 Tax Cas. at p. 343. (10) 5 Tax Cas. 537.
(11) [1943] 2 All E.R. 352 at p. 354; 25 Tax Cas. 445 at p. 460.
(12) [1943] 2 All E.R. 352; 25 Tax Cas. 445. (13) 5 Tax Cas. at p. 544.

Therefore it becomes necessary to examine the provisions of the Income Tax Act which should be regarded as supporting the view reached by UPJOHN, J., in the later case (14). Section 169 and s. 170 of the Act of 1952 are plainly part of the administrative provisions of the Income Tax Act, 1952, and the charging provisions are to be found elsewhere in the Act. One begins with s. 1, which provides:

> " Where any Act enacts that income tax shall be charged for any year at any rates, then, subject to the provisions of this Act, the tax at those rates shall be charged for that year in respect of all property, profits or gains respectively described or comprised in the schedules contained in the sections of this Act enumerated below, that is to say . . . Sch. D— s. 122."

Section 122 is entitled " Charge to tax and general ", and is as follows:

> " The schedule referred to in this Act as Sch. D is as follows—Schedule D. 1. Tax under this schedule shall be charged in respect of—(a) the annual profits or gains arising or accruing . . ."

from various things which are mentioned thereafter, which undoubtedly would include the payments in the present case. Section 148, which is probably the most important section on this part of the matter, is in these terms under the heading: " Miscellaneous Provisions as to Sch. D ".

> " Tax under Sch. D shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that schedule is in this Act directed to be charged."

That is plainly the material charging section and one of the utmost importance in regard to the present case, and, if it may be said that s. 170 (2) is mandatory on the Special Commissioners in that it directs them to make assessments on the person who pays, then this also may be said to be mandatory in a sense because again you have the word " shall "—

> ". . . shall be charged on and paid by the persons receiving or entitled to the income in respect of which tax under that schedule is in this Act directed to be charged."

Now, it was contended by Mr. Heyworth Talbot for the taxpayers, with considerable force and reason, as I think, that the Special Commissioners have failed to carry out the duty which is laid on them by s. 170 (2), which says quite definitely that they " shall assess and charge the payment for which an account is so delivered on that person ". Subsection (3) provides:

> " The Special Commissioners may, where any person has made default in delivering an account required by this section, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment . . ."

In the present case, apparently, there was no difficulty in deciding what was the proper amount to be charged, although no proper account seems to have been rendered by the National Coal Board. Therefore, it seems to me that primarily the duty of the Special Commissioners was to make an assessment on the National Coal Board and not on the taxpayers. I am not intending to impute any moral blame to the commissioners in that respect, if I think that they ought to have made such an assessment, because according to the state of the law as they saw it they believed that they were not under any necessary duty to do so. It does seem to me, however, that the fact that the payees received their rents without deduction of tax was no reason why the commissioners should refrain from assessing the persons who paid the rents. It is the duty of the Special Commissioners to carry out the provisions of the Acts which direct them to do something or not to do something, not to try to assess the moral liability of people who are concerned with tax. Therefore, it seems to me that primarily, quite plainly according to the provisions of s. 170 (2) of the Income Tax Act, 1952, an assessment ought to have been made on the National Coal Board.

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(14) *Stokes* v. *Bennett*, [1953] 2 All E.R. 313; 34 Tax Cas. 337.

Now, counsel for the taxpayers went further than that. He referred me to s. 36 (1), which provides:

> " Statements of profits or gains under Sch. D shall, unless an assessment thereon is required to be made by the Special Commissioners, be laid before the Additional Commissioners, and the Additional Commissioners shall appoint meetings for the consideration of all such statements as are from time to time delivered to them."

It will have been observed that under s. 170 (2) the assessment is required to be made, not by the Additional Commissioners under that provision, but by the Special Commissioners. Consequently it seemed to me, at first sight, that counsel for the taxpayers had a very convincing argument in favour of the view that the Additional Commissioners, it may be said in the present case, had no power whatever to make any such assessments on anybody. But my attention was called also by counsel for the Crown to s. 38 (1), which provides:

> "A person chargeable under Sch. D may require that all proceedings in order to an assessment upon him under that schedule shall be taken before the Special Commissioners, instead of before the Additional Commissioners, and in that case shall deliver a notice of his request, together with the statement of his profits or gains, to the surveyor of the district."

It is certainly a possible construction of s. 36 that the words " unless an assessment thereon is required to be made by the Special Commissioners " may be a reference to the power to elect in the taxpayer to have the proceedings brought before the Special Commissioners, contained in s. 38. There is an additional point which also emerged finally in the course of the argument in this case: it is possible that the provision to which I have referred in s. 170 (2) does not exclude an assessment by the Additional Commissioners on the recipient of payments by virtue of s. 36. It is quite a possible view that s. 170 (2) was saying: " If the person who pays is assessed, the assessment shall be made by the Special Commissioners ". That may be so, but it does not necessarily follow from that that an assessment on the recipient cannot be made by the Additional Commissioners, as has been made in the present case.

The matter is obviously one of considerable complication and difficulty. I have gone through the various sections and considerations that apply, and I think that, in the situation which has emerged, I am really bound to apply the decision of BRAY, J. (15), although it was before the Act of 1927, and I must follow the observations and the view of UPJOHN, J., in *Stokes* v. *Bennett* (16) and hold in this case that the assessments have been properly made on the recipients of the rents.

Appeal dismissed.

Solicitors: *Stanley Attenborough & Co.* (for the taxpayers); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(15) *Glamorgan Quarter Sessions* v. *Wilson* ((1910), 5 Tax Cas. 537).

(16) [1953] 2 All E.R. at p. 316; 34 Tax Cas. at p. 343.

WILKINS (INSPECTOR OF TAXES) *v.* ROGERSON.

[CHANCERY DIVISION (Danckwerts, J.), February 16, 1960.]

Income Tax—Income—Perquisites or profits of office or employment—Employer's gift of suit of clothes—Computation of value—Cost to employer or second-hand value to taxpayer—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *Sch.* 9, *r.* 1 (*Rules applicable to Sch. E*).

Under a scheme of his employers for making a gift of a suit of clothes, an overcoat or a raincoat to twenty-one of their employees, the taxpayer bought a suit from Montague Burton, Ltd., the price of which, £14 15s., was paid by the employers. The taxpayer was assessed to income tax in the sum of £14 15s. as an addition to his salary. On appeal the Special Commissioners of Income Tax held that he should be assessed in respect of the value of that suit to him on the footing that he could sell it as a second-hand suit. This value was agreed at £5.

Held: the taxpayer was properly assessed in the sum of £5 only, since he was chargeable in respect of the gift as one of the " perquisites or profits " of his employment, under r. 1 of Sch. 9 to the Income Tax Act, 1952 (Rules applicable to Sch. E), and so was chargeable on the profit that he received, viz., the value of the suit in his hands.

Dictum of LORD MACNAGHTEN in *Tennant* v. *Smith* ((1892), 3 Tax Cas. at p. 161) applied.

Appeal dismissed.

[**Editorial Note.** The present decision may usefully be considered with *Abbott* v. *Philbin* ([1959] 3 All E.R. 590) where the perquisite was an option acquired for value, and its fruits were decided to be taxable as a profit of the year in which the option was exercised.

As to perquisites of an office or employment under Sch. E, see 20 HALSBURY'S LAWS (3rd Edn.) 311-313, paras. 573, 574; and for cases on the subject, see 28 DIGEST (Repl.) 225-237, *971-1040*.

For r. 1 of Sch. 9 to the Income Tax Act, 1952 (Rules applicable to Sch. E), see 31 HALSBURY'S STATUTES (2nd Edn.) 522.]

Cases referred to:

Ede v. *Wilson & Cornwall*, [1945] 1 All E.R. 367; 26 Tax Cas. 381; 28 Digest (Repl.) 229, *993*.

Nicoll v. *Austin*, (1935). 19 Tax Cas. 531; 28 Digest (Repl.) 230, *1003*.

Salmon v. *Weight*, [1935] All E.R. Rep. 904; 153 L.T. 55; sub nom. *Weight* v. *Salmon*, 19 Tax Cas. 174; 28 Digest (Repl.) 230, *1002*.

Tennant v. *Smith*, [1892] A.C. 150; 61 L.J.P.C. 11; 66 L.T. 327; 56 J.P. 596; 3 Tax Cas. 158; 28 Digest (Repl.) 216, *916*.

Case Stated.

The taxpayer appealed to the Special Commissioners of Income Tax against an assessment made on him in the sum of £1,036 for 1955-56 under Sch. E to the Income Tax Act, 1952. The point for determination was whether a sum of £14 15s. was correctly included in computing the amount of his salary, fees, wages, perquisites or profits from his employment within the meaning of r. 1 of Sch. 9 to the Income Tax Act, 1952. The sum of £14 15s. was the sum paid by the taxpayer's employers for a suit of clothes given by the employers to the taxpayer as a Christmas present. The Crown contended that the suit represented an advantage in money's worth received by the taxpayer in addition to the cash emoluments of his employment, the value of which fell to be measured by the price for the suit paid by the taxpayer's employers and which was correctly included in computing the amount of the salary, fees, wages, perquisites or profits of the taxpayer's employment under r. 1 of Sch. 9. The taxpayer contended that the gift of the suit did not fall within that provision and alternatively that the value of the suit was not the price paid by the employers but the sum which the taxpayer would have realised by the sale of the suit in November, 1955, when he received it, and was very small. The commissioners held that the taxpayer received in the year 1955-56 in addition to the cash emoluments of his employment an advantage which was capable of being turned into money, but that the money's worth of the suit must be valued at the market value when it became the taxpayer's property, i.e., the second-hand value of the suit in November, 1955. This value was subsequently agreed at £5. The commissioners therefore reduced the assessment accordingly. The Crown appealed against the second part of the decision.

H. B. Magnus, Q.C., and *A. S. Orr* for the Crown.
C. N. Beattie for the taxpayer.

DANCKWERTS, J.: This is an appeal from the Special Commissioners of Income Tax. The facts are extremely simple. A company decided to make a present to twenty-two (or, as it turned out, twenty-one) of its employees in 1955 of a suit of clothes or an overcoat or a raincoat, which were to be obtained by the employees from Montague Burton, Ltd. They accordingly wrote to Montague Burton, Ltd., and asked them to fit out the employees in question with the necessary clothing. At the same time they wrote to the employees, authorising them to go and order a suit or an overcoat or a raincoat at a branch of Montague Burton, Ltd., as they desired. No money was to pass on either side, and the bills for the clothing had to be sent to the company. They were in fact sent to the company, and were duly paid.

The respondent taxpayer in the present case, Mr. Rogerson, is one of the twenty-one employees. He went to a branch of Montague Burton, Ltd., and ordered a suit which was priced £14 15s. He paid no money and he got his suit. He was assessed by the Commissioners of Inland Revenue on the amount of £14 15s. as an addition to his salary from the company. His duties were secretarial, and he worked at the head office of the company. On that assessment he appealed to the Special Commissioners, contending that the payment in respect of the suit did not form part of his taxable salary at all; or, alternatively, that the amount on which he was taxable was not the amount paid by the company.

The first question was decided against him by the Special Commissioners, and from that there is no appeal; but the Special Commissioners decided that the amount to be brought into account for the purpose of the employee's tax was not the sum of £14 15s. but was whatever the value of the suit was in the hands of the employee, on the footing that he could sell it as a second-hand suit as soon as he got it. By agreement, the amount of that value was fixed at £5. Accordingly, the amount of £5 was the sum which the commissioners held should be added to his taxable income. From that decision of the Special Commissioners, the Crown appeals. It seems to me that the decision of the Special Commissioners was perfectly correct.

Reliance has been placed by the Crown on such cases as *Nicoll* v. *Austin* (1) where a director was asked by his company to continue to reside at the house which he had, the company promising to pay all the expenses which he incurred or which were required to be discharged in respect of the house, because they seemed to think that it would increase the prestige of the company. Accordingly, a number of payments were made for that purpose. The amounts actually spent by the company in pursuance of the agreement were £58 12s. 2d. for rates, water, etc.; £51 8s. 9d. for light, heat, and so on; £8 0s. 3d. for telephone, etc.; and £196 4s. 11d. for the upkeep of gardens. That made a total of £314 6s. 1d. That was the sum which, so it was held, was to be added to the director's income assessable under Sch. E. The amount was the actual amount which had been expended by the company.

The circumstances of that case are distinguishable from the facts of the present case; and it is necessary, I think, that I should refer to r. 1 of Sch. 9, which contains the Rules applicable to Sch. E. That provides:

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(1) 19 Tax Cas. 531.

> "Tax under Sch. E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Sch. E, or to whom any annuity, pension or stipend chargeable under that schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged."

I draw attention to the fact that the tax is charged on the "perquisites or profits", and to my mind that means the perquisites or profits which have been received by the employee whom it is desired to tax.

The commissioners based their decision on such cases as *Salmon* v. *Weight* (2) and *Ede* v. *Wilson & Cornwall* (3), in both of which the claim by the Crown was made in respect of certain shares which the company allowed an employee to acquire at par value when the shares were of considerably greater value. The employee there had to pay the sum required, which was charged at par value, and it was held that he was taxable on the difference as between that and the actual value of the shares. In other words, he was taxed on the value of that which he received.

It may be perfectly true that in certain cases, of which *Nicoll* v. *Austin* (4) is an example, it is not possible to measure the value of what the employee has received except by taking the amount of the payment which has been made for the purpose of conferring the advantages which he has received. Accepting that those cases are correctly decided, it is because that is the only standard which can be applied in those cases. But when the employee has received something as a result of a transaction which has been carried out, then it seems to me that the amount of the profit which the employee has received, the emolument in question, is the value of what he has received. It seems to me that, having due regard to the very proper observations as to statements by judges being considered with respect to the facts of the case with which they are dealing, none the less the observation of LORD MACNAGHTEN in *Tennant* v. *Smith* (5) is applicable to the present case, i.e., that the employee is to be taxed "not on what saves his pocket, but on what goes into his pocket".

It is perfectly true that, if the taxpayer in the present case had been told to go to Montague Burton, Ltd., and order the suit and pay for it, and had been promised that the company would then reimburse him the amount which he had paid, the benefit which he would have got would have been the amount paid by the company to him as reimbursement of his expenditure. It is true that that produces a different result according to the way the transaction is carried out, but according to experience in tax matters nothing is more common than to find such a situation. In the present case the benefit which the taxpayer received was the value of the suit in his hands, which he received as a result of the generosity of the company which employed him.

Accordingly, it seems to me that the decision of the commissioners was correct, and that the amount to be added to the taxable income for Sch. E is the sum of £5. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Slaughter & May* (for the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(2) [1935] All E.R. Rep. 904; 19 Tax Cas. 174.

(3) [1945] 1 All E.R. 367; 26 Tax Cas. 381.

(4) 19 Tax Cas. 531.

(5) 3 Tax Cas. 158 at p. 161.

SAMSON *v.* SAMSON.

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), February 10, 1960.]

Husband and Wife—Property—Wedding presents—No principle of law that they are joint property—Married Women's Property Act, 1882 (45 *&* 46 *Vict.* c. 75), *s.* 17—*Matrimonial Causes* (*Property and Maintenance*) *Act*, 1958 (6 *&* 7 *Eliz.* 2 *c.* 35), *s.* 7.

There is no principle of law that wedding presents are joint wedding presents to both spouses. If there is evidence of intention on the part of the donor, that may determine whether the gift belongs to one spouse or both, but, if there is no such evidence, the inference may be drawn that gifts from relatives or friends of a spouse were gifts to that spouse. Property which was given to one spouse may also become the property of both by subsequent conduct.

Dictum of LORD GODDARD in *Hichens* v. *Hichens* ([1945] 1 All E.R. at p. 453) considered and applied.

Per CURIAM: where money has been given to a husband and wife jointly as a wedding present it does not necessarily follow that the court, in the exercise of its discretion under s. 17* of the Married Women's Property Act, 1882, as extended by s. 7 of the Matrimonial Causes (Property and Maintenance) Act, 1958, will order repayment, e.g., where it has been expended in the acquiring of a home and time has elapsed (see p. 654, letter D, post).

Appeal dismissed.

[As to the ownership of wedding gifts as between husband and wife, see 18 HALSBURY'S LAWS (3rd Edn.) 391, para. 743, text and notes (a) and (b); and for cases on the subject, see 27 DIGEST (Repl.) 263-265, *2119-2133*.

As to summary proceedings between husband and wife as to property, see 19 HALSBURY'S LAWS (3rd Edn.) 898-901, paras. 1488-1492; and for cases on the subject, see 27 DIGEST (Repl.) 263-265, *2119-2133*.

For the Married Women's Property Act, 1882, s. 17, see 11 HALSBURY'S STATUTES (2nd Edn.) 804; and for the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7, see 38 HALSBURY'S STATUTES (2nd Edn.) 450.]

Cases referred to:

Avnet v. *Avnet*, (1953), 124 N.Y.S. (2nd Series) 517.

Debtor (*No. 80 of 1957*), *Re A*, *Ex p. The Debtor* v. *Wiseburgh*, [1957] 2 All E.R. 551; [1958] Ch. 81; [1957] 3 W.L.R. 184; 4 Digest (Repl.) 113, *999*.

Hichens v. *Hichens*, [1945] 1 All E.R. 451; [1945] P. 23; 114 L.J.P. 65; 172 L.T. 331; 27 Digest (Repl.) 263, *2120*.

Newgrosh v. *Newgrosh*, (1950), 210 L.T. Jo. 108; 27 Digest (Repl.) 145, *1056*.

Rimmer v. *Rimmer*, [1952] 2 All E.R. 863; [1953] 1 Q.B. 63; 3rd Digest Supp.

Appeal.

A wife appealed from an order made by Mr. Registrar FORBES on May 7, 1959, under s. 17 of the Married Women's Property Act, 1882. The facts are stated in the judgment of HODSON, L.J.

Gerald V. Owen for the wife.

H. S. Law for the husband was not called on.

HODSON, L.J.: This is an appeal from Mr. Registrar FORBES, who made an order on May 7, 1959, under s. 17 of the Married Women's Property Act, 1882, in a dispute between husband and wife. The order which he made was for delivery of certain chattels (set out in schedules), in both directions—some to be delivered by the wife to the husband and some by the husband to the wife. He further declared, pursuant to the provisions of s. 7 of the Matrimonial Causes (Property and Maintenance) Act, 1958 (which for the first time enabled the court to deal with money claims between husband and wife and extended the powers conferred by the Act of 1882), that the wife was beneficially entitled to the sum of £135 which the husband had had in his possession or under his control; and ordered that the husband should pay to the wife that sum by instalments of £5 a month. Against that order the wife has appealed, her submissions being that the articles in question and the money involved in this case originally consisted of wedding presents, that there is a presumption of law that wedding presents ought to be regarded as gifts jointly to the spouses and that, in making an order which admittedly is a discretionary order under the section, the court ought to start with the presumption which I have mentioned, only exercising its discretion after having employed the presumption of law.

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* Section 17 provides that "In any question between husband and wife as to the title to or possession of property, either party . . . may apply . . . to any judge . . . and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit . . ."

I deal with the exercise of discretion first. It does not arise in this case; but assuming that the argument for the wife, namely, that a sum of money (it is the money of which I am particularly thinking) was given jointly to the husband and the wife by way of a wedding present or by way of an engagement present before the wedding, were right, it would not necessarily follow that, in the exercise of its discretion, the court would make an order for the repayment of such money. If the money had (as here), for example, been expended in part in the purchase of a home or in obtaining the assignment of a tenancy of a flat, and time had elapsed, it might well be that the court would hold its hand in ordering the repayment of the money.

In dealing with the matter of discretion generally, it is worth while to refer to the language of Jenkins, L.J., in his dissenting judgment in *Re A Debtor (No. 80 of 1957), Ex p. The Debtor* v. *Wiseburgh* (1). Although Jenkins, L.J., dissented on the matter which had to be decided, the passage which I propose to read is of general application and does not run counter to anything else that has been said in this court on this topic. He said (2):

> " The other cases bearing on s. 17 of the Married Women's Property Act, 1882, to which we were referred were cited on the question how far the making of any order under s. 17 and the terms of any order so made were matters for the discretion of the court. It was agreed in discussion that none of these cases go the length of saying that the judge charged with dealing with such an application can disregard a claim of legal right, but admittedly the cases do show that, in matters concerning property jointly acquired or jointly used, the court may have a wide discretion to deal with it in such manner as will be fair and equitable as between the parties, having regard to the whole history as to the acquisition and use of the chattels in question and, indeed, to all the surrounding circumstances of the matrimonial life of the parties."

He then went on to refer to another decision of this court, *Rimmer* v. *Rimmer* (3), where Sir Raymond Evershed, M.R., cited *Newgrosh* v. *Newgrosh* (4), a case in which Bucknill, L.J., a member of the court, affirming a decision of Willmer, J., said (5):

> " That [s. 17] gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in

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(1) [1957] 2 All E.R. 551; [1958] Ch. 81.
(2) [1957] 2 All E.R. at p. 557; [1958] Ch. at p. 91.
(3) [1952] 2 All E.R. 863; [1953] 1 Q.B. 63.
(4) (1950), 210 L.T. Jo. 108.
(5) [1952] 2 All E.R. at p. 865; [1953] 1 Q.B. at p. 68.

> common are disputes which may very well be dealt with by the principle which has been described here as ' palm tree justice '. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case."

That passage again refers to the respect which must be paid to principles of law. The whole argument for the wife in this case depends on her being able to satisfy the court that there is some principle of law which has not been observed by the registrar, the principle which the wife alleges being the principle that wedding presents belong to both spouses jointly. I will refer to the history of this matter shortly. The marriage was of short duration. The parties were married in October, 1956. Before the marriage, some gifts in kind and money were given to both, and £100 in cash went into the husband's banking account. There was never more than one banking account, although the wife had power to draw on it after the marriage. The total amount of the money that went into the banking account, including the engagement gifts, was £1,023, out of which the honeymoon expenses of £135 were paid with the concurrence of both parties. They lived in furnished flats at first, and eventually obtained a flat in a house at St. John's Wood at a rental of £300 a year. The husband then drew out £725 from the banking account, which was in his name, as a premium for the assignment of the tenancy. The wife (as the registrar found) knew nothing about that. The contention of the wife is that prima facie she is entitled now, on the basis which I have stated, to half the money in the banking account and half the wedding presents. The finding of the registrar in which this matter is dealt with is as follows:

> " The total [that is, the total in the bank] amounted to £1,023 of which £175 came from the relatives and friends of the wife, and the balance from the relatives and friends of the husband. There is no evidence that any of the donors knew both spouses equally well . . . So far as the items contained in the respective lists of the husband and wife are concerned there will be an order that the presents received by the husband from his relatives and friends are his property, and those received by the wife from her relatives and friends are the property of the wife, and particulars thereof will be set out in the order. I do not consider there is sufficient evidence to support the view that any particular present came from a donor who knew both the spouses."

No doubt it is a principle of law that a gift must be considered by reference to the intention of the donor; but there is no authority in this country for the further proposition that there is some particular principle of law applicable to wedding presents. We were referred to one American decision (6) of a New York court (7) (we were told it was the equivalent of the English county court) which appears to lay down such a principle. Apart from that there is no guidance in that direction to be obtained, so far as the researches of counsel go, from decisions in this country. The matter was mentioned by LORD GODDARD in *Hichens* v. *Hichens* (8) where, on an inquiry ordered on a summons under s. 17 of the Married Women's Property Act, 1882, the question of jurisdiction to hear the summons arose; and in his judgment LORD GODDARD said this, obiter, about wedding presents (9):

> " As everybody knows, it is often difficult to decide questions of property between husband and wife according to their strict rights. The matter very often comes up with regard to wedding presents, which in one sense are given to both spouses, and very often you have to solve the matter by saying that if a present is given by a friend of the wife or a relation of the wife the

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(6) *Avnet* v. *Avnet* (1953), 124 N.Y.S. (2nd series) 517.

(7) The New York Municipal Court.

(8) [1945] 1 All E.R. 451; [1945] P. 23.

(9) [1945] 1 All E.R. at p. 453; [1945] P. at p. 26.

> property should be given to the wife, and that it should be given to the husband if it was a present by a relation or friend of the husband." A

If I may say so, with respect, that seems to be eminently sound sense; but it does not purport to be a declaration of law. The part which is relied on by counsel for the wife is the phrase " which in one sense are given to both spouses ". I do not regard that relative clause as detracting from the general drift of what LORD GODDARD was saying in the passage which I have read. B

The guidance which LORD GODDARD gave in that case was followed by one of the county court judges, His Honour JUDGE CAVE, in a more recent case, which is referred to (10) in 95 L.J. 222. The registrar has cited in his judgment the report of what His Honour is said to have done.

> " The wife sought an order for the return of articles given to her as wedding C presents and other articles claimed as having been bought out of her pre-war savings. The claim included a silver tea service . . . and linen . . . His Honour, without wasting time over argumentative details, expressed the . . . view [which was described by the Law Journal as a " common sense " view] that a wedding present is usually given to a relative and not to the stranger marrying the relative. He dissented from the view that wedding D presents became the joint property of husband and wife."

That is to say, he dissented from the view that they so became as a matter of law.

I entirely agree with the observations which purport to have fallen from His Honour's lips. I do not think that, as a matter of law, any intention is to be attributed to the donor. Where there is evidence of intention on the part of the donor, it may well be that wedding presents may be found to have been given E either to one spouse or to the other, or to both; but where no intention is clear the court is fully entitled to draw the inference (which was drawn in this case) that money and gifts in kind originating from one side of the family were intended for the husband and those from the other side, from friends of that party, were intended for the wife.

Counsel for the wife has rested, here and below, on the omnibus submission F to which I have referred and has not sought to say that in any particular case the evidence indicated that the gift was intended for joint use or for the use of his client in particular. He relied—and in my judgment was unable successfully to rely—on the proposition of law that the inference which I have stated should be drawn in his favour. He has recognised that there is another possible position which does not arise in this case but which may arise in other cases—that property G which is given at the time of the wedding to one spouse or the other may become joint property by the subsequent conduct of the parties. That position is illustrated by *Newgrosh* v. *Newgrosh* (11), to which I have made reference. There it appears from the material which is available from the report (and it is very little) that there was in dispute a suite of furniture for a bedroom and another for a sitting room or drawing room: one was said to have been given to the one H spouse and one to the other. The parties lived together: they used that furniture for both rooms: and the learned judge decided, in the circumstances of that case, that the order which he would make would be made on the basis that this was mixed property which had become joint property.

I have said what I have in order to indicate that what has been said in this case does not cover every case. I am only at pains to reject the supposed proposition I of law that wedding presents are joint wedding presents to both spouses. So far as this case is concerned, I see no reason to suppose that there is any criticism to be levelled at the learned registrar for the way in which he dealt with this matter—either the way in which he drew the inference from the origin of the gifts or the way in which he disposed of the chattels and the money in question in this case. I would, therefore, dismiss this appeal.

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(10) June 14, 1945.

(11) (1950), 210 L.T. Jo. 108.

WILLMER, L.J.: I have reached the same conclusion, and for the same reasons; and I desire to add nothing further.

DEVLIN, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Millward, Ladsky & Co.* (for the wife); *Philip Taylor & Co.* (for the husband).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

Re LANGTON (*deceased*). LANGTON *v.* LLOYDS BANK, LTD. AND OTHERS.

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), February 12, 1960.]

Pleading—Amendment—Statement of claim—Statement of claim amended by plaintiff but not in red—Order to " deliver amended statement of claim in proper form "—Dismissal of action for want of prosecution by failing to comply with order—Whether jurisdiction to order delivery of amended statement of claim.

A plaintiff, litigating in person, delivered an amended, and subsequently a re-amended, statement of claim, the amendments being made in black. The statement of claim was otherwise in order. The plaintiff's attention having been drawn to the Practice Masters' Rules whereby amendments should be made in coloured inks, he refused to amend in coloured ink and thereon was ordered to " deliver his amended statement of claim in proper amended form within " a certain time. The plaintiff did nothing to comply with the order and, on the application of a defendant, the action was dismissed for want of prosecution in that the plaintiff " refused . . . to deliver an amended statement of claim ". On appeal,

Held: the court had not had jurisdiction to order the plaintiff to deliver an amended statement of claim, and therefore the order dismissing the action would be set aside.

Appeal allowed.

[As to amendment of statement of claim without leave, see 30 HALSBURY'S LAWS (3rd Edn.) 33, para. 68; and as to dismissal of action for want of prosecution or default under the rules, see ibid., 410, para. 771.]

Interlocutory Appeal.

On July 8, 1957, the plaintiff issued a writ against the defendants claiming revocation of probate of the will of the deceased and propounding an earlier will, and on Dec. 30, 1957, he delivered his statement of claim. On Mar. 12, 1958, the plaintiff delivered further and better particulars of the statement of claim, and on June 13, 1958, he delivered an amended statement of claim, in which the amendments were made in black. Later he delivered more further and better particulars, and on July 31, 1958, he delivered a re-amended statement of claim, in which all the amendments were in black. The defendants made no objection to any of these statements of claim, but on Oct. 28, 1958, Mr. Registrar RUSSELL, while hearing an application by the plaintiff, which he refused, for discovery, drew the plaintiff's attention to the Practice Masters' Rule, set out in the Annual Practice of the Supreme Court*, on the use of coloured inks for amendments, and told the plaintiff that he must put his amendments in coloured ink. The plaintiff refused to do this, and Mr. Registrar RUSSELL then made an order " that the plaintiff do deliver his amended statement of claim in proper amended form within twenty-eight days from today ". The plaintiff applied to set aside this order, but this application was refused by STEVENSON, J., in chambers, on Jan. 16, 1959. The plaintiff did nothing to comply with this order, and on Mar. 24, 1959, the fourth defendant took out a summons to dismiss the action for want of prosecution. On Apr. 3, 1959, this summons came before Mr. Registrar Wilkinson, who told the plaintiff to comply with the order of Mr. Registrar Russell, and adjourned the summons for fourteen days. The plaintiff did nothing and on Apr. 20, 1959, on the adjourned hearing of the fourth defendant's summons, Mr. Registrar Wilkinson ordered "that this action be and the same is hereby dismissed with costs, the plaintiff having refused and continuing to refuse to deliver an amended statement of claim". On Apr. 27, 1959, the plaintiff appealed against this dismissal; on May 8, 1959, his appeal was dismissed by Stevenson, J., in chambers, and on June 19, 1959, the plaintiff appealed to the Court of Appeal.

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* See ANNUAL PRACTICE, 1960, at p. 2156.

The plaintiff appeared in person.

J. A. Armstrong for the first and second defendants, the executors.

H. S. Law for the fourth defendant.

The third defendant did not appear and was not represented.

HODSON, L.J., referred to the facts, stated that the order dismissing the action was made as the plaintiff had refused to deliver an amended statement of claim but not on the basis that he had refused to prosecute the action in other respects, and continued: So far as the jurisdiction of the court and the rules as to amendment are concerned, the plaintiff was not in default. It is true that under r. 2 of R.S.C., Ord. 28 (which provides for a plaintiff amending his statement of claim "once at any time before the expiration of the time limited for reply"), the rules only provide for such an amendment being made once without leave. The point was never taken, however, that the plaintiff required leave to amend his statement of claim; and none of the defendants has ever taken the point that the plaintiff's statement of claim was in any sense out of order or that the amendment was wrongly made: the point was taken by the registrar himself. In my judgment (and indeed it is conceded in this court) the registrar had no power to make such an order as that of Oct. 28, 1958. There is nothing in the statement of claim (which I need not read) which involves a departure from the rules.

Appeal against the order of Mr. Registrar Russell of Oct. 28, 1958, was made to the learned judge, the plaintiff asking for the order of the registrar to be set aside, but apparently directing his argument before the learned judge to that part of the order which had to do with his application for discovery. The order being, in so far as it directed the plaintiff to "deliver his amended statement of claim in proper amended form within twenty-eight days from today", a nullity, and the subsequent orders having sprung from that, this appeal must be allowed. It is quite true that the plaintiff must prosecute this action. He has, so we are told (we have not heard him about this), delayed the action by repeated applications for discovery, which have been refused owing to their having been made prematurely; and, unless the action is prosecuted by the plaintiff, it will be dismissed for want of prosecution, on an application being made to the court for that purpose. However, the ground on which this dismissal of the action was made was wrong: the action must therefore proceed, and the order of the learned judge must be reversed.

The appeal will therefore be allowed.

WILLMER, L.J.: I agree; and I desire to add nothing beyond this, namely, to express the hope that the order we are now making will enable the parties to get the dispute between themselves settled with expedition.

DEVLIN, L.J.: I also agree.

Appeal allowed. Order below set aside.

Solicitors: *Baker & Nairne* (for the first and second defendants); *Barlow, Lyde & Gilbert* (for the fourth defendant).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

MARSHALL *v.* NOTTINGHAM CITY CORPORATION.

[QUEEN'S BENCH DIVISION (Glyn-Jones, J.), November 18, 19, 1959, January 29, 1960.]

Town and Country Planning—Development—Material change in use of land—Revival of commercial use but for sale of caravans instead of portable garden buildings, etc.—Use for sale only in place of former manufacture and sale—Hut on land used, both before and after revival of commercial use, as office in which sales conducted—Whether revival of commercial use and different nature of article sold a material change in the use of the land—Hut a " shop "—Use of hut and other land for sale of caravans not development—Town and Country Planning (Use Classes) Order, 1950 (*S.I.* 1950 *No.* 1131), *art.* 2 (2), *art.* 3 (1), *schedule.*

From 1912 to 1957 L. was the owner of a plot of land which he used for his business of manufacturing and selling wooden portable garden buildings, garages and wooden garden ornaments. L. manufactured most of the goods that he sold, the goods being made in a workshop erected on the land; he used as an office in which he conducted sales a wooden hut also erected on the land. After 1939 L.'s business dwindled, and it continued to dwindle after the end of the war in 1945. Though the business was moribund in 1957, it was not dead and the land was still being used to a small extent for the purpose of L.'s business. Until 1957 the land had a bosky appearance, as a number of trees and bushes grew on the land and screened the articles on it to some extent from the adjoining road. In 1957 the plaintiff bought the land from L. so that a company of which she was managing director could use it in their business of selling caravans and wooden portable buildings. For the purpose of this business the company cut down the trees and bushes, cleared and levelled the site and covered it with tarmacadam to make hard standing ground for the caravans. They retained for use as an office in which they conducted sales the hut formerly used by L. as an office, but they demolished the workshop and all other buildings on the land except a summerhouse built by L. The company did not manufacture any goods on the land but used it only for the display and sale of caravans and, to a minor extent, other portable buildings. L. had never manufactured or sold caravans on the land. The defendants, the local planning authority, served on the company an enforcement notice alleging that by using the land (a) for the display and sale of caravans and wooden buildings and (b) for a building used as a " sales-shop ", the company had made a material change in the use of the land amounting to development under s. 12 (2) of the Town and Country Planning Act, 1947, for which they had not got planning permission, and the defendants required the company to discontinue so using the land.

Held: there had not been a material change in the user of the land for the purpose of the Town and Country Planning Act, 1947, since

(i) neither the fact that the company were distributors, not manufacturers, of goods that they sold on the land nor the fact that the main purpose of the company was to sell caravans, which L. had not sold, rather than garden buildings, etc., which he had sold, constituted a material change in user; and this was not a case in which there had been such a vast increase in the intensity of use of land as might constitute a material change of use within the dictum of LORD EVERSHED, M.R., in *Guildford Rural District Council* v. *Penny* ([1959] 2 All E.R. at p. 113).

(ii) the hut, as and when used by L., was a " shop " within the definition in the Town and Country Planning (Use Classes) Order, 1950* (viz., a building used for carrying on a retail trade or business, in which business the primary purpose was selling goods) and, since it was also used as such a "shop" by the company, their use of both it and the land for a different purpose from L. (viz., for the sale of caravans rather than portable buildings) was deemed, by art. 3 (1) of and the schedule to the Order of 1950* not to involve development of the land.

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* " Shop " is defined in art. 2 (2) of the Order of 1950, the relevant terms of which are set out at p. 666, letter I, *post.*

[For the Town and Country Planning Act, 1947, s. 12 (2), (5), see 25 Halsbury's Statutes (2nd Edn.) 506, 507.

For the Town and Country Planning (Use Classes) Order, 1950, art. 2 (2), art. 3 (1) and schedule, see 21 Halsbury's Statutory Instruments 177, 178.]

Case referred to:

Guildford Rural District Council v. *Penny*, [1959] 2 All E.R. 111; [1959] 2 Q.B. 112; [1959] 2 W.L.R. 643.

Action.

The plaintiff in this action, Edith Agnes Marshall, was the owner of a plot of land at 428, Mansfield Road, Nottingham. She bought the land in 1957 from a Mr. E. J. Ledger so that the company of which she was managing director, Leicester Caravans, Ltd., could use it to carry on its business of selling caravans, portable buildings such as garages, garden sheds, summerhouses and the like, and interwoven wooden fencing; the main business of the company was the sale of caravans. Since the autumn of 1957 the company had used the land for these purposes under the name Nottingham Caravan Centre. Mr. Ledger, the vendor, had gone into occupation of 428, Mansfield Road in 1912 when he began to carry on there his business of a woodworker and handyman. In 1914 he had gone to live at 2, Mapperley Park Drive, a plot adjoining 428, Mansfield Road, and situated on the corner of Mansfield Road and Mapperley Park Drive. The Mapperley Park estate of which these two plots formed part was then in the process of being developed. At 428, Mansfield Road, Mr. Ledger had a workshop in which he made for sale portable buildings of various kinds, including potting and other garden sheds, greenhouses, summerhouses, and later garages of wood, corrugated iron or asbestos. Some of these buildings were made to order; others were made for stock and were erected on the plot and there exposed for sale. In the workshop Mr. Ledger also made wheelbarrows, wooden garden ornaments such as pergolas, chairs and tables; he also carried out work at customers' gardens. There was also a wooden hut on the plot, used by Mr. Ledger as his office and saleroom, which contained a desk, filing cabinets, a stock of catalogues, drawings and other articles. Most of the goods sold by Mr. Ledger were manufactured by himself but he bought for sale some articles such as ladders, wattle fencing and rustic poles. At one time Mr. Ledger's business had been a substantial one in which he employed seven men, but in 1939, after the outbreak of war, the business dwindled and by 1945 Mr. Ledger was carrying it on by himself. Shortly after the war he erected four garages on the plot, one of which was sold to a customer who left it there and kept his car in it paying rent for the land on which it stood, while the other three were let pending their sale; at this time he also erected on the plot a summerhouse for sale. In 1946 Mr. Ledger left his home at 2, Mapperley Park Drive, which his son then began to occupy, and went to live some twelve miles away, but he continued to visit his workshop and office at 428, Mansfield Road, several times a week to execute any orders that he received. Mr. Ledger's business continued to dwindle and was almost moribund by 1957 when the plaintiff purchased the plot. When the plaintiff bought the plot it had on it the workshop, the hut used by Mr. Ledger as an office, the four garages, a stack of rustic poles and a stack of timber. These buildings and objects were mainly concealed from view

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* For the relevant terms of art. 3 (1) and the schedule to the Town and Country Planning (Use Classes) Order, 1950 (S.I. 1950 No. 1131), see p. 666, letter G, post.

A from Mansfield Road by trees, including fruit trees, and there were bushes, grass and weeds growing on the plot giving it a bosky appearance. Between 1948* and 1957 the defendants, Nottingham Corporation, who were the local planning authority, did not attempt to exercise their powers to improve the appearance of the land under s. 26† of the Town and Country Planning Act, 1947, and its appearance was not then thought by the defendants or by the B neighbours to be out of keeping with the general appearance of the district. The plaintiff having bought the plot her company cut down all the trees and bushes on it; demolished the buildings except for the summerhouse and hut, cleared and levelled the site, which involved raising its back level by about three feet, and covered with tarmacadam the whole surface of the plot, apart from some small flower beds at the front, in order to make hard standing ground C for the caravans which the company were to sell. The company retained Mr. Ledger's office hut for use as an office in which it conducted sales and retained the same notice directing customers to it as he had used. The company exhibited large advertisements of its business, and took down the fence between the plot and Mansfield Road, building in its place a stone wall providing a wider access to the footway in Mansfield Road but not altering or interfering with the footway D or access thereto from the carriageway. The defendants were displeased with the altered appearance of the site. They took the view that the company had made a material change in the user of the land amounting to development under the Town and Country Planning Act, 1947, for which the company had not obtained planning permission. Accordingly, the defendants served on the company an enforcement notice, dated Dec. 20, 1957, stating that development E had been carried out on the land without the grant of planning permission which development consisted in making

> " a change from the uses mentioned in para. (a) to the uses mentioned in para. (b) set out below:—(a) use for the following purposes:—(i) the manufacture and storage of rustic furniture including garden seats, pergolas F and the like in a wood joinery workshop (now demolished): (ii) lock-up garages (now demolished): (iii) storing and stacking of rustic poles: and (iv) orchard and kitchen garden. (b) use for the following purposes:—(i) the display for sale of caravans and wooden buildings, and (ii) a building used as a sales-shop."

The enforcement notice went on to require the company to discontinue using G the land for the sale of caravans and wooden buildings, to remove all caravans and wooden buildings from the land and to discontinue " the use of a building on the land as a sales-shop ". The plaintiff did not raise the point that the notice was served on the company instead of on herself, but, as a result of the enforcement notice, she applied to the defendants for permission (i) to use the land for the sale of caravans and wooden buildings and (ii) to use on the land a H wooden building as an office. The application was made without prejudice to the plaintiff's contention that planning permission for such use was not required. The plaintiff also appealed against the enforcement notice to the magistrates' court under s. 23 (4) of the Act of 1947, but the hearing of the appeal was adjourned pending the trial of this action. The defendants refused the plaintiff's application for planning permission and the plaintiff appealed against the refusal I to the Minister of Housing and Local Government. The Minister dismissed the plaintiff's appeal in a letter dated Sept. 11, 1958, in which he set out and concurred with the findings of fact made by the inspector who had held a local inquiry into the plaintiff's application. These findings of fact, as set out in the Minister's letter, were also adopted by the court (GLYN-JONES, J.) in this action. In his letter the Minister, after stating that the plot was situated in a large residential area known as Mapperley Park which consisted of detached and semi-detached houses, many of them large and of imposing appearance, and that the plot itself had a frontage to Mansfield Road of fifty feet and a depth of 150 feet and adjoined house gardens on its northern, eastern and southern side, continued:

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* Viz., the year in which, on July 1, the Town and Country Planning Act, 1947, came into force.

† See footnote (7), p. 665, *post*.

> " [The inspector] had no doubt that, judged solely on its planning merits as a use of land, the caravan centre was quite out of place. The site had been made as attractive as possible. The front wall was a pleasant feature matching the adjoining garden walls, the flower beds were neat, the structures and caravans were bright and clean and the site as a whole was tidy. Nevertheless it was in his [the inspector's] view, a highly commercialised use of land. Not only physically, but also in the incidental effects resulting from the advertisements, from the attraction of customers and the presence of towing vehicles, and from the general activity on the site, the use was wholly alien to a residential development area of good quality and character."

By her present action which was tried at Nottingham Assizes on Nov. 18 and 19, 1959, the plaintiff claimed against the defendants the following declarations:—(i) that no development consisting of a material change of use had been carried out on the land in the four years* preceding Dec. 20, 1957; (ii) that the lawful use of the land for the purpose of the Town and Country Planning Act, 1947, included its use for the purposes of displaying and selling caravans, sectional buildings and garden furniture and/or its use for the manufacture, sale and display of such articles; (iii) that the purported enforcement notice dated Dec. 20, 1957, was of no effect in law. The plaintiff also claimed an injunction restraining the defendants their agents or servants from taking any further steps under the notice, and by amendment of the prayer, claimed a further declaration that prior to July 1, 1948, and after Jan. 7, 1937†, a building on the land was used for carrying on a retail trade or business wherein the primary purpose was the selling of goods by retail and the land was occupied therewith and used for the same purposes; that the said building was a shop within Class I of the schedule to S.I. No. 1131 of 1950; that the use of the building and of the land when occupied therewith and used together for the same purpose of a retail trade or business was not and would not be development for the purposes of the Town and Country Planning Act, 1947; and that use of the land and the building as a shop was and would be lawful for the purposes of the Act of 1947.

J. G. S. Hobson, Q.C., and *D. P. Kerrigan* for the plaintiff.
G. D. Squibb, Q.C., and *J. D. James* for the defendants.

Cur. adv. vult.

Jan. 29. **GLYN-JONES, J.,** having referred to the facts, read the following judgment: Having failed to persuade the Minister that planning permission, if needed, ought to have been granted, the plaintiff now in this action fired her second barrel at the defendants by claiming that there had been no material change of use of the land and, therefore, that planning permission was not and is not required; and this is the question which I have to decide in this case.

The Town and Country Planning Act, 1947, provides in effect that for planning purposes every plot of land is stamped, as it were, with a hall-mark of permission to use it after the coming into force of the Act for the purpose for which it had been last used before the Act came into force: and a hall-mark stamped by previous user is not expunged by the fact that at the date when the Act came into force the land was being used temporarily for some purpose other than that for which it was normally used (1); nor, if the land were unoccupied, by the

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* See the terms of s. 23 (1) of the Town and Country Planning Act, 1947.
† See the terms of proviso (ii) to s. 12 (5) of the Town and Country Planning Act, 1947.
(1) See s. 12 (5) (a) of the Town and Country Planning Act, 1947.

A fact that the previous user had ceased, provided that the date when the land became unoccupied is later than Jan. 7, 1937, (2). It is also provided by the Act (3) that the carrying out of building, engineering, mining or other operations in, on, over or under land shall constitute development for which planning permission is required.

The defendants plead in paras. 6 and 8 of their defence that the works and B operations of the company which have been described (4) constituted in themselves a development of the land. Counsel, in opening the plaintiff's case, referred me to the provisions of art. 3 of S.I. No. 728 of 1950 (5) and to the entry "Sundry minor operations" in Sch. 1. But counsel for the defendants did not take or argue the point that, assuming the plaintiff established that there had been no material change of user, the works done by the company would nevertheless C constitute development requiring planning permission; and I think that counsel was right, for the object of this action is to challenge the validity of the enforcement notice, and that notice does not mention the works carried out by the company, nor does it require the company to restore the land to its former condition, but is based solely on the allegation that there has been a sufficient change of user to constitute development. I therefore treat the evidence of D what has been done on the land by the company merely as evidence relevant to the issue whether or not there has been a material change of user of the land; and I refrain from expressing any opinion whether or not the works done by the company constitute of themselves a development of the land or whether or not, if they do, it would be, or would have been, reasonable to issue an enforcement notice in respect thereof.

E I turn then to the question: "What was the last user of the land?" On that question I have the evidence of Mr. E. J. Ledger, the plaintiff's predecessor in title, and it is evidence which in substance I accept. [His Lordship then set out Mr. Ledger's evidence, see p. 660, letters E to I, ante, and continued:]

Counsel for the defendants contends that from 1946 when Mr. Ledger moved away from 2, Mapperley Park Drive he in effect abandoned his business and F thereafter it was his son who used the land, and that merely as ancillary to his occupation of the dwelling-house. Mr. Ledger's use of the land thereafter, says counsel, was minimal and should be disregarded: at the most, what he did should be described as pottering about the workshop as a hobby rather than as the carrying on of a business. And counsel for the defendants, in support of this contention, points to the fact that in 1956 it was the son who made a proposal G for the alteration of the valuation list by reducing the assessment for rating purposes which had been recently increased fourfold. The description of the plot, which is separately rated, is "Workshop, yard, store and premises", and in his proposal Mr. Ledger junior says that the workshop is used only occasionally during spare time for personal and domestic use. He also describes himself as the occupier. Mr. Ledger junior was not called as a witness by either side. H What he wrote in the proposal is not admissible evidence before me to prove the truth of what was so written. There is no evidence before me that he ever acquired a tenancy or any other legal interest in the land. I find that the most that he had was his father's permission or licence to go on the land and to use the workshop, and doubtless to pick the fruit, if any. On the evidence before me I cannot find that his use of the land was other than minimal. In any event, it I was no more than a temporary use: his father must have retained the power to terminate it at any time, whatever licence the son had, and he must have done so before the sale to the plaintiff.

Even if counsel for the defendants were right in saying that by the time the Act of 1947 came into force the business had ceased to be carried on and the land

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(2) See s. 12 (5) (c) and proviso (ii) of the Act of 1947.

(3) In s. 12 (2).

(4) See p. 661, letters B to E, ante.

(5) Viz., the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950.

was used only by the son as ancillary to his occupation of 2, Mapperley Park A
Drive, plus some small use by the father more by way of a hobby than otherwise, I find that both uses were only temporary. I do not see why Mr. Ledger senior should have required planning permission before terminating his son's licence, if he needed to do so, and starting to carry on once more his former business. I do not find that Mr. Ledger had ceased to carry on business. The business may have been almost moribund by 1957, but it was not then dead; nor a fortiori was it B
dead in 1948. It could have been revived; and I find that at the coming into force of the Town and Country Planning Act, 1947, this plot of land was used by Mr. Ledger for the purpose of carrying on his business thereon and that at the time of the sale of the land to the plaintiff it was still so used, even though the business being done was small. After the coming into force of the Act, Mr. Ledger was entitled without planning permission to continue to use the land for C
the purpose of his business, and the plaintiff has succeeded to that right to use the land for the purpose of carrying on thereon a similar business.

This brings me, I think, to the crux of the case; for counsel for the defendants' next contention is that the business now carried on by the plaintiff's company differs so widely from the business carried on by Mr. Ledger that I ought to find that there has been a material change in the use of the land. His main points, D
as I understand them, are these: (i) that Mr. Ledger was a manufacturer and made most of the goods he sold; that the plaintiff's company has demolished the workshop, does not manufacture and is a mere distributor of the goods of others; and (ii) that the main purpose of the company is to sell caravans, which Mr. Ledger neither made nor sold; and even if the sale of an occasional caravan by Mr. Ledger would not have constituted a material change of user, a business the E
main purpose of which is the sale of caravans differs from his, Mr. Ledger's, use to such a degree as to be a different business, and the carrying on of such a business is a material change of use of the land. I test this by assuming that Mr. Ledger, instead of selling his land to the plaintiff, had employed a manager or taken in a partner who was a capable business man and had set himself to revive and rebuild the business. He would doubtless have sought to increase the F
stock displayed for sale. For that purpose he would have needed more room. It might well have been good business to cut down the trees, clear and level the site and lay down a surface that could be conveniently walked on by prospective customers in all weathers. That would have made more obvious, more obtrusive and much more disagreeable to the neighbours the fact that the land was being used for a commercial purpose, as it had been used since 1912; and it may well G
be that a conspicuous prospect of workshop, corrugated iron garages, greenhouses, potting sheds and the like, no longer concealed by " boskiness ", would have been just as disagreeable to the neighbours and to the planning authority as are the plaintiff's caravans. But I do not think that the exposure for sale of more buildings on a scale corresponding to that on which the plaintiff's company has displayed caravans would have involved a material change in the use of the H
land. As Mr. Lawson, the deputy city engineer of Nottingham said in evidence, any substantial increase in the scale on which Mr. Ledger carried on business would have been detrimental to the amenities of the district; but the question whether there has been a material change in user does not depend, in my opinion, on whether the business carried on is a success or a failure, though I bear in mind in saying this that the business may be so successful as to involve such a vast I
increase in the intensity of the use of the land and that increase in the intensity of use may perhaps amount to a material change of use. At all events in *Guildford Rural District Council* v. *Penny* (6), LORD EVERSHED, M.R., says:

> " Counsel for the appellants contended that the mere intensity of user or occupation could never be relevant. As a general proposition, I am not prepared to accept that argument; nor indeed is it necessary to do so. Mere

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(6) [1959] 2 All E.R. 111 at p. 113; [1959] 2 Q.B. 112 at p. 124.

> intensity of user may (as it seems to me; but I must not be taken as deciding this point) affect a definable character of the land and of its use—or one of them."

The Master of the Rolls having kept the point open, I certainly do not propose to decide it. With that qualification, therefore, I go on to say that if the presence on this land of a successful rather than an unsuccessful commercial enterprise is detrimental to the neighbourhood, the defendants' remedy, it seems to me, is to exercise their powers under s. 26 of the Town and Country Planning Act, 1947, and get rid of it on payment of compensation (7). If the business had grown and still more room were wanted it might have occurred to Mr. Ledger to remove the workshop and stocks of raw materials to another site elsewhere. I cannot agree with counsel for the defendants that either the cutting down of the trees, etc. or the removal of the workshop to another site would have involved a material change in the use of the land. In my opinion, the primary purpose for which the land was used was to advertise, display and sell the various products of Mr. Ledger's business, whether they were made on the same site or elsewhere. I go further. In my view, there would be no material change in the use of the land if the buildings and other products displayed and sold thereon were not made by Mr. Ledger at all, but were bought from some other manufacturer. If Mr. Ledger, having found himself incapacitated by age or infirmity from continuing to work, or having found it cheaper to buy his stock rather than to make it, had accordingly ceased to manufacture, I do not think the Act of 1947 gives power to the planning authority to serve an enforcement notice on him requiring him to resume manufacture under pain of having to cease using the land for selling goods. On the evidence in this case I am not prepared to find that the fact that the caravans exposed for sale are not made or built on the site constitutes a material change of user.

I pass next to counsel for the defendants' second point; that is to say, whether or not the fact (which I find) that the majority of the goods now sold and displayed are caravans rather than portable buildings and other goods constitutes a material change in the use of the land. There is some similarity between caravans and the portable buildings which Mr. Ledger sold. Counsel conceded as much when he said, rightly as I think, that if Mr. Ledger had sold one or two caravans in addition to his portable buildings he would not thereby have made a material change in his use of the land. Counsel for the defendants' case must be, I think, not that Mr. Ledger by selling caravans would have gone wholly outside the class of goods in which he dealt, but that if the proportion of his total turnover represented by the sale of caravans had been as high as it must be in the business of the plaintiff's company, the nature of the business would have been so transformed that it would have become a different business altogether; for the primary purpose of the business would have become the sale of caravans. The mere fact that a dealer in the course of his business begins to deal in goods in which he had not dealt before does not necessarily involve a change, still less a material change in his use of the land or premises where the business is carried on. A dealer in musical instruments might fifty years ago have begun to deal in gramophones or phonographs, as I suppose they would then have been called; and then in the course of time in radio sets and later in television sets. A dealer in electrical appliances as demand changed and fresh appliances were invented may have successively added vacuum cleaners, refrigerators, washing machines and the like to his stock in trade and he too might have begun to deal in radio and television sets. Each of them may have ceased to sell goods formerly sold for which there is no longer an adequate demand. Yet neither, in my view, has thereby altered the use he is making of his premises. Moreover, if the business of a retail dealer is being carried on in any building, it may be that there is a change of use if, for example, the business of a baker is substituted for a different business, for example, that of a grocer; but I am unable to see why or how such a change can be material from any point of view which could legitimately be taken by a planning authority; that is to say, material for the purposes of the Town and Country Planning Act, 1947. It may be argued perhaps that the proviso to sub-s. (2) of s. 12 of the Act of 1947 and the Town and Country Planning (Use Classes) Order, 1950, are inconsistent with the view I have last expressed; or, on the other hand, that so far as the business of a retail dealer is concerned, the proviso is unnecessary and the Use Classes Order does no more than remove doubts and make it plain that a change of use from carrying on in a retail shop an innocuous trade to carrying on one of the scheduled trades which might be noxious or offensive could be material. But it is unnecessary for the purpose of this case for me to deal in generalities. I need only ask myself whether or not if Mr. Ledger had dealt in caravans on the scale on which the plaintiff's company has done he would have made a material change in his user of his land.

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(7) Section 26 enables a local planning authority, if it is expedient in the interests of proper planning, to require the discontinuance of any use of land, to impose conditions on the continuance of the use of land or to require specified steps to be taken for the alteration or removal of any buildings or works. Section 27 of the Act of 1947 requires the local planning authority to compensate any person suffering damage in consequence of an order made under s. 26.

This question, as I understand it, is one of fact and degree to be answered on the evidence in this case: and my answer is that the plaintiff's company has not made a material change in the use of the land. It is, of course, immaterial to my decision, but perhaps only fair to the plaintiff, that I should state at this point that, having acquired an option to buy Mr. Ledger's land, she did not exercise it until after she had informally consulted the defendants' planning officer or a member of his staff, and disclosed to him what she proposed to do on the land and had been informed by the officer concerned that planning permission would not be required.

The plaintiff raised by amendment of her statement of claim—to which no objection was offered and which I allowed—a further point which arises in this way. The defendants charge the plaintiff with having made a change of user in that the hut of which I have spoken is used as what is called in the enforcement notice and in the defence a " sales-shop ". The plaintiff by amendment has taken advantage of this description of what she had described as " an office ": she now adopts the defendants' description of the hut as " a shop " and says that the hut, together with the land on which goods are exposed for sale, constitute a shop within the meaning of the Town and Country Planning (Use Classes) Order, 1950. By para. 1 of art. 3 of the order it is provided that:

> " Where a building or other land is used for a purpose of any class specified in the schedule to this order, the use of such building or other land for any other purpose of the same class shall not be deemed for the purposes of the Act to involve development of the land."

The first entry in the schedule is: " Class I. Use as a shop for any purpose except as "—and then certain exceptions are set out which are not material in this case. " Shop " is defined (8) as follows (and I leave out immaterial words):

> " ' shop ' means a building used for the carrying on of any retail trade or retail business wherein [that is to say " in which business ", not " in which building "] the primary purpose is the selling of goods by retail, and includes a building used for the purpose of [then there are set out a number of purposes, including that of a ticket agency] . . . or for any other purpose appropriate to a shopping area . . ."

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(8) In art. 2 (2) of S.I. 1950 No. 1131.

A This definition is very wide, and I do not see how I can avoid a finding that in Mr. Ledger's time the hut which I have already mentioned was a building used for the carrying on of Mr. Ledger's retail trade or retail business wherein (that is to say, in Mr. Ledger's trade or business) the primary purpose was the selling of Mr. Ledger's goods. It is true that Mr. Ledger also carried on the business of doing work in customers' gardens, and the same hut was used for taking orders B for such work to be done and as his office; but the primary purpose of the retail trade and business carried on by Mr. Ledger in the hut was the sale of the goods displayed on the surrounding land or illustrated or described in his catalogue. It was, therefore, by definition a shop within the meaning of the Order of 1950. In the same hut there is being carried on by the plaintiff's company a retail trade or business the primary purpose of which is the sale of the caravans or other goods C displayed on the land; and if this does amount to a use of the building or other land for some purpose other than that for which Mr. Ledger used it, it is expressly laid down by the order that such a change of user is not to be deemed to involve development. On this ground also the plaintiff succeeds.

The successive owners of this land have enjoyed since early in the development of this estate the right to carry on a commercial enterprise thereon, notwith- D standing that it is in the middle of a residential area. It is not a case in which there has been an attempt to set up a commercial enterprise within an established residential area. Provided the enterprise is not so conducted as to give to the neighbours a remedy in nuisance, I do not see how the use of the land for commercial purposes is to be stopped unless the defendants, for the protection of the rateable values in the area, or for any other reason, think it proper to E exercise their powers under s. 26 of the Act of 1947, under penalty of having to pay the compensation, if any, to which the plaintiff can show that she is entitled (9).

[HIS LORDSHIP indicated that the plaintiff was entitled to declaration (i) and (iii) and to the declaration claimed in the amended prayer (10). He did not think, however, that he could grant declaration (ii) since if he did it might appear F that on whatever scale the business of the plaintiff's company was conducted there would not be a change of user, which might prevent the defendants from raising this point which was left open by LORD EVERSHED, M.R., in *Guildford Rural District Council* v. *Penny* (11).]

Judgment for the plaintiff.

Solicitors: *Shelton, Cobb & Co.*, agents for *Rorke, White & Holbrook*, Nottingham (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *T. J. Owen*, Nottingham (for the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(9) See footnote (7) ante.

(10) The declarations claimed by the plaintiff are set out at p. 662, letter D, ante.

(11) [1959] 2 All E.R. at p. 113; [1959] 2 Q.B. at p. 124.

BAKER *v.* MERCKEL (ANSON Third Party, WHITE Fourth Party).

[COURT OF APPEAL (Sellers and Pearce, L.JJ., and Havers, J.), February 2, 3, 22, 1960.]

Landlord and Tenant—Surrender of tenancy—Surrender by operation of law—Grant of option to extend term—Operation as surrender and grant of new lease—Effective from grant rather than exercise of option—Liability of lessee assigning after grant but before exercise of option—Rent and dilapidations after end of original term.

By a lease under seal in 1947, the lessor demised premises to the lessee ("the tenant", which expression included his successors in title), for a term of seven years from Nov. 1, 1946, at a yearly rent of £150, the lessee undertaking to keep the premises in good and tenantable repair. A supplemental deed made between the lessor and the lessee in March, 1949, and indorsed on the lease provided that: "if the tenant shall give notice . . . to the landlord before Nov. 1, 1952, of such his desire the within written lease thereupon shall be read, construed and take effect as though the term thereby granted was for a period of eleven years from Nov. 1, 1946 . . ." In 1951 the lessee assigned the lease and option to the first assignee, who in turn assigned it in the same year. In 1952 the second assignee exercised the option to extend the term of the lease and, subsequently in that year, assigned it to the last assignee, who in 1957 gave up possession owing rent and being in default on the repairing covenant. In an action for rent and for damages for breach of covenant brought by the lessor against the original lessee (who brought in the first assignee as third party),

Held: the lessor was entitled to recover the rent and damages against the original lessee for the following reasons—

(i) the grant of the option in 1949 was a consensual act which, at that date, varied the original lease and resulted, particularly having regard to the substantial nature of the variation, in a notional surrender of the lease and re-grant of a new lease by operation of law at that date, so that the lease then became one for a maximum of eleven years if the option were duly exercised.

Dictum of MAUGHAM, J., in *Re Savile Settled Estates* ([1931] All E.R. Rep. at p. 557) applied.

(ii) the exercise of the option took effect as a unilateral act, for which the consent of the lessor was not required (dictum of LORD GREENE, M.R., in *Hankey* v. *Clavering*, [1942] 2 All E.R. at p. 313, applied); and accordingly it resulted in privity of contract continuing between the lessor and the lessee throughout the extended term of the lease.

Appeal dismissed.

[As to the surrender of a lease by grant of a new lease to the tenant, see 23 HALSBURY'S LAWS (3rd Edn.) 686, para. 1415; and for cases on the subject, see 31 DIGEST (Repl.) 571-576, *6913-6971*.]

Cases referred to:

Bruce, Re, Brudenell v. *Brudenell*, [1931] All E.R. Rep. 638; [1932] 1 Ch. 316; 101 L.J.Ch. 204; 146 L.T. 363; Digest Supp.

Hand v. *Hall*, (1877), 2 Ex.D. 355; 46 L.J.Q.B. 603; 36 L.T. 765; 42 J.P. 133; 31 Digest (Repl.) 68, *2246*.

Hankey v. *Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 L.J.K.B. 711; 167 L.T. 193; 31 Digest (Repl.) 599, *7170*.

Inland Revenue Comrs. v. *Derby* (*Earl*), [1914] 3 K.B. 1186; 84 L.J.K.B. 248; 109 L.T. 827; 31 Digest (Repl.) 573, *6937*.

Savile Settled Estates, Re, Savile v. *Savile*, [1931] All E.R. Rep. 556; [1931] 2 Ch. 210; 100 L.J.Ch. 274; 145 L.T. 17; 31 Digest (Repl.) 571, *6922*.

Appeal.

The first assignee of the lease of certain premises appealed against a judgment of McNAIR, J., given on Dec. 10, 1958, on the trial of preliminary issues in an action for the recovery of rent and for damages for breach of contract for repairs brought by the lessor against the lessee who brought in the first assignee as third party. McNAIR, J., held that an option to renew or to call for an extension of the lease, which was for a period of seven years, conferred on the lessee by a deed of later date than the original lease, could be validly exercised by a subsequent assignee, that it had been validly exercised, and that the original lessee became or remained liable for rent falling due after the expiration of the term of his original lease and for dilapidations arising after that date. The original lessee was held to be entitled to indemnity from the third party. The effect of the judgment was that the exercise of the option by the second assignee, then the ultimate assignee, who was brought in as fourth party, had retrospective effect and created a term of eleven years so as to bind the defendant lessee to the plaintiff lessor and the first assignee (third party) to the defendant lessee, by privity of their respective contracts. The grounds of appeal were that the learned judge misdirected himself and erred in law in that as a matter of construction of the supplemental deed he adjudged that the original lessee became or remained liable for rent falling due after the expiration of the term of the original lease and for dilapidations arising after that date and that the first assignee was bound to indemnify him against the lessor's claim.

R. O. Wilberforce, Q.C., and *A. R. Campbell* for the first assignee.
R. E. Megarry, Q.C., and *M. T. B. Underhill* for the lessor.
T. M. Eastham for the lessee.

Cur. adv. vult.

Feb. 22. The following judgments were read.

SELLERS, L.J.: I would uphold the decision of McNAIR, J., on the basis that the supplemental deed of March, 1949, had the effect in law of supplanting the original lease by a new one, the terms of which are derived from reading the two documents together. The effect is to include the option as if it had been in the original lease. There was, therefore, whilst the lessor and lessee were in direct contractual relationship, a contractual right by unilateral action of the lessee to enlarge the term from seven to eleven years and to vary by the same action the provisions as to the painting of the outside of the premises.

The rule of law on which the first assignee relied to attack both the findings of the learned judge on the only issue under appeal was stated by MAUGHAM, J., in *Re Savile Settled Estates, Savile* v. *Savile* (1)

> " . . . an alteration of an existing lease, so that it will operate for a term extending beyond the original term, can operate in law only as a surrender of the old lease and a grant of a new one . . .",

and I do not understand counsel for the lessor to challenge the rule. It does not involve the universal application of a rule of surrender and re-grant in the case of every alteration of the term of a lease.

The argument for the first assignee was that the operation of the rule did not take place until the option was exercised in 1952 by the fourth party (the second assignee) as assignee of the third party (the first assignee), who was an assignee of the defendant, the original lessee, and, therefore, the lessee was not bound to the lessor after the expiration of the seven years as he was not a party to the extended lease. But what was done in 1949 was not a mere agreement for the future; it was the granting and obtaining by mutual agreement of a right which the lessee could at his option exercise and which at once became an enforceable part of the contract. The agreement did not of itself enlarge the original term, but it provided that it might be extended without any further consent of the lessor and was therefore a substantial alteration of a character to which the rule applies.

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(1) [1931] All E.R. Rep. at p. 557; [1931] 2 Ch. at p. 217.

Whilst the agreement for the option was consensual and in law effected a new lease, the exercise of the option, as I think counsel for the lessor rightly contended, was unilateral. He cited, aptly and with resource, the words of Lord Greene, M.R., in *Hankey* v. *Clavering* (2):

> " Notices of this kind . . . are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents . . ."

Here the notice had the effect of enlarging the demise, of its own force. It was in fulfilment of and in accordance with the agreement and not inconsistent with it or in variation of it. No new bargain was struck in 1952. That which had been agreed as permissible became effective.

I have not restated the facts and the relevant documents which have been so clearly and concisely summarised by the learned judge and in the judgment of Pearce, L.J., with which Havers, J., asks me to say that he agrees, as I do also in its more complete review of the arguments and in its conclusions. I do not think that the lessee can escape from the burden he undertook as a lessee of the lessor and I would dismiss the appeal.

PEARCE, L.J.: This is an appeal from a decision of McNair, J., on certain preliminary issues. By a lease under seal dated Feb. 17, 1947, made between the plaintiff as the landlord and the defendant as the tenant (which expression included his successors in title) the plaintiff lessor demised to the defendant lessee certain premises for a term of seven years from Nov. 1, 1946, at a yearly rent of £150. The lessee covenanted to keep the demised premises in good and tenantable repair and in the third and last years of the term to paint the external wood and iron work. In 1949 the lessor and the lessee came to an agreement which was embodied in a supplemental deed indorsed on the lease. It was in the following terms:

> " This deed made Mar. 23, 1949, between the within named Frederick Jonas Baker [the lessor] of the one part and the within named Henry Walter Merckel [the lessee] of the other part is supplemental to the within written lease. Whereas it has been agreed between the parties hereto that the term granted by the within written lease shall be extended for a further period of four years at the option of the tenant. Now this deed witnesseth and it is hereby agreed and declared that if the tenant shall give notice in writing to the landlord before Nov. 1, 1952, of such his desire the within written lease thereupon shall be read, construed and take effect as though the term thereby granted was for a period of eleven years from Nov. 1, 1946, and that the tenant shall paint the external wood and iron work of the demised premises with two coats of good oil paint and in a workmanlike manner in the fifth, eighth and last years of the term and not as provided in cl. 2 (e) of the within written lease."

By a deed of assignment made on Apr. 9, 1951, the lessee assigned to the first assignee the premises comprised in the original lease with the benefit of the option to renew referred to in the recital to the deed, being the option conferred by the deed of Mar. 23, 1949. On Oct. 18, 1951, the first assignee by a similar document assigned the premises to the second assignee, the fourth party. In 1952 the second assignee (as the learned judge found) validly exercised the option. Later in 1952 the second assignee in his turn assigned to one Mrs. White. It appears that in September, 1957, Mrs. White gave up possession leaving rent unpaid, and having committed breaches of the covenant to repair. The lessor obtained judgment against her for £818 8s. 11d. No recovery was made under this judgment, and the lessor then instituted proceedings against the lessee seeking to recover the same sum against him. The defence admitted the original lease and the supplemental deed but denied that the option was validly exercised. The lessee contends that his liability terminated at Nov. 1, 1953, the expiry date of the original lease. The lessee brought in his assignee as third party, claiming from her an indemnity under the first assignment, and she brought in the second assignee, the fourth party, claiming the like indemnity under the second assignment.

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(2) [1942] 2 All E.R. at p. 313; [1942] 2 K.B. at p. 329.

The learned judge had three preliminary issues to decide: (i) Whether the option to call for an extension of the lease could be validly exercised by the subsequent assignee; (ii) if so, whether it was validly exercised; and (iii) if it was validly exercised, whether the lessee as the original lessee was liable for rent falling due and dilapidations arising after the expiration of the term of his original lease. In a very clear judgment he decided that the option could be and was validly exercised, and that the lessee was liable in respect of rent and dilapidations arising after the expiration of the term of the original lease. The lessee and the first assignee appealed and the main burden of the argument before us was carried by the first assignee.

The lessee and first assignee contend before us that on the last point the judge was in error on the following grounds. The alteration of the term of a lease is the alteration of an interest in land. The nature of the lessee's interest could only be altered during the currency of the lease by the surrender of the existing interest and a new grant of the fresh interest. That is not a matter of intention but a matter of legal implication. In *Re Savile Settled Estates* (3), MAUGHAM, J., said:

> "I should add that, in my opinion, an alteration of an existing lease, so that it will operate for a term extending beyond the original term, can operate in law only as a surrender of the old lease and a grant of a new one . . ."

The original lease therefore was surrendered when the option was exercised by the second assignee in 1952. Thereafter the lessee was divested of his liability as original lessee, and the second assignee became the original lessee of the fresh grant under which, thenceforward, the premises must be deemed to be held. The learned judge, it is said, was wrong in deciding that the surrender and fresh grant need not be implied or that they must in any case have occurred in 1949 at the time when the option was embodied in the supplemental deed. For that option did not affect the lease until it was exercised. It never became part of the demise but was merely a collateral bargain as in *Hand* v. *Hall* (4), where it was held that the presence of an option in the agreement there under consideration did not vary or modify the original demise until the option was exercised. The present case, it was said, was in some sense stronger than *Hand* v. *Hall* (4), since in our case the option was a separate subsequent contract embodied in a supplemental deed and the use of the word "thereupon" suggests that the option was to affect the lease on the exercise of the option and not before. Reliance was also placed on *Inland Revenue Comrs.* v. *Earl of Derby* (5), as showing that the implied surrender and fresh grant do not take effect until all the conditions of the fresh grant (in our case the exercise of the option) have been fulfilled and until specific performance could have been granted.

The point is short and turns on when the supplemental deed affected the demise and what that effect was. In spite of the clarity and force of Mr. Wilberforce's argument, I find myself unable to assent to it. I think that it would be wrong to hold that the demise was unaffected by the option until its exercise in 1952. The learned judge did not feel that it was necessary to imply a surrender and fresh grant. However, he held that in any event, if, contrary to his view, there had to be such an implication, it occurred in 1949 when the option was given, when the lessee would still be the original lessee of the fresh grant, and when the same legal consequences would follow as under the original grant. I incline to the latter view in preference to the former. Although the implication of surrender and fresh grant is a fiction based on estoppel, and, as CLAUSON, J., said in *Re Bruce, Brudenell* v. *Brudenell* (6), it is not to be encouraged or extended, it is not easy on the authorities to avoid the implication of a surrender and fresh grant where such a change is made in the term, viz., a variation of a term of seven years to a term of seven years with an option for a further four years. I agree, however, with the learned judge when he said that, if it were necessary that the variation of the existing term could only operate as a surrender of the original lease and the grant of a new lease, he would feel no difficulty in saying that the effect of the supplemental deed was to work a surrender of the original lease and the grant of a new lease for seven years or, on the happening of a specified event, for eleven years. So to hold would in my view carry out the intention of the parties as it appears from the document. By a consensual variation embodied in the supplemental deed indorsed on the lease there was built into the original lease of seven years an option that changed the demise from one of seven years to one which might extend to eleven years on the exercise of the option. It was at that stage that the variation was made. Owing to the clause which was so built into the lease, the happening of an event (viz., the exercise of the option) was to have a retrospective effect and to cause the deed to be read and construed as though it had originally been a lease for eleven years and to affect the repairing covenant not only thereafter but retrospectively. From the wording of that document, I do not find it possible to regard it as a mere collateral option which did not affect the demise until it was exercised. It is plain that, when the supplemental deed was indorsed on the lease, the parties regarded the transaction as one demise which might be for seven years or might on a certain event continue for eleven years.

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(3) [1931] All E.R. Rep. at p. 557; [1931] 2 Ch. at p. 217.
(4) (1877), 2 Ex.D. 355.
(5) [1914] 3 K.B. 1186.

There was therefore no consensual variation after 1949. The exercise of the option was not a consensual matter. In a dictum which Mr. Megarry's learning elicited from an otherwise irrelevant case, *Hankey* v. *Clavering* (7), LORD GREENE, M.R., dealing with a notice to determine, said (8):

> "Notices of this kind . . . are documents of a technical nature, technical for this reason, that if they are in proper form they have of their own force without any assent by the recipient the effect of bringing the demise to an end. They are not consensual documents . . ."

The words are equally applicable to a notice of extension. The extension caused by the exercise of the option was not dependent on the lessor's consent. It was not in conflict with the lease as altered in 1949 but arose out of and in accordance with its terms.

Like the learned judge, I see no rule of law on the facts of this case that prevents us from giving effect to what the parties intended. In my view, he was right in deciding that the lessee is still liable, by privity of contract as original lessee, in respect of Mrs. White's defaults.

Appeal dismissed.

Solicitors: *Otto K. Pollak* (for the first assignee); *Wilkinsons*, agents for *F. E. Baldock & Co.*, Guildford (for the lessor); *Kenneth Brown, Baker, Baker* (for the lessee).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(6) [1931] All E.R. Rep. 638; [1932] 1 Ch. 316.
(7) [1942] 2 All E.R. 311; [1942] 2 K.B. 326.
(8) [1942] 2 All E.R. at p. 313; [1942] 2 K.B. at p. 329.

BELLSHILL & MOSSEND CO-OPERATIVE SOCIETY, LTD. *v.* DALZIEL CO-OPERATIVE SOCIETY, LTD.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Keith of Avonholm and Lord Denning), February 8, 9, March 10, 1960.]

Industrial and Provident Societies—Rules—Arbitration rule—Dispute submitted to arbitration while respondents a member of society—Withdrawal of respondents from membership of society after award—Whether respondents continued to be bound by award.

The appellants and respondents, who were co-operative societies registered under the Industrial and Provident Societies Act, 1893, were both members of the Co-operative Union, Ltd., whose objects were, by its rules, stated to be, inter alia, " arbiters in matters of dispute arising between societies which cannot be settled locally ". By r. 10 of the union's rules, it was provided, among other things, that " Any disagreement that may arise as to overlapping or any other matter . . . between the parties shall, in failure of conciliation be submitted to persons appointed . . . as arbitrators and their decision shall be final and binding on all parties ". By r. 15 (1), a society could withdraw from the union subject to certain conditions. These rules were binding on the appellants and the respondents as members of the union. In accordance with the rules, a dispute between them in regard to overlapping by the respondents into the territory of the appellants was referred to arbitration. Both parties appeared and the arbitrator made an award in favour of the appellants. The respondents did not accept the award nor observe it and withdrew from membership of the union. The appellants claimed that the respondents remained bound by the award.

Held: on the true construction of the award together with the rules of the union the restriction of trading area imposed by the award did not remain binding on the respondents after they withdrew from the union, but if, on the true construction of the award, it purported to impose a permanent restriction it was invalid as being ultra fines compromissi.

Birtley District Co-operative Society, Ltd. v. *Windy Nook & District Industrial Co-operative Society, Ltd.* ([1959] 1 All E.R. 623) overruled.

Appeal dismissed.

[As to the determination of disputes between industrial and provident societies, see 21 HALSBURY'S LAWS (3rd Edn.) 50, paras. 119, 120; and for cases on the subject, see 28 DIGEST (Repl.) 468, 469, *63-71*.]

Cases referred to:

Birtley District Co-operative Society, Ltd. v. *Windy Nook & District Industrial Co-operative Society, Ltd.*, [1959] 1 All E.R. 43, 623.

Llanelly Ry. & Dock Co. v. *London & North Western Ry. Co.*, (1875), L.R. 7 H.L. 550; 45 L.J.Ch. 539; 32 L.T. 575; *affg.*, (1873), 8 Ch. App. 942; 42 L.J.Ch. 884; 29 L.T. 357; 2 Digest (Repl.) 452, *190*.

Pearson v. *Oswald*, (1859), 21 D. 419; 31 Sc. Jur. 229; 2 Digest (Repl.) 447, *143*.

Appeal.

Appeal by Bellshill & Mossend Co-operative Society, Ltd. against an interlocutor of the First Division of the Court of Session (LORD CLYDE (Lord President), LORD CARMONT and LORD RUSSELL), dated Feb. 13, 1959, recalling an interlocutor of the Lord Ordinary (LORD GUEST), dated July 25, 1958, and dismissing an action brought by the appellants against the respondents, Dalziel Co-operative Society, Ltd. The facts are set out in the opinion of VISCOUNT SIMONDS.

Sir Frank Soskice, Q.C., I. M. Robertson, Q.C., and *G. S. Gimson* (both of the Scottish Bar) for the appellants.

R. S. Johnston, Q.C., and *Peter Maxwell* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

Mar. 10. The following opinions were read.

VISCOUNT SIMONDS: My Lords, in and for some time prior to the month of October, 1955, two Co-operative Societies, both registered under the Industrial and Provident Societies Act, 1893, were in dispute as to their respective rights of trading in a certain area in the county of Lanark. They were the appellants, the Bellshill & Mossend Co-operative Society, Ltd., the original pursuers, whom I will sometimes call " Bellshill ", and the respondents, the Dalziel Co-operative Society, Ltd., the original defenders, whom I will sometimes call " Dalziel ". Both societies were members of another society called the " Co-operative Union, Ltd. ", whose objects were by its rules stated to be to carry on certain trades and businesses, amongst them that of

> " arbiters in matters of dispute arising between societies which cannot be settled locally, and of propagating co-operative principles and ideas, and the organising of co-operative work in all its branches, whether such work be in connexion with industries, trades, or business, or for the promotion of education and other objects and purposes of a similar character with a view to the ultimate establishment of a Co-operative Commonwealth."

Rule 6 provided that the union should consist of all industrial and provident societies, joint stock companies and other bodies corporate which had for their object the promotion of co-operative principles and ideas, and were members of the Co-operative Union at the time therein stated or which might thereafter be admitted. Rule 9 provided that each applicant for admission should be deemed by such application to accept as the principles by which all its business transactions should be guided—the desire to promote the practice of truthfulness, justice and economy in production and exchange by (amongst other things) preventing the waste of labour now caused by unregulated competition. Rule 10 provided that no society should be allowed to remain in membership with the union which did not abide by its rules, conform to its aims, and accept the decisions of the central executive confirmed by congress, and that any disagreement that might arise as to overlapping or any other matter which could not be settled in consultation between the parties should, in failure of conciliation, be submitted to persons appointed by the union as arbitrators, and that their decision should be final and binding on all parties. Rule 12 (2) provided that every society should, as long as it continued a member of the union, make an annual contribution to the funds of the union. Rule 15 (1) provided that a society might withdraw from the union subject to the conditions therein stated or, if deemed guilty by the central executive of conduct detrimental to the union or to the movement generally, might be excluded from the union by the resolution of any congress as therein mentioned. It is thus clear that membership of the union was optional and could be terminated at any time either voluntarily or by exclusion.

It is common ground that these rules were binding on Bellshill and Dalziel as members of the union. In accordance with them, a dispute between the parties in regard to overlapping by Dalziel into the territory of Bellshill was, in May, 1955, referred (apparently by the union) to the arbitration of three persons nominated by the union who were, in fact, three of its officials. Both parties appeared in due course before the arbitrators and, on Oct. 6, they made their award. It was that, in relation to the dispute between Bellshill and Dalziel, the co-operative service in the Bellshill and Mossend area should be provided exclusively by Bellshill and Dalziel should not trade in this area from fixed premises therein nor from mobile shops or vans. The Bellshill area was defined. Dalziel did not accept the award and told Bellshill so. They did not observe it and, on Oct. 21, 1957, withdrew from membership of the union as they were well entitled to do. They continued to trade in the prohibited area. On Nov. 5, 1957, Bellshill commenced the action out of which this appeal arises. By the conclusions of their summons, they sought, first, a declarator that Dalziel were bound by the award of Oct. 6, 1955, secondly, a declarator that the award prohibited Dalziel from trading in the defined area and, thirdly, an interdict against Dalziel from carrying on such trade. It will be observed that declarator and interdict alike were based on the contention that the award not only operated while Dalziel was a member of the union but was permanent and unqualified. This contention is now opposed by Dalziel on two grounds, first that, on its true construction, the award is limited in its operation to the period of their membership of the union, and, secondly, that if, on its true construction, its operation is permanent, then it is ultra fines compromissi and is invalid. The first only of these grounds appears to have been urged before the Lord Ordinary (LORD GUEST), the second, which is embodied in the sixth plea-in-law for Dalziel, having been added by leave before the First Division. Numerous other questions were raised and discussed, but I think it inexpedient to pronounce on them, for I am satisfied, as I believe are all your Lordships, that the award cannot be upheld if it bears the meaning for which Bellshill contend.

Whether or not it does bear that meaning is a matter on which opinions may differ. For myself, applying the principles laid down in *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.* (1) and numerous other cases that were cited to us and regarding the award not in vacuo but in relation to the rules under which the dispute was referred to arbitration, I should have no difficulty in concluding that it was operative against Dalziel only while they were members of the union. But, if the opposite view is taken, I see no answer to the argument that the award is ultra vires. I assume that the parties were contractually bound to each other by the rules of the union and that r. 10 constituted a submission to arbitration on (inter alia) any question of overlapping that was in dispute. Nothing can be clearer than that the parties, apart from the contract into which they had entered, could trade as and where they would and that, when the contract was determined, that freedom was restored. What effect, then, is to be given to the submission to arbitration of a dispute in regard to a prohibited area of trade? The answer is plain. I find in BELL'S TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND (2nd Edn., 1887) a passage at p. 75, para. 128, which is entirely apposite:

> " From the opinions which have been delivered in some recent cases, respecting the ancillary submission clause it would appear that ' it is the natural construction of all such clauses that without very express words they are not to be carried beyond the term for which the primary contract endures '."

In the present case, there are no express words which suggest that a member of the union is to be restricted in his trading after it has ceased to be a member. On the contrary, the rules contemplate that it may cease voluntarily or involuntarily to be a member and by so doing escape the burden and lose the benefit of membership. If so, it is unreasonable to suppose that a society joining the union and thereby agreeing to submit its freedom of trading to arbitration intends to bind itself for all time whether or not it continues to be a member. I cannot express my view better than in the words of LORD IVORY in *Pearson* v. *Oswald* (2), which the Lord President (LORD CLYDE) cites in the present case,

> " this clause of reference . . . is a subordinate contract entirely, ancillary to the primary contract with which it is connected, and except in so far as it is ancillary to the execution of that contract, I do not think it has any legal existence whatever."

Here the primary contract relates to competition between members of the union while they are members; to that contract the submission is ancillary; an award made on it cannot validly carry the matter further.

Learned counsel for the appellants invited your Lordships to draw some inference favourable to his contention from the words at the end of r. 10, " their decision shall be final and binding on all parties ", and from the words in r. 12 (1): " Every society shall, so long as it continues a member of the union ", but I am, for my part, unable to get the least assistance from them. They do not appear to me to touch the question that we must answer. It was natural that he should also rely on a case recently decided in England, *Birtley District Co-operative Society, Ltd.* v. *Windy Nook & District Industrial Co-operative Society, Ltd.* (3), but on that case I will only say that I concur in the Lord President's observations. I cannot regard the decision as correct.

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(1) (1875), L.R. 7 H.L. 550.

(2) (1859), 21 D. 419 at p. 426.

At an earlier stage in this opinion I said that a number of other objections to the claim of Bellshill were raised by Dalziel. We were invited by counsel for Bellshill to hear and adjudicate on these objections, even though we should dispose of the appeal on the grounds that I have discussed. This we declined to do, and I only mention the matter in order to make it clear that we heard no argument and, therefore, express no opinion on them.

The appeal must, in my opinion, be dismissed with costs.

I am asked by my noble and learned friend, **LORD RADCLIFFE,** who is unable to be here today, to say that he has read and concurs in the opinion that I have just delivered.

LORD REID: My Lords, by becoming a member of the Co-operative Union, Ltd., the respondents agreed to be bound by the rules of that body. Under r. 9 " the principles by which all its business transactions shall be guided " included (3), preventing " the waste of labour now caused by unregulated competition ". One of the methods of achieving this is by the prevention of " overlapping ", i.e., trading in the same area by more than one of the member societies. So the respondents agreed to limit their common law right as traders to carry on their trade wherever they desired to do so. But r. 15 provides that a society may withdraw from the union, and the respondents withdrew from the union in 1957. Thereafter they were free to carry on their business in any area, and this is admitted by the appellants with one exception. Rule 10 provides:

> " Any disagreement that may arise as to overlapping or any other matter which cannot be settled in consultation between the parties shall, in failure of conciliation be submitted to persons appointed by the Co-operative Union, Ltd. as arbitrators and their decision shall be final and binding on all parties."

The appellants maintain that, if a disagreement as to overlapping has been submitted to arbitrators in terms of this rule and the arbitrators decide that a society shall not trade in a particular area, as happened in this case, then that society remains bound by that award even after it has withdrawn from the union. I cannot so interpret r. 10. Its purpose appears to me to be to facilitate the smooth working of r. 9 by providing a domestic tribunal to settle disputes between members. Admittedly, if a member society, anticipating an award against it, chooses to forestall proceedings under r. 10 by withdrawing from the union before the union steps in under this rule, the withdrawing society cannot be prevented from competing in the areas of societies which remain members. I find nothing to indicate that the fact that the union has stepped in makes a difference. The arbitration in this case was not preceded by a submission agreed by the parties—if it had been, much might have depended on the terms of the submission to which the respondents agreed. But the respondents' only agreement was its agreement as a member of the union to be bound by the rules of the union, and it could only be by virtue of the rules that the respondents could still be bound by the award made against them while they were members. The rules ceased to bind the respondents when they withdrew, and it would, in my opinion, at least require some very clear provision in the rules to render an award made under the rules effective after the rules themselves had ceased to be binding. I can find no such provision.

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(3) [1959] 1 All E.R. 623.

I am confirmed in my opinion by considering what would be the alternative. Is the award to be binding for ever? Counsel for the appellants was unable to support that view, or to maintain that the concluding words of r. 10—" their decision shall be final and binding on all parties "—have that meaning. Counsel felt bound to admit that the award would cease to be binding if the appellants ceased to provide efficient co-operative service in the area from which the award excludes the respondents. And, if it had been the appellants and not the respondents who had withdrawn from the union, it surely would not be possible for a non-member to enforce against a member an award made under the rules of the union. I find it impossible to read into the rules or the award that the award is to cease to have effect in circumstances such as these but is otherwise to remain effective against a non-member.

It is unnecessary to consider the further question whether the award would in any event be unenforceable against the respondents as being in restraint of trade. I have not considered that question and I express no opinion on it.

In my judgment, this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD DENNING: My Lords, where two societies are in disagreement as to overlapping and the dispute is referred to arbitration under r. 10, it seems to me plain that any order made by the arbitrators delimiting trading areas can only apply so long as the two societies remain in membership with the union. The reason is because each society only subscribes to the principles of the union so long as it is a member and must be taken to submit to the jurisdiction of the arbitrators only so long as it is a member. If it ceases to be a member, it is neither entitled to the benefits of the order nor bound by its obligations. I can see grave objections to the arbitrators making a perpetual order restraining competition to continue beyond membership of the union. If such an order were to continue beyond membership of the union, it would mean that the complaining society would be able to withdraw from the union, thus obtaining a free hand to compete within the territory of the defending society, and the latter would have no redress. Even during membership, the complaining society may serve the prohibited area so inefficiently that the prohibition should be removed. The changes in circumstances that may occur are so various that any order restraining competition, in order to be reasonable, must be capable of modification in the face of change. There must be " liberty to apply ". And, inasmuch as modifications can only be made during membership, the order must be limited to the period of membership.

It follows that I cannot agree with the decision of STREATFEILD, J., in *Birtley District Co-operative Society, Ltd.* v. *Windy Nook & District Industrial Co-operative Society, Ltd.* (4).

I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Martin & Co.*, agents for *Keyden, Strang & Co.*, Glasgow, and *Gray, Muirhead & Carmichael*, Edinburgh (for the appellants); *Herbert Smith & Co.*, agents for *Shepherd & Wedderburn, Macpherson & Mackay*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(4) [1959] 1 All E.R. 623.

WRIGHT *v.* WRIGHT.

[COURT OF APPEAL (Hodson and Harman, L.JJ., and Havers, J.). January 21, 22, 25, February 22, 1960.]

Divorce—Cruelty—Child—Ill treatment of child—Unjustifiable acts—Beating Proof of intent to injure health of other spouse—No need to aver or prove express intent.

If the conduct of a husband towards a child of the marriage is unjustifiable, it is not necessary, in proceedings in which the husband's conduct towards the child is alleged to constitute cruelty to the wife, to aver or prove an express intention by the husband to injure the health of the wife (see p. 685, letter F, post).

There is no difference in principle between the cases of indecent assault on a child of the marriage and cases of ill treatment of a child by beating, but whereas an indecent assault is an unjustifiable act, and little, if any, evidence is required to persuade the court that the husband knew or must have known that his conduct would, or would be likely to, affect the wife's health, a wife relying on the beating of a child must show that what was done was more than reasonable chastisement and was unjustifiable, and must prove facts from which the court should infer that the husband knew or must have known that his conduct would, or would be likely to, injure the wife's health (see p. 685, letters B and C, post).

Birch v. *Birch* ((1873), 28 L.T. 540) overruled on this point; and dictum of BUCKNILL, L.J., in *Kaslefsky* v. *Kaslefsky* ([1950] 2 All E.R. at p. 401) criticised.

Squire v. *Squire* ([1948] 2 All E.R. 51) applied.

Jamieson v. *Jamieson* ([1952] 1 All E.R. 875), *Cooper* v. *Cooper* ([1954] 3 All E.R. 415) and *Ivens* v. *Ivens* ([1954] 3 All E.R. 446) considered.

Appeal dismissed.

[As to when ill treatment of children by one spouse is cruelty to the other spouse, see 12 HALSBURY'S LAWS (3rd Edn.) 274, para. 526; and for cases on the subject, see 27 DIGEST (Repl.) 306, *2526-2528*.]

Cases referred to:

Birch v. *Birch*, (1873), 42 L.J.P. & M. 23; 28 L.T. 540; 27 Digest (Repl.) 303, *2494*.

Bosworthick v. *Bosworthick*, (1901), 86 L.T. 121; 27 Digest (Repl.) 333, *2775*.

Boyd v. *Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; 27 Digest (Repl.) 351, *2908*.

Cooper v. *Cooper*, [1954] 3 All E.R. 415; [1955] P. 99; 119 J.P. 1; [1954] 3 W.L.R. 867; 3rd Digest Supp.

Daniell v. *Daniell*, (1954), "The Times", Feb. 2.

Hadden v. *Hadden*, (1919), "The Times", Dec. 5.

Ivens v. *Ivens*, [1954] 3 All E.R. 446; [1955] P. 129; [1954] 3 W.L.R. 887; 3rd Digest Supp.

Jamieson v. *Jamieson*, [1952] 1 All E.R. 875; [1952] A.C. 525; 116 J.P. 226; 3rd Digest Supp.

Kaslefsky v. *Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404; 27 Digest (Repl.) 296, *2413*.

King v. *King*, [1952] 2 All E.R. 584; [1953] A.C. 124; 3rd Digest Supp.

Simpson v. *Simpson*, [1951] 1 All E.R. 955; [1951] P. 320; 115 J.P. 286; 27 Digest (Repl.) 299, *2447*.

Squire v. *Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 27 Digest (Repl.) 296, *2415*.

Thompson v. *Thompson*, (1901), 85 L.T. 172; 27 Digest (Repl.) 306, *2534*.

Watt (*or Thomas*) v. *Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.

A **Appeal.**

The husband appealed against the decision of WRANGHAM, J., dated Feb. 6, 1959, granting the wife a decree nisi on the ground of the husband's cruelty. The facts are stated in the judgment.

J. P. Comyn and *Bruce Holroyd Pearce* for the husband.
Stanley Rees, Q.C., H. S. Law and *G. L. Walker* for the wife.

B

Cur. adv. vult.

Feb. 22. **HODSON, L.J.,** read the following judgment of the court: This appeal is by the husband against the judgment and order of WRANGHAM, J., whereby he granted to the wife petitioner a decree nisi of divorce on the ground of the husband's cruelty.

C The parties were married on June 9, 1935, the wife then being twenty-two and the husband twenty-seven. There were three children of the marriage: Valerie, born on July 30, 1937; Iris, born on May 5, 1940; and David, born on July 8, 1943. Apart from two incidents, one in August, 1935, and the other in July, 1942, the cruelty alleged by the wife against the husband was the ill treatment of the two children Iris and David, in the presence of the wife and D despite her protests, by beating them on the head and ears with his hand with unnecessary violence and without good reason. This conduct of the husband was said to have caused the wife great distress and led to the impairment of her health. [HIS LORDSHIP then dealt with two incidents in which the cruelty alleged was not ill treatment of these children, and stated that WRANGHAM, J., was right to attach no importance to both these incidents save that one of them, E as WRANGHAM, J., said, illustrated the very quick temper of the husband which he found difficult to control. HIS LORDSHIP then continued:]

So far as Iris was concerned, the conduct of the husband towards her which was complained of took place while the husband and wife and the children were living in the home of the wife's parents at Sunbury for twelve to eighteen months in 1949-50. WRANGHAM, J., found that living with the wife's parents was a singu- F larly unwise arrangement, partly because the influence of the wife's mother throughout the marriage was a bad one and partly because, apart from the natural difficulty of a young couple living with the wife's parents, the husband simply would not fit in. At this time Iris was coming up to the age of nine or ten and slightly obtrusive, and the husband found her growing up like that rather a nuisance and in his way. WRANGHAM, J., found that the husband would punish G her, not maliciously nor with any notion that he was really punishing her, with a smack over the head or the ears—and not one but more than one—for merely being in his way at the time. WRANGHAM, J., accepted the evidence of Iris that at that time she actually became frightened of her father. The wife used to ask her husband to stop, and he refused. WRANGHAM, J., thought that the wife was entitled to object to this conduct of the husband, not because it was necessarily H cruel but because the husband was not deliberately and thoughtfully punishing the child for its good. WRANGHAM, J., found that the husband was hitting the child harder than she should have been hit merely in a fit of temper or irritation and in circumstances in which it was not really justifiable to hit her at all. WRANGHAM, J., however, regarded the treatment of Iris as of no importance except in so far as it threw light on the character and disposition of the husband I in this case, because it did not last for more than twelve to eighteen months and had ceased for years before action brought. We agree with all those findings.

The whole case of the wife therefore rested on the conduct of the husband towards David between 1950 and July, 1957. By this time the husband and wife and the children had moved to their own home at Gloucester Road, Hampton. David was then about eight, the same obtrusive age that Iris had reached a year or so before. WRANGHAM, J., found that the same thing happened with David as had happened with Iris. He got in his father's way and irritated his father. The result of his getting in his father's way and of the irritation was that he was continually slapped on the side of the head and on the head. The learned judge believed the evidence of the wife's father that the way in which the husband treated David went far beyond anything that was reasonable at all. The wife's father told the husband that this was not the way to punish the boy, but the husband paid no attention. Iris stated in evidence that David was struck with great severity, mostly about the ears or face, and the result was that her mother was very upset. Wrangham, J., found that the husband was treating this boy in a way in which he ought not to be treated; that he did not confine himself to a single clip on the ear for a naughty boy but was hitting him on the head more than once; that there were occasions when the wife attempted to interfere and was pushed out of the way. The learned judge did not believe that these punishments were administered in order to teach the child not to do it again or for the child's good; they were mere outbursts of ill temper against a child which had irritated its father, possibly by doing something that was wrong or possibly by doing something that was not, from the child's point of view, really wrong at all. Wrangham, J., found that this form of treatment was particularly bad for David because he was a boy who could not stand that type of thing. [His Lordship then considered an allegation that David had attempted to kill himself and continued:] The learned judge did not find this allegation proved. The learned judge accepted that the boy said and at the moment believed that nobody loved him and that he had a chip on his shoulder, but did not accept that the state of the boy was wholly due to his father's treatment of him. The criticism which the learned judge made about the husband was that if he had been an affectionate and observant father, he would have known about it and noticed it, but instead of noticing it he went on treating the boy in the same way throughout those years.

The learned judge also found that the husband must have known very well that his wife's health was very likely to have been impaired by his continuance of treatment which she clearly disliked as being harsh, but, despite that knowledge that he must have had that that would be the effect on his wife, he continued in the same course.

Matters went on in this way until by the summer of 1957 the situation was getting worse and worse. The wife said that some time in the summer of 1957—probably June—she heard a noise and banging in the front room and went in and found the husband hitting David about the head and ears again, very hard. The wife said that she complained and told her husband that, if the boy had done anything wrong, would he please correct him in the proper manner. He told her to mind her own bloody business and he would do as he liked in his own house and that her bloody parents had spoilt David. The husband said that he would hit the boy where he liked and called the boy " a swine ". There was no express finding about this, but the husband said that there was an occasion when he said that he would strike the boy when and where he liked. He could not recollect calling him " a swine ", but he might have said it on that one occasion when he was annoyed.

After this, in the summer of 1957 the wife consulted Dr. Gold about this matter. She said that she went with her husband and that they were both present when the doctor told the husband that he ought not to hit David any more about the head or face. The husband said that he went alone, as his wife had told him the doctor wanted to see him. The husband said that from that time he did not strike the boy again. There is no evidence that he ever did. Unfortunately he never told his wife, because he was annoyed with her for consulting the doctor about David.

[His Lordship then referred to events in September, 1957, when the husband was told, at the home of his wife's parents, that she had arranged for David to stay on with her parents for the rest of the holidays and then to go to a new school which was at Canterbury. The husband, the wife and Iris returned home, leaving David with the wife's parents. There was a quarrel between the husband and

A wife and the wife consulted solicitors. In March, 1958, she left home. HIS LORDSHIP continued:] On Mar. 6, 1958, the wife filed the petition in this suit for dissolution of marriage, and on Mar. 8, 1958, she left the matrimonial home with Iris. She has never returned. Valerie had already left in February, 1958.

On these facts the learned judge held that the wife had established cruelty against the husband.

B Counsel for the husband contended before us: (i) That the facts found by the learned judge with regard to the conduct of the husband towards David were against the weight of evidence: (ii) That the finding of the learned judge that the conduct of the husband towards David impaired the health of the wife was against the weight of the evidence: (iii) That the fact found by the judge that the conduct of the husband towards David gave reasonable apprehension of injury C to the health of the wife was against the weight of the evidence: (iv) That the learned judge wrongly drew an inference unfavourable to the husband from the fact that the daughter Valerie was not called as a witness: (v) That the facts found by the learned judge did not amount to cruelty in law: (vi) That on the facts found by the learned judge, he ought to have drawn an inference that the husband's cruelty to the wife, if any, had been condoned.

D The learned judge had the advantage, which we have not had, of seeing and hearing the witnesses. He made a careful assessment of the credibility of each of the witnesses called. [HIS LORDSHIP read this assessment and continued:] When an appellate court is asked to disturb the finding of fact in a suit for divorce, particularly on the ground of cruelty, the court must be guided by the decision of the House of Lords in *Watt* (*or Thomas*) v. *Thomas* (1). LORD E THANKERTON in his speech said (2):

> "It will hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and, further, within that class, cases of alleged cruelty will afford an even stronger example of such an advantage."

F Though, as counsel for the wife conceded, this is a border-line case, we do not think that it is possible in this court to disturb the finding of the learned judge that the treatment of David by the husband was unjustifiable.

The second contention of counsel for the husband does raise a somewhat difficult question of fact. [HIS LORDSHIP considered the evidence as to the wife's health, and concluded thereon:] We are of the opinion that the finding of injury to health brought about by the husband's conduct was right.

G In view of this finding it is not necessary to decide the next question, namely, whether the learned judge was right in deciding that the conduct of the husband to David gave rise to reasonable apprehension of injury to the health of the wife, if she continued to live with her husband.

The learned judge commented on the fact that the eldest daughter, Valerie, H who knew most of the truth of the matter apart from the husband and wife, had not been called as a witness either by her mother or father. From this he drew the inference that Valerie's evidence had she been called would not have supported her mother's evidence at least in full and would not have supported her father's evidence either. Counsel for the husband contended before us that the learned judge was not entitled to draw the inference that her evidence would I not have supported the husband's evidence. Counsel for the husband could, if he had thought fit to do so, have compelled Valerie to give evidence on subpoena, but in the exercise of his discretion he did not do so. It is clear from the observations of the learned judge that the inference which he drew was far more adverse to the wife than to the husband, and we do not think that, in so far as he drew any inference unfavourable to the husband, he attached any weight to it. Counsel for the husband applied to us for leave to call Valerie as a witness before this court.

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(1) [1947] 1 All E.R. 582; [1947] A.C. 484.
(2) [1947] 1 All E.R. at p. 587; [1947] A.C. at p. 488.

He did not suggest that Valerie could not have been called as a witness at the trial, but stated that at that time she was unwilling to be called. In our view it would be wholly contrary to the practice of this court to allow her to be called in these circumstances, and the application was refused.

The next contention of counsel for the husband was that the facts found by the learned judge do not amount to cruelty in law. Counsel relied on the passage in the judgment of Sir James Hannen in *Birch* v. *Birch* (3), a case in which a husband frequently beat one of his children in the presence of the wife with great violence and without cause. Sir James Hannen said (4) that

> " With regard to the brutality of the husband towards the child, that cannot be relied upon. I do not say that it could not be under all circumstances; because, undoubtedly, if the evidence showed that the violence was committed upon the child for the express purpose of wounding the feelings of the mother to such an extent as to injure her health it would amount to cruelty. But there is nothing to support such a charge in this case . . ."

Counsel for the husband contended, in our view rightly, that there was no evidence of " express purpose " in this case.

Bucknill, L.J., in *Kaslefsky* v. *Kaslefsky* (5), referring to this passage said (6):

> " That is a clear statement that brutality to the child would not amount to cruelty to the wife unless it was shown to have been done for the express purpose of wounding her feelings in such a way as to injure her health. The question to be considered is whether the law contained in that decision of Sir James Hannen, J.O., has been modified by the decision of the Court of Appeal in *Squire* v. *Squire* (7). I do not think the decision in *Squire* v. *Squire* (7) has had that effect."

Later Bucknill, L.J., said (8):

> " I venture to think that that is one of the tests which one has to apply: Is the conduct of the wife, unless done for the express purpose of injuring the health of the husband, innocent in the sense that it is justified or justifiable in the circumstances? In cases such as refusal of sexual intercourse, or sheer laziness, or neglect of a child, I think that is conduct which is innocent so far as any charge of cruelty is concerned, unless it is done for the express purpose of causing injury to the health of the complaining spouse."

Somervell, L.J., agreed (9) with the judgment of Bucknill, L.J., and with the reasons given by him. Denning, L.J., drew a distinction between conduct of one spouse which consists of actions or words actually or physically directed at the other spouse and misconduct of one spouse indirectly affecting the other spouse, such as drunkenness, gambling or crime. He said (9) that in the former case, it is not essential that there should be a specific intent to injure or even cause distress: in the latter case, such misconduct

> " . . . can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also in some part with an intention to injure the other or to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct, especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not."

In *Squire* v. *Squire* (7), the Court of Appeal held that the principle that a

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(3) (1873), 28 L.T. 540.

(4) (1873), 28 L.T. at p. 541.

(5) [1950] 2 All E.R. 398; [1951] P. 38.

(6) [1950] 2 All E.R. at p. 401; [1951] P. at p. 43.

(7) [1948] 2 All E.R. 51; [1949] P. 51.

(8) [1950] 2 All E.R. at p. 401; [1951] P. at p. 44.

(9) [1950] 2 All E.R. at p. 402; [1951] P. at p. 46.

A person must be presumed to intend the natural and probable consequences of his or her acts is applicable to acts alleged to amount to cruelty in matrimonial causes. It is not therefore necessary to constitute cruelty that the conduct complained of should have proceeded from malignity or an intention to harm the complaining spouse. TUCKER, L.J., cited (10) with approval a passage in the judgment of SHEARMAN, J., in *Hadden* v. *Hadden* (11):

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> "I do not question he had no intention of being cruel but his intentional acts amounted to cruelty."

LORD MERRIMAN, P., in *Simpson* v. *Simpson* (12) expressed his agreement with *Squire* v. *Squire* (13) and adhered to that view when sitting in the House of Lords in *Jamieson* v. *Jamieson* (14). In *Jamieson* v. *Jamieson* (14), a wife's action in Scotland for divorce on the ground of cruelty, it was held by the House of Lords C that averments that the husband had been guilty of conduct calculated to hurt her and deliberately persisted in such conduct with knowledge of the resulting injury to her health were relevant to go to proof. LORD NORMAND said (15):

> "The Lord President, I think, reaches the crux of the case when he says that 'where the cruelty is of the type conveniently described as mental D cruelty, the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim'. There is room for differences of opinion about what kinds of case may be covered by the words 'unwarrantably indifferent'. I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case E a decisive importance and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference."

LORD MERRIMAN said (16):

> "I fully agree . . . that the averment of an intention on the part of the F husband to impose his will on the pursuer, and the averment of persistence in his callous conduct, although aware of its effect on his wife's health, both of which are plainly made, are important averments in this case. In saying this, however, I must not be taken to suggest that either in England or in Scotland it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty."

G LORD MERRIMAN then expressed his approval of *Squire* v. *Squire* (13). LORD REID said (17):

> ". . . there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to H continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health . . . What I have said is only intended to apply when a deliberate intention such as I have described was the cause of the defender's conduct. Such an intention need not be proved by direct evidence. It may be inferred from the whole facts and atmosphere disclosed by the proof. I do not doubt that there are many cases where I cruelty can be established without it being necessary to be satisfied by evidence that the defender had such an intention, but I do not intend to

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(10) [1948] 2 All E.R. at p. 53; [1949] P. at p. 57.
(11) "The Times", Dec. 5, 1919.
(12) [1951] 1 All E.R. 955 at p. 962; [1951] P. 320 at p. 333.
(13) [1948] 2 All E.R. 51; [1949] P. 51.
(14) [1952] 1 All E.R. 875; [1952] A.C. 525.
(15) [1952] 1 All E.R. at p. 877; [1952] A.C. at p. 535.
(16) [1952] 1 All E.R. at p. 880; [1952] A.C. at p. 540.
(17) [1952] 1 All E.R. at p. 886; [1952] A.C. at p. 548.

> decide anything about such cases. If the defender did not, in fact, intend to ill-treat the pursuer, I desire to reserve my opinion whether or to what extent it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts."

In *King* v. *King* (18) LORD REID repeated in substance the same observation. LORD MERRIMAN, P., in *Cooper* v. *Cooper* (19) pointed out that LORD REID was alone in this reservation and said (20):

> " Neither LORD NORMAND, nor LORD TUCKER who had delivered the principal judgment in *Squire* v. *Squire* (21), dealt with the point at all, while . . . I adhered to my opinion . . . that *Squire* v. *Squire* (21) was rightly decided."

LORD TUCKER in *Jamieson* v. *Jamieson* said (22):

> " Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of Lord KEITH) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. For this reason I agree with LORD KEITH that it is, generally speaking, not possible to compartment acts for the purposes of relevance as being gross so as to constitute cruelty . . ."

There is a line of cases, beginning in 1901, in which it has been held that indecent assaults on a child of the marriage or of one of the spouses and sexual offences against third parties may amount to cruelty to the innocent spouse, though in committing those acts the husband had no actual intention to injure his wife. These cases were reviewed by KARMINSKI, J., who gave the first judgment of the Divisional Court in *Cooper* v. *Cooper* (19). He began with *Thompson* v. *Thompson* (23) where the husband debauched the servants in the matrimonial home. He then referred to *Bosworthick* v. *Bosworthick* (24) (a case of indecent assault on little girls), and *Boyd* v. *Boyd* (25) where BUCKNILL, J., held that an indecent assault on a young girl had not amounted to constructive desertion, but granted a decree nisi for cruelty arising from the same offence.

In *Cooper* v. *Cooper* (19) the husband had been convicted of indecently assaulting a child of the marriage not in the presence of the wife. The wife's summons alleging persistent cruelty to her was dismissed by the justices on the ground that there was no evidence to show that the assault was committed in the presence of the wife and with the intention of causing his wife pain. The court held that the justices had misdirected themselves on the issue of cruelty and sent the case back to them for a re-hearing. The court held that an actual intent to injure is not an essential averment in cruelty, although in a doubtful case it may be of decisive importance. Conduct which is the consequence of mere obtuseness or indifference may none the less be cruelty.

This case was followed by the Court of Appeal in *Ivens* v. *Ivens* (26), where a husband had committed indecent assaults on the wife's daughter by a previous marriage. It was held that criminal and indecent assault by a husband on a child might amount to cruelty to the child's mother, although no intention to injure the mother was shown. In this case the husband must have known what the effect of his conduct would be on his wife and on her state of health and yet,

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(18) [1952] 2 All E.R. 584 at p. 593; [1953] A.C. 124 at p. 140.

(19) [1954] 3 All E.R. 415; [1955] P. 99.

(20) [1954] 3 All E.R. at p. 427; [1955] P. at p. 125.

(21) [1948] 2 All E.R. 51; [1949] P. 51.

(22) [1952] 1 All E.R. at p. 887; [1952] A.C. at p. 550.

(23) (1901), 85 L.T. 172.

(24) (1901), 86 L.T. 121.

(25) [1938] 4 All E.R. 181.

(26) [1954] 3 All E.R. 446; [1955] P. 129.

A careless and indifferent to what the effect would be, he continued with his indecent conduct. The facts proved were held to constitute a strong case of cruelty. In his judgment LORD GODDARD, C.J., referred (27) to *Daniell* v. *Daniell* (28) where the husband corrected his children by whipping though his wife objected to any corporal punishment being inflicted on them. LORD GODDARD explained that the reason why the court refused to hold that what was done in B that case amounted to cruelty to the wife was because it took the view that the husband was justified in chastising children so long as he did not do it in an unreasonable or brutal fashion.

In our view there is no difference in principle between the cases of indecent assault on a child of the marriage and cases of ill treatment of a child by beating. The distinction between them is that no evidence is required to establish that C an indecent assault (which in the words of LORD MERRIMAN, P. (29) is "directly relevant to the husband's conjugal obligations") is an unjustifiable act; whereas on the other hand, the petitioner who is relying on the beating of a child must show that what was done was more than reasonable chastisement and was unjustifiable. Where the act relied on is an indecent assault on a child of the marriage, little, if any, evidence is required to persuade the court that the husband D knew or must have known that his conduct would, or would be likely to, affect her health. On the other hand, where the wife is relying on ill treatment of the child by beating, she must prove facts from which the court should infer that the husband knew or must have known that his conduct would, or would be likely to, injure his wife's health, but it cannot be necessary to prove that the purpose was expressed in words. If that is what is meant by "express purpose" E in the judgment of SIR JAMES HANNEN which we have cited, we do not think it is possible to reconcile *Birch* v. *Birch* (30) and the passage in the judgment of BUCKNILL, L.J., in *Kaslefsky* v. *Kaslefsky* (31) to which we have referred with *Squire* v. *Squire* (32) unless BUCKNILL, L.J., was referring to conduct which was innocent in the sense that it is justifiable in the circumstances.

If the conduct of a husband towards a child of the marriage is unjustifiable, F as we find it to have been in this case, it is not necessary to aver or prove an express intention by the husband to injure the health of the wife. The husband knew that the wife was averse to his conduct, neurotic and anaemic as she was, and must have known that it was likely to cause injury to her health, as it did. We agree with the learned judge in finding that cruelty was established.

The answer of the husband contained a bare denial of cruelty. There was no G plea of condonation. The learned judge, however, had the duty of satisfying himself that the cruelty had not been condoned and found that the wife had not condoned the cruelty. [HIS LORDSHIP referred to the evidence on this point and, having agreed with WRANGHAM, J.'s finding thereon, concluded:] In our judgment this appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Warmingtons & Trevor Jones* (for the husband); *Barnett & Barnett* (for the wife).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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(27) [1954] 3 All E.R. at p. 447; [1955] P. at p. 130.

(28) "The Times", Feb. 2, 1954.

(29) See *Cooper* v. *Cooper*, [1954] 3 All E.R. at p. 426; [1955] P. at p. 123.

(30) (1873), 28 L.T. 540.

(31) [1950] 2 All E.R. at p. 401; [1951] P. at p. 44.

(32) [1948] 2 All E.R. 51; [1949] P. 51.

HENRY ANSBACHER & CO. *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), February 18, 1960.]

Stamp Duty—Guarantee—Sale agreement not under seal for sale of stock—Duty claimed on guarantee as " Mortgage, bond, debenture, covenant "—Whether duty chargeable ad valorem as on principal or primary security or chargeable at 10s. as on a collateral, or auxiliary, or additional, or substituted security—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *Sch.* 1, *Mortgage, Bond, etc.*

By a written contract of sale which was not under seal and was exempt from stamp duty as an agreement for the sale of stock under s. 35 (1) (a) of the Finance Act, 1949, the appellants agreed to purchase the stock units in a company. They were to pay 61s. for every 1s. ordinary stock payable on the first completion date plus a further sum on the second completion date to be ascertained when the amount of the compensation for the acquisition of the company's assets by the Federation of Malaya and Singapore was known. Under a term of the contract the appellants procured the execution and delivery by a bank of a guarantee of payment (to the extent of £750,000) of the second sum, the deed being expressed as supplemental to the sale agreement. The Commissioners of Inland Revenue determined that stamp duty was payable on the guarantee at the rate of 5s. per cent., amounting to £1,875, on the ground that the guarantee was chargeable under the head " Mortgage, bond, debenture, covenant . . . (1) " in Sch. 1 to the Stamp Act, 1891, as being the " only or principal or primary security " for payment of £750,000. On appeal,

Held: the guarantee did not fall under the heading of " mortgage, bond, debenture, covenant . . ." in Sch. 1 to the Stamp Act, 1891, because it was not " the only or principal or primary security . . . for the payment . . . of money " within the meaning of that heading, but was a secondary security to the contract of sale, which was the primary security for the purpose, although it did not itself fall within the heading as it was not under seal; accordingly the stamp duty on the guarantee would be assessed at 10s.

Appeal allowed.

[As to stamp duty payable on a mortgage, debenture, bond, covenant, see 28 HALSBURY'S LAWS (2nd Edn.) 477, para. 1008.

For the Stamp Act, 1891, Sch. 1, see 21 HALSBURY'S STATUTES (2nd Edn.) 682.]

Case Stated.

The appellants presented an instrument dated Dec. 9, 1957, to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty chargeable thereon. The instrument was called a deed of guarantee and was expressed to be supplemental to a contract of sale of stock in the Oriental Telephone and Electric Co., Ltd. Under it the National Bank, Ltd., guaranteed to the extent of £750,000 the payment to parties to the deed who were described as trustees of whatever sum should become payable to them by the appellants as purchasers of the stock under a clause of the contract of sale. The commissioners were of opinion that the guaranteee fell within the heading " Mortgage, bond, debenture, covenant . . . (1) " in Sch. 1 to the Stamp Act, 1891, and that it was " the only or principal or primary security . . . for the payment " of the sum of £750,000. They accordingly assessed it to duty at 5s. for every £100 of the sum of £750,000, viz., £1,875. The appellants contended that the sale agreement was a security and " the principal or primary security " for the specified sum and accordingly that the guarantee was not a principal or primary security within the heading: and that it was a " collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance . . . where the principal or primary security is duly stamped " within the same heading and as such should be liable to duty at the rate of 1s. for every £100 limited to a maximum of 10s. under s. 7 of the Revenue Act, 1903. The appellants required the commissioners to state and sign a Case for the opinion of the High Court.

J. G. Foster, Q.C., and *G. B. H. Dillon* for the appellants.
John Pennycuick, Q.C., and *E. Blanshard Stamp* for the Crown.

DANCKWERTS, J.: This is a case of stamp duty and, like most stamp duty cases, it is a troublesome matter. The question arises in this way. There was a contract of sale by which the appellants, a company but not a limited company, agreed to purchase for practical purposes all the ordinary stock units of a company called the Oriental Telephone and Electric Co., Ltd. It was subject to a condition that the shareholders should agree to this transaction and that condition was fulfilled, and therefore I may treat it for practical purposes as a definite contract between the contractors and the appellants for the sale and purchase of all the stock units in that company. The price was to be ascertained in this way. There was to be a payment of the sum of 61s. for every 1s. ordinary stock unit on the first completion date. The particular date does not matter. The date of the agreement was Oct. 29, 1957, and in the result, I think, the first completion date was Dec. 13, 1957. The amount of the second payment could not be ascertained at once, because the assets of the company had been acquired by the Federation of Malaya and Singapore, and the amount of the compensation could not be ascertained, but the agreement provided in effect that, when it had been ascertained, the amount should be paid off accordingly; that final payment would take place on the second completion date.

By cl. 11 of the agreement it was provided that the appellants should procure that the payment to the trustees of the sum, if any, payable to them under cl. 10 should be guaranteed to the extent of £750,000 by the National Bank, Ltd., executing and delivering to the trustees on the first completion date a deed of guarantee duly stamped in the form of the draft deed set out in Sch. 5 thereto, being the draft of the guarantee. Accordingly, such a guarantee was executed by the bank. It was expressed to be supplemental to the sale agreement and by it the bank guaranteed to the extent of £750,000

> " the due and punctual payment to the trustees of whatever sum shall in the event be payable to the trustees on the second completion date under the terms of cl. 10 of the said agreement."

The Commissioners of Inland Revenue being applied to on the question of what was the proper amount of the stamp duty on the guarantee, they paid duty at a rate of 5s. per cent., which amounts to the sum of £1,875. It is claimed, on the other hand, that the amount of stamp duty on the guarantee should be only 10s. I should add that, by virtue of the Finance Act, 1949, s. 35 (1) (a), the agreement for sale has not borne any stamp duty, as being exempted by that section as an agreement or memorandum of agreement for the sale of stock.

I now turn to the provisions under which the claim is made. The claim is made under a heading in Sch. 1 to the Stamp Act, 1891:

> " Mortgage, bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and warrant of attorney to confess and enter up judgment: (1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money . . ."

and then there are certain rates—for sums not exceeding £10 and going up to over £300 and also for any fractional part of £100 over £300 of the amount secured, 5s. per cent. There is a second paragraph which is material:

> " (2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the

> above-mentioned purpose where the principal or primary security is duly stamped."

Now that is the heading under which the payment of stamp duty in the present case is claimed by the commissioners, and it is the only one under which the claim is made. The other provisions to which I am about to refer are only material because of certain decisions which have been given on the provisions of a slightly different character.

Turning back to Sch. 1, there is a heading which starts with bonds:

> "Bond, covenant, or instrument of any kind whatsoever: (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack."

There is also a second paragraph similar to the one relating to the other group:

> "(2) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument is duly stamped."

I am not concerned with the question whether a claim might be made under either of the instruments in this case under that head or any other head. I am simply concerned with the claim made by the Crown in this case under the particular heading that I read first of all. The materiality of that other paragraph is this, that there have been several cases, which have been referred to in argument (I need not go through them), which have established, to the surprise of most people who come fresh to this Act, that "security" is not, as one would have supposed, securing payment of money by land or personal property being charged so as to make sure that the sum payable shall be discharged, but includes a mere promise to pay, although the instrument is not one which creates security for a debt and though there is no security in the conveyancing sense of the word but the debt is a purely unsecured debt. There is complete authority for that proposition in the cases to which I have been referred and those cases also establish that a primary security may be a mere instrument under hand for the purpose of the other heading (not the one which is the material one), and, if it has either been stamped with the proper duty or is exempt from duty, then any other document which is secondary to it cannot be stamped as a primary document and it may, at most, bear the lower rate of duty for which these headings provide.

The claim really is based on this proposition, as it seems. It is said, and it would appear correctly, that the instrument under hand in the present case, the sale agreement, cannot be a mortgage, bond, debenture or covenant within the material heading because it is not under seal, but it is also claimed on the part of the Crown that it cannot be "the only or principal or primary security" for the purpose of the provisions under these various headings, including in particular any mortgage, bond, debenture or covenant, because, for the same reason, it is not under seal; and therefore it is said that it does not come within para. 1 of the heading "Mortgage, bond, debenture, covenant". That may be perfectly correct, but it does not seem to me that that makes what is, in effect, a secondary security become the primary security within the meaning of the Act. It remains a secondary document, even though it is secondary to some document which is not a security under seal within the term "Mortgage, bond, debenture, covenant", and the argument put up on behalf of the Commissioners of Inland Revenue supports this result, because the words in para. 2 of the heading "Mortgage, bond, debenture, covenant" must mean some document which is secondary to the document mentioned in para. 1. The guarantee may well be a document which is not a secondary document to any document within para. 1 under the heading " Mortgage, bond, debenture, covenant ". The result seems to me to be that it does not come within this heading at all, and it does not become a primary document when it is not a primary document.

That, shortly, is the argument and, if it is analysed in that manner, it seems to me that the answer is perfectly plain, that neither the sale agreement under hand nor the guarantee by the bank under seal is a document within " Mortgage, bond, debenture, covenant " and that the guarantee remains a secondary document. It is a collateral, auxiliary, additional or substituted security to a security of another kind than that mentioned in " Mortgage, bond, debenture, covenant ", but it is not by virtue of that, for purposes of that heading, a primary document or the only document, or the only or principal or primary security, and it seems, therefore, that the claim for duty is misplaced in the way it was made. Therefore, the appeal should be allowed with costs.

Appeal allowed. Stamp duty payable determined at 10s.

Solicitors: *Herbert Smith & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

In the Estate of COOK (*deceased*). MURISON *v.* COOK AND ANOTHER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), February 19, 1960.]

Will—Execution—Signature—Holograph will attested properly but signed " your loving mother "—Whether a signature within the meaning of the Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *s.* 9.

A testatrix drew up a holograph will which was duly attested by two competent witnesses in accordance with the provisions of the Wills Act, 1837, s. 9*. She commenced the document " I, Emmie Cook . . . declare this to be my last will . . ." and, after making certain dispositions of her property, concluded: " Please Leslie be kind to Dot. Your loving mother ". Leslie was her son and " Dot " referred to one of her daughters. On an application to the court to have probate of the will pronounced in solemn form, notwithstanding that it was not signed in the testatrix' own name,

Held: that the will had been properly executed and would be admitted to probate as the words used by the testatrix in signing the will were meant to represent her name.

In the Goods of Sperling ((1863), 3 Sw. & Tr. 272) followed.

[As to what constitutes signature for the formal validity of wills, see 34 HALSBURY'S LAWS (2nd Edn.) 55-57, paras. 65-69 and SUPPLEMENT; and for cases on the subject, see 44 DIGEST 249-251, *752-773* and SUPPLEMENTS.

For the Wills Act, 1837, s. 9, see 26 HALSBURY'S STATUTES (2nd Edn.) 1332.]

Cases referred to:

Baker v. *Dening*, (1838), 8 Ad. & El. 94; 7 L.J.Q.B. 137; 112 E.R. 771; 44 Digest 249, *760*.

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* Section 9 of the Wills Act, 1837, reads as follows: ". . . No will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator . . . and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Hindmarsh v. *Charlton*, (1861), 8 H.L. Cas. 160; 4 L.T. 125; 25 J.P. 339; 11 E.R. 388; 44 Digest 261, *882*.

Redding (*otherwise Higgins*), *In the Goods of*, (1850), 2 Rob. Eccl. 339; 16 L.T.O.S. 177; 163 E.R. 1338; 44 Digest 250, *773*.

Sperling, In the Goods of, (1863), 3 Sw. & Tr. 272; 33 L.J.P.M. & A. 25; 9 L.T. 348; 27 J.P. 777; 164 E.R. 1279; 44 Digest 272, *1029*.

Probate Action.

This was a probate action between the plaintiff, Doris Edith Murison, and the defendants, Leslie Langdon Cook and Marjorie Cann-Lippincott, all of whom were children of the deceased testatrix, Emma Edith Cook, who died on Nov. 28, 1956. The action was compromised and by the terms of the settlement the court was asked to pronounce in solemn form for a will of the deceased dated Oct. 28, 1956. This will had been written on two sheets of notepaper by the deceased and commenced: "I, Emmie Cook . . . declare this to be my last will . . ."; it ended "Please Leslie be kind to Dot. Your loving mother". "Leslie" referred to the first defendant and "Dot" referred to the plaintiff. Then followed observations of a general character and the will was attested by two competent witnesses in accordance with the provisions of s. 9 of the Wills Act, 1837. The only question before the court was whether the expression "Your loving mother" constituted a signature within the meaning of that Act. It was agreed between the parties that whether or not the court pronounced for the will, the estate of the deceased would be distributed in accordance with the provisions of the said will.

Counsel for the plaintiff referred to the authorities mentioned in the judgment, citing in particular the judgment of SIR HERBERT JENNER FUST in *In the Goods of Redding* (*otherwise Higgins*)* and the opinions of LORD CRANWORTH and LORD CHELMSFORD in *Hindmarsh* v. *Charlton*†. He also drew the court's attention to a passage in the judgment of MAULE, J., in *Morton* v. *Copeland*‡ where, although not in relation to a will, he said§:

> "Signature does not necessarily mean writing a person's christian and surname, but any mark which identifies it as the act of the party."

Counsel submitted that this was the most clear statement of principle to be found from the cases, and that any writing by a person intended to describe himself or herself and to identify the writer as the subscriber of a document, including such a description as was found here, "your loving mother", was sufficient signature.

John Latey, Q.C., E. R. Moulton-Barrett, and *B. H. Anns* for the plaintiff, Doris Edith Murison.

A. Richard Ellis for the first defendant, Leslie Langdon Cook.

R. G. Freeman for the second defendant, Marjorie Cann-Lippincott.

COLLINGWOOD, J.: In this case there is no doubt that the requirements of the Wills Act, 1837, have been complied with so far as attestation is concerned; the only question is whether the will has been signed within the meaning of that Act.

By this document dated Oct. 28, 1956, the deceased Emma Edith Cook begins by saying: "I Emmie Cook of 38 Maida Vale, W.9, declare this to be my last will which I make", etc.; in the presence of the two witnesses instead of signing her name she put "Your loving mother". Her words were—"Please Leslie be kind to Dot. Your loving mother".

Counsel for the plaintiff has referred me to several authorities, the most important of which is *In the Goods of Sperling* (1). That was a case where the deceased having signed his will in the presence of a servant, the servant described

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* (1850), 2 Rob. Eccl. at p. 340.

† (1861), 8 H.L. Cas. at pp. 168-170 and p. 171 respectively.

‡ (1855), 16 C.B. 517.

§ (1855), 16 C.B. at p. 535, but see ibid., note (a).

(1) (1863), 3 Sw. & Tr. 272.

A himself as " Servant to Mr. Sperling ", not writing his name or giving any further identification. That was held to be a sufficient attestation and subscription and WILDE, J., giving the short judgment, said (2):

> " I think that there is a sufficient attestation and subscription. I am satisfied that Saunders [i.e., the servant] wrote the words which appear on the will, intending thereby an identification of himself as the person B attesting."

I think that the same test would be applicable to the case of a testator.

In *Baker* v. *Dening* (3) the headnote reads as follows:

> " Under the Statute of Frauds [1677] the making of a mark by a devisor, to a will of real estate, is a sufficient signing; and it is not necessary to prove C that he could not write his name at the time."

In his judgment COLERIDGE, J., said (4):

> " I should be sorry if our decision were to lead to the practice of substituting a mark for a name, for this might give much opportunity for fraud. But here we are on the question of law, whether, if a party make his mark, D that be a signature, although he could have written his name. How can we say that it is not, when we look at the statute [i.e., the Statute of Frauds, 1677] and find what is admitted in argument? The statute has only the word ' signed '; and it is admitted that, in some cases, this is satisfied by a mark. When I consider the inconvenience which would result from inquiring, in all cases, whether the party who has made a mark could write E at all, or could write at the particular time, I think it would be wrong to raise a doubt by granting a rule."

Then, in *In the Goods of Redding* (*otherwise Higgins*) (5), the headnote reads:

> " A testatrix, having duly executed her will under an assumed name, subsequently altered the will by erasing that name, and signing her true name; but the witnesses did not subscribe the will as altered. Probate was F granted of the will as it originally stood, as the court considered the assumed name might be regarded as the mark of the testatrix."

Finally, there is the decision in *Hindmarsh* v. *Charlton* (6), where LORD CAMPBELL, L.C., in the course of his opinion said (7):

> " I will lay down this as my notion of the law: that to make a valid G subscription of a witness, there must either be the name or some mark which is intended to represent the name."

Applying those principles to the present case, I am quite satisfied here that the words " Your loving mother " were meant to represent the name of Emma Edith Cook, the testatrix, and, accordingly, I pronounce for the will of Oct. 28, 1956, in solemn form and the terms of compromise will be made a rule of court.

Solicitors: *James B. Holt* (for the plaintiff, Doris Edith Murison); *Tamplin, Joseph & Flux* (for the first defendant, Leslie Langdon Cook); *Millard & Potts* (for the second defendant, Marjorie Cann-Lippincott).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law*.]

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(2) (1863), 3 Sw. & Tr. at p. 273.

(3) (1838), 8 Ad. & El. 94.

(4) (1838), 8 Ad. & El. at p. 98.

(5) (1850), 2 Rob. Eccl. 339.

(6) (1861), 8 H.L. Cas. 160.

(7) (1861), 8 H.L. Cas. at p. 167.

AUTEN *v.* RAYNER AND OTHERS.

[QUEEN'S BENCH DIVISION (Glyn-Jones, J.), February 25, 1960.]

Discovery—Production of documents—Privilege—Production contrary to the public interest—Police officer's diaries—Director of Public Prosecution's memoranda—Right of Attorney-General to claim privilege in face of court without swearing an affidavit.

Discovery—Production of documents—Privilege—Legal professional privilege—Whether Director of Public Prosecutions entitled to legal professional privilege.

In an action commenced on Sept. 1, 1956, the plaintiff charged the defendants, one of whom was a police officer employed in the Company Fraud Department of the C.I.D., with malicious prosecution, false imprisonment, malicious arrest and malicious abuse of process. Certain entries in diaries which had been kept by the defendant police officer were sealed by being covered with brown paper. The Secretary of State swore an affidavit objecting to the disclosure of these entries on the ground that it would be injurious to the public interest as the entries indicated sources of information given in confidence for the purpose of a criminal investigation. The plaintiff applied during the trial of the action to have certain of these entries unsealed on the ground that evidence had been given at the trial which suggested that the entries did not contain anything to indicate such sources of information.

In the sixth week of the trial, on Feb. 25, 1960, the plaintiff served a subpoena duces tecum, which had been issued on Jan. 20, 1960, on one M., in the office of the Director of Public Prosecutions, requiring him to produce the following documents:—(1) all correspondence and other documents in his possession relating to matters in issue in the action, particularly to the investigations, preliminary proceedings, seeking and interviewing of witnesses and trial in a prosecution against the plaintiff at the Central Criminal Court; (2) reports of the defendant police officer and of other police officers; (3) memoranda or notes of interviews; (4) relevant entries in M.'s official diaries; (5) notes of conferences, briefs and instructions to prosecuting counsel at the Central Criminal Court and any opinions from them; and (6) proofs of witnesses and all other material accompanying those briefs. The Attorney-General appeared before the court to claim that the subpoena should be set aside, to claim Crown privilege in respect of documents (3) (4) and legal professional privilege on behalf of the Director of Public Prosecutions in respect of documents (5) (6). No affidavit was tendered in support of the claim of Crown privilege for documents (3) (4), but in previous proceedings* the Court of Appeal had held that documents (2), in so far as they were in possession of the defendant police officer, were privileged.

Held: (i) documents (3) and (4), viz., the memoranda, notes of interviews and entries in official diaries of the office of the Director of Public Prosecutions, were the subject of Crown privilege; the Director was entitled to legal professional privilege against production in respect of documents (5) and (6), viz., the notes of conferences, briefs, proofs of witnesses and instructions to counsel at the Central Criminal Court and their opinions thereon, because the rules of public policy that had established the right of a client and solicitor to claim privilege applied with equal, if not greater, force to the Director (see p. 696, letter G, post).

(ii) late service of a subpoena duces tecum was not sufficient ground for setting it aside (see p. 695, letter I, post), but the subpoena would be set aside in the circumstances of this case since the documents in paras. (2)-(6) were privileged and almost all those within para. (1) fell within one or other of paras. (2)-(6).

(iii) the claim of Crown privilege in regard to the sealed entries in the

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* Reported [1958] 3 All E.R. 566.

A diaries was not a claim in respect of a class of documents; the claim was conclusive and accordingly the sealed entries would not be unsealed.

Per CURIAM: the Attorney-General was entitled to appear and to claim Crown privilege (as also legal professional privilege) on behalf of the Director of Public Prosecutions without making an affidavit and the court would not go behind the claim (see p. 696, letter E, post).

B [As to production of documents where disclosure is contrary to public interest, see 12 HALSBURY'S LAWS (3rd Edn.) 54, para. 73; and for cases on the subject, see 18 DIGEST (Repl.) 139-142, *1256-1282*.

As to the nature and extent of legal professional privilege, see 12 HALSBURY'S LAWS (3rd Edn.) 39, para. 56 and 41, para. 58; for cases on the subject, see 18 DIGEST (Repl.) 90-98, *743-818*.

C As to sealing privileged parts of documents, see 12 HALSBURY'S LAWS (3rd Edn.) 29, para. 40.

As to production of documents by subpoena duces tecum and objection thereto, see 15 HALSBURY'S LAWS (3rd Edn.) 427, 428, paras. 771, 772; for cases on the setting aside of a subpoena duces tecum, see 22 DIGEST (Repl.) 422, *4574-4577*.]

D Case referred to:

Auten v. *Rayner*, [1958] 3 All E.R. 566; [1958] 1 W.L.R. 1300; 3rd Digest Supp.

Actions.

In an action commenced by writ dated Sept. 1, 1956, the plaintiff, Harold William Auten, claimed against Gordon William George Rayner, his wife Eileen E Mowbray Rayner and Patrick Bolongaro, a detective-constable (now detective-sergeant) stationed at Scotland Yard and employed at all material times in the Company Fraud Department of the C.I.D., damages for conspiracy, malicious prosecution, false imprisonment, malicious arrest, malicious abuse of process and injurious falsehood. Consolidated with that action was a further action by the plaintiff against Baker, Todman & Co., a firm of accountants, and Peter F Jones claiming damages for conspiracy to cheat and injure the plaintiff and for breach of duty. On Nov. 4, 1958, the Court of Appeal, dismissing an interlocutory appeal by the plaintiff from an order of ASHWORTH, J., dated July 9, 1958, held ([1958] 3 All E.R. 566) that documents specified in an affidavit sworn by the defendant Bolongaro, namely, reports made by Bolongaro to his superior officers in the Metropolitan Police Force and communications passing between G the Metropolitan Police Force and other police forces, were privileged from production, the Secretary of State having determined that they should be withheld from production. On the same date, Nov. 4, 1958, the Court of Appeal dismissed a further interlocutory appeal by the plaintiff from an order of ASHWORTH, J., dated July 9, 1958, refusing to order Det. Sgt. Bolongaro to produce for inspection certain diaries specified in his affidavit of documents, alternatively H refusing to order the Commissioner of Metropolitan Police to produce the diaries; that appeal was dismissed because the parties to it had agreed that in subsequent proceedings the diaries should be treated as having been disclosed to the plaintiff by Det. Sgt. Bolongaro in the ordinary course of discovery and as being open to whatever challenge the law permitted in respect of all entries sought to be withheld by or on behalf of Bolongaro, the Commissioner of Police or Her I Majesty's Government. In an affidavit sworn by the Secretary of State on Oct. 21, 1958, the Secretary, after stating that those entries in the diaries which were covered up with blue paper or were folded over with adhesive material did not relate to any matter in question in the actions, went on to say:

> "I have carefully considered the contents of the remaining entries in the said diaries and I have formed the opinion that it would be injurious to the public interest if those entries which I have caused to be covered up with brown paper were to be disclosed because they indicate or tend to identify

> the sources of information given in confidence for the purpose of a criminal investigation or tend to disclose the identity of persons who were interviewed with a view to obtaining in confidence information for the said purpose or meeting-places at which informers or potential informers were interviewed. Accordingly I object to the disclosure of the entries covered up with brown paper."

The plaintiff now applied to the court to have unsealed some of the entries covered up with brown paper in the diaries and this application was objected to by the Attorney-General on the ground of the affidavit sworn by the Secretary of State on Oct. 21, 1958. Further, the plaintiff served a subpoena duces tecum on Mr. MacDermott of the office of the Director of Public Prosecutions to produce the following documents set out in the subpoena:

> " 1. All correspondence and other documents in Mr. MacDermott's possession relating to the matters in issue in this suit and in particular to the investigations, the preliminary proceedings, the seeking and interviewing of potential witnesses, and the trial in the prosecution *R.* v. *Auten*. 2. Reports of the defendant Bolongaro and of other officers of the Metropolitan or other police forces. 3. Memoranda or notes of interviews. 4. Relevant entries in your official diaries for the material period. 5. Notes of conferences, your briefs and instructions to prosecuting counsel at the Central Criminal Court, and any opinions from them. 6. Proofs of witnesses and all other material accompanying your briefs."

The Attorney-General now applied to the court to have the subpoena set aside on the grounds that the documents in paras. 2, 3 and 4 were entitled to Crown privilege and that the Director of Public Prosecutions was entitled to claim legal professional privilege for the documents in paras. 5 and 6. The subpoena was issued on Jan. 20, 1960, but was not served on Mr. MacDermott until Feb. 25, 1960, i.e., in the sixth week of the trial which began on Jan. 18, 1960.

Neil Lawson, Q.C., J. F. F. Platts-Mills and *D. J. Turner-Samuels* for the plaintiff.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*), *J. R. Cumming-Bruce* and *R. A. Barr* for the Crown.

Christmas Humphreys, Q.C., and *H. K. Woolf* for the defendants Lieutenant-Colonel and Mrs. Rayner.

G. De P. Veale, Q.C., and *W. W. Stabb* for the defendant Bolongaro.

Maurice Lyell, Q.C., and *S. H. Noakes* for the defendants Baker, Todman & Co. and Peter Jones.

GLYN-JONES, J.: Two matters are raised. The first concerns certain entries in diaries kept by the defendant Bolongaro. Some of the entries in those diaries are covered up in blue paper. Those are entries which do not contain any matter relevant to this trial. Others have been sealed and covered up with brown paper. The remainder are left exposed and are open to me or to the parties to read. In respect of entries covered up in brown paper I have an affidavit from the Secretary of State in which he says that he has personally examined the entries. He says:

> " I have carefully considered the contents of the remaining entries in the said diaries and I have formed the opinion that it would be injurious to the public interest if those entries which I have caused to be covered up with brown paper were to be disclosed . . . [Then he gives his reasons] because they indicate or tend to identify the sources of information given in confidence for the purpose of a criminal investigation . . ."

The Secretary of State says: " I object to the disclosure of the entries covered up with brown paper."

Counsel for the plaintiff refers me to a sentence in the judgment of the Court of Appeal on an interlocutory appeal in this very case, *Auten* v. *Rayner* (1), which reads as follows:

> "In particular, we express now no view on the question (which in our judgment does not arise on this appeal) what the result might be in a case where the Secretary of State's certificate or conclusion was on the face of it expressly based on the premise that the document or documents which he had determined to withhold was or were of a particular character or class and it were then shown aliunde that in fact he had been mistaken in the premise."

Counsel for the plaintiff says that evidence has been given in this case which appears to suggest that a particular entry, which he takes as illustrating his point, in all probability does not contain anything which would indicate or tend to identify the sources of information, and so on, spoken of by the Secretary of State in his affidavit. I think, however, that the Attorney-General is quite right in saying that this is not a case in which privilege is claimed for a class of documents which are described so that, if aliunde I were to discover that a particular document fell outside that class and had been mistakenly included, I might look at it. It is a case in which the Secretary of State by his affidavit says that he has looked at these particular entries, and what he has said in his affidavit applies to each and every entry. In my view, I have no power to go behind the Secretary of State's certificate and look at any of the entries in respect of which and each of which Crown privilege is claimed.

A second question has arisen on which I have had the Attorney-General's assistance. The writs in these actions were issued on Sept. 1, 1956. The pleadings amount to a bundle of 334 pages; that is excluding all the affidavits, interrogatories and the like. The bundle consists solely of pleadings and the interlocutory orders on such questions as discovery of documents. There has been the most prolonged and searching consideration of what documents should or should not be disclosed that I have ever seen in a case in my experience. There is case after case in which the master has been asked to decide about documents; case after case in which the master's decision has been taken on appeal to the judge; and two cases (2) in which the decision of the judge in chambers has gone to the Court of Appeal. The parties have obviously given profound study to the question of what documents ought to be available before the court in this case. It has been manifest, I think, since the case started that a question would arise here as to the reports made by the defendant Bolongaro—he is now a detective-sergeant—and other documents in the possession of the Director of Public Prosecutions; and yet not until today, in the sixth week of the trial, is there served on the representative (3) of the Director who conducted the prosecution out of which the claim for malicious prosecution arises, or, at any rate, the proceedings before the examining magistrate, the subpoena duces tecum, which I see was issued as long ago as Jan. 20, 1960, and it is only as the Attorney-General was on his way to court to give me the benefit of his help in respect of and in answer to counsel for the plaintiff's claim to unseal some of the brown entries in the diaries, that the Attorney-General learns for the first time of the issue of such a subpoena. If I felt free, in the exercise of my discretion, to set aside this subpoena on the ground that it has not been served until today, I would do so, but I doubt whether I have discretion so to do. I do not think that, within the authorities (4), the fact that a subpoena is served late is sufficient ground for saying the service of it is an abuse of the process of the court. But I am asked to set aside the subpoena for other reasons, and it is said that the rules of law compel me to do so. The subpoena requires Mr. MacDermott, who is in the office of the Director of Public Prosecutions, to produce five classes of documents. [HIS LORDSHIP stated the classes of documents (2)-(6) (see p. 694, letter D, ante) and continued:] So far as the "Reports of the defendant Bolongaro and of other officers of the Metropolitan or other police forces" (5) are concerned, these are the very reports in respect of which Crown privilege has already been claimed, and in so far as they were at one time, or in so far as any of them were at one time in possession of the defendant Bolongaro, the Court of Appeal (6) decided that he could not be called on to produce them. They are the same documents still:—police reports by the defendant Bolongaro to his superiors, or by other officers of the Metropolitan Police Force to the Director or by members of any other police force to the Metropolitan Police Force. The Attorney-General says that in so far as it is necessary for him to do so, he would here and now claim Crown privilege, or, alternatively that the claim to Crown privilege already made in respect of these documents so far as they were in the possession of Bolongaro still applies to prevent their production. I am quite sure that is right.

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(1) [1958] 3 All E.R. at p. 572.

(2) One of which is reported in [1958] 3 All E.R. 566.

(3) Mr. MacDermott.

(4) See 22 DIGEST (Repl.) 422, *4574-4577*.

If it should be necessary—I do not think it is—for any formal claim in respect of the production of these documents by Mr. MacDermott to be made by any other Minister of the Crown, I should undoubtedly have refused to order the production of the documents for a sufficient time to enable the claim to be made.

So far as the documents in paras. 3 and 4 of the subpoena are concerned—"3. Memoranda or notes of interviews. 4. Relevant entries in your official diaries"—that is, in Mr. MacDermott's official diaries—they are documents in respect of which the Attorney-General himself here and now claims Crown privilege, and I cannot go behind that claim. It is quite unnecessary to put the Attorney-General to the trouble of swearing an affidavit. He is obviously entitled to come into court and make his claim to Crown privilege in face of the court, and he has done so. Those documents are not to be produced.

So far as documents in paras. 5 and 6 of the subpoena are concerned (7), the Attorney-General says that the Director of Public Prosecutions is entitled to claim a professional privilege analogous to the privilege claimed in respect of documents in the possession of a solicitor. There is perhaps a little difficulty there, because the right to claim privilege is that of the client rather than the solicitor. The Attorney-General says that for the purpose of such a claim to privilege, the Director is his own client. I am not sure that there is a precise analogy between the position of the Director and the position of a solicitor; but those rules of public policy which have resulted in there being established a right of a client and solicitor to claim privilege as to documents and statements in the possession of the solicitor appear to me to apply with equal, if not greater, force to the position of the Director of Public Prosecutions. I regret having to make such a ruling on the spur of the moment, as it were, and without having had the benefit of that fuller argument which I am sure I should have had if, as I say, the Attorney-General had not been confronted with this document almost on his way to the court, but I think, however full the argument (8), I should arrive at the same conclusion, and I should much prefer to give my judgment straight away rather than cause any further delay in this case which has already lasted long enough.

I am going to order this subpoena to be set aside so far as all documents mentioned in paras. 2, 3, 4, 5 and 6 are concerned. So far as the documents in para. 1 are concerned (9), it seems to me that almost all of those must fall in one or other of the classes in paras. 2, 3, 4, 5 and 6, and I think that the simplest thing for me to do is to set aside the subpoena in respect of that paragraph also. I can hardly conceive that there can be any documents which fall outside the classes which I have expressly excluded, and I shall take the risk if there are any. I shall set aside the subpoena.

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(5) These are the documents referred to in para. 2 of the subpoena.

(6) [1958] 3 All E.R. 566.

(7) Viz., notes of conferences and briefs and instructions to prosecuting counsel in *R.* v. *Auten* at the Central Criminal Court, and proofs of witnesses and all other material accompanying counsel's briefs.

(8) The following cases were cited to the court: *Marks* v. *Beyfus*, (1890), 25 Q.B.D. at pp. 496, 498 and *Hobbs* v. *Hobbs & Cousens*, [1959] 3 All E.R. at p. 829.

(9) See p. 694, letter C, ante.

Application to unseal entries covered in brown paper in diaries of the defendant Bolongaro refused. Subpoena duces tecum set aside.

Solicitors: *W. H. Thompson* (for the plaintiff); *Treasury Solicitor* (for the Crown); *Herbert Baron & Co.* (for the defendants Lieutenant-Colonel and Mrs. Rayner); *Solicitor, Metropolitan Police* (for the defendant Bolongaro); *Chamberlain & Co.* (for the defendants Baker, Todman & Co., and Peter Jones).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* BERNSTEIN.

[CHANCERY DIVISION (Danckwerts, J.), February 15, 1960.]

Surtax—Settlement—Settlor retaining interest—Accumulation of income during settlor's lifetime—Trusts in favour of settlor's wife and unborn children—Beneficiaries benefiting on settlor's death—Power of advancement negatived by trust for accumulation—No assumption for tax purposes that child would not be born when wife beyond child-bearing age—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2 *c.* 10), *s.* 405 (1), (2)—*Trustee Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 32 (1), *s.* 69 (2).

Trust and Trustee—Powers of trustee—Power of advancement—Exclusion by trust for accumulation—Contrary intention—Trust after settlor's death as to one-third for children and as to two-thirds for widow—Children's interests not prior interests—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 32 (1), *s.* 69 (2).

In a settlement, dated Oct. 16, 1947, making provision for his future wife, a settlor directed the trustees to accumulate the income of the trust fund by investing it and the resulting income therefrom in authorised investments in augmentation of the capital of the fund for the benefit of the person eventually becoming entitled thereto. After his death the fund was to be held in trust as to one-third for any children of the marriage then living and as to two-thirds for the wife absolutely but, if she should die in the settlor's lifetime leaving children, then for the children of the marriage living at the settlor's death. There had been no child of the marriage. The settlor was assessed to surtax on the basis that half the income arising under the settlement should be treated as his income under s. 405 (1), (2)* of the Income Tax Act, 1952, on the ground that he was deemed to have an interest therein because income might become payable to his wife by virtue of an exercise in her favour of the statutory power of advancement (allegedly applicable to one half of the capital of the trust fund) under s. 32 (1) of the Trustee Act, 1925. On appeal,

Held: (i) the power of advancement under s. 32 (1)† of the Trustee Act, 1925, did not apply to the settlement during the settlor's lifetime, since the trust for accumulation showed, on the true construction of the settlement, an intention inconsistent with an advance of capital being made and thus constituted an expression of a contrary intention (within s. 69 (2)) excluding

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* The relevant terms of s. 405 (1), (2) of the Income Tax Act, 1952, are printed at p. 700, letters D and E, post.

† The terms of s. 32 (1) and s. 69 (2) of the Trustee Act, 1925, are printed at p. 700, letter G, and p. 701, letter C, post.

s. 32; therefore, income arising under the settlement could not be treated A as income of the settlor for surtax purposes.

Re Turner's Will Trusts ([1936] 2 All E.R. 1435) applied.

(ii) children of the marriage had not prior interests within s. 32 (1) proviso (c) of the Trustee Act, 1925, to that of the wife, so as to necessitate their consent to any exercise of the power of advancement, if it had been applicable to the settlement. B

(iii) the rule of administration whereby the court might allow distribution of a trust fund on the footing that a woman was past child-bearing was inapplicable for the purpose of attracting liability on the part of the husband to surtax in relation to the settlement; nor was it to be presumed, e.g., for the purposes of the rule against perpetuities, that a woman was past the age of child-bearing. C

Re Deloitte, Griffiths v. *Deloitte* ([1925] All E.R. Rep. 118) and *Re Dawson, Johnston* v. *Hill* ((1888), 39 Ch.D. 155) applied.

Appeal dismissed, but for different reasons.

[As to income from settlements being deemed to be income of the settlor through retention of an interest therein, see 20 HALSBURY'S LAWS (3rd Edn.) 583, 584, paras. 1139, 1140; D and for cases on the subject, see 28 DIGEST (Repl.) 292-294, *1279-1287*.

As to powers of advancement under a settlement, see 29 HALSBURY'S LAWS (2nd Edn.) 776, para. 1083; and for cases on the subject, see 43 DIGEST 789, 790, *2274-2285*.

For the Income Tax Act, 1952, s. 405, see 31 HALSBURY'S STATUTES (2nd Edn.) 382; E and for the Trustee Act, 1925, s. 32 (1), s. 69 (2), see 26 HALSBURY'S STATUTES (2nd Edn.) 99, 157.]

Cases referred to:

Blake, Re, Berry v. *Geen*, [1938] 2 All E.R. 362; 107 L.J.Ch. 173; sub nom. *Berry* v. *Geen*, [1938] A.C. 575; 159 L.T. 122; Digest Supp.

Dawson, Re, Johnston v. *Hill*, (1888), 39 Ch.D. 155; 57 L.J.Ch. 1061; 59 L.T. F 725; 22 Digest (Repl.) 170, *1559*.

Deloitte, Re, Griffiths v. *Deloitte*, [1925] All E.R. Rep. 118; [1926] Ch. 56; 95 L.J.Ch. 154; 135 L.T. 150; 37 Digest 149, *752*.

Hocking, Re, Michell v. *Loe*, [1898] 2 Ch. 567; 67 L.J.Ch. 662; 79 L.T. 164; 22 Digest (Repl.) 171, *1574*.

Ricarde-Seaver's Will Trusts, Re, Midland Bank Executor & Trustee Co., Ltd. G v. *Sandbrook*, [1936] 1 All E.R. 580.; 154 L.T. 599; 23 Digest (Repl.) 462, *5337*.

Spencer, Re, Lloyds Bank, Ltd. v. *Spencer*, [1935] Ch. 533; 104 L.J.Ch. 127; 153 L.T. 121; 28 Digest (Repl.) 569, *842*.

Turner's Will Trusts, Re, District Bank, Ltd. v. *Turner*, [1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266; 28 Digest (Repl.) 569, H *843*.

Case Stated.

The taxpayer, the settlor of a settlement, appealed to the Special Commissioners of Income Tax against assessments to surtax made on him in the following amounts: 1950-51, £6,102 (additional); 1951-52, £6,659; 1952-53, £1,338 I (additional); 1953-54, £4,630 (additional). The question for determination was whether income arising in each of those years under a settlement dated Oct. 16, 1947, should be treated as income of the settlor under s. 405 of the Income Tax Act, 1952. All income from the trust fund the subject of the settlement had been accumulated in accordance with cl. 2 of the settlement, set out at p. 699, letter H, post. It was common ground that the question depended on whether the settlor had " an interest in any income arising under or property comprised in " the settlement within s. 405 (1), (2), and that this depended on whether the statutory power of advancement contained in s. 32 (1) of the Trustee Act, 1925, was applicable to the settlement and could be exercised in favour of the settlor's wife. The Crown contended: (i) that the trustees of the settlement had power under s. 32 of the Act of 1925 at any time to pay or apply for the advancement or benefit of the settlor's wife one half of the trust fund; (ii) that by virtue of such power one half of the property comprised in the settlement might become payable to or applicable for the benefit of the settlor's wife within s. 405 (2) of the Income Tax Act, 1952; and (iii) that by s. 405 (1) and proviso (a) thereto of the Act one half of the income arising under the settlement in the relevant years was accordingly to be treated as the settlor's income. The settlor contended: (i) that the power of advancement contained in s. 32 of the Trustee Act, 1925, was not applicable to the settlement inasmuch as on the true construction of the deed of settlement it contained an indication of a contrary intention within s. 69 (2) of the Trustee Act, 1925; and (ii) that, even if the statutory power of advancement was to be read into the deed of settlement, such power could not be exercised in favour of the settlor's wife without the prior consent of the persons (born or unborn) who had " prior interests " within s. 32 (1) proviso (c) of the Act of 1925, and that possible children of the marriage had such prior interests and, their consent being unobtainable at any time during the period of accumulation, the statutory power of advancement could never be exercised in respect of the money in which such children had such prior interests, which extended to the income of the whole of the trust fund and the accumulations of the income thereof and alternatively to one-third of the trust fund. The commissioners held that the statutory power of advancement was not inconsistent with any express provision in the settlement and must be read into it and that the interests of the unborn children were prior interests within proviso (c), with the consequence that no advancement could be made owing to the impossibility of obtaining their consents. They therefore allowed the appeal and discharged the assessments. The Crown appealed by way of Case Stated to the High Court.

John Pennycuick, Q.C., *E. Blanshard Stamp* and *A. S. Orr* for the Crown.
Sir Lynn Ungoed-Thomas, Q.C., and *C. N. Beattie* for the settlor (the taxpayer).

DANCKWERTS, J.: This is an appeal by the Crown from the Special Commissioners in respect of certain claims to assess Mr. Bernstein, the settlor, in respect of surtax by virtue of a settlement which he made on Oct. 16, 1947. The settlement recites that the settlor is desirous of making provision for a lady—called in the settlement the beneficiary—who afterwards became the settlor's wife. The material provisions of the settlement for the purposes of this case are contained in cll. 2 and 3. Clause 2 provides:

> " The trustees shall during the life of the settlor accumulate the income of the trust fund at compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation of the capital of the trust fund and for the benefit of the person or persons who shall eventually become entitled thereto."

Therefore, there is to be an accumulation during the life of the settlor and the settlement contemplates that no income will be distributed before his death. Clause 3 provides:

> " After the death of the settlor the trustees shall hold the trust fund as to one equal third part thereof in trust for all or any of the children or child then living of the settlor by the beneficiary (if more than one in equal shares) and as to two equal third parts thereof in trust for the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor leaving children or a child her surviving then the trustees shall hold the trust fund in trust for all or any of such children or child who shall be living at the death of the settlor if more than one in equal shares absolutely."

I should also refer to cl. 4:

> "If at the death of the settlor there shall be living no child of the settlor by the beneficiary the trustees shall hold the trust fund in trust for the beneficiary absolutely but if the beneficiary dies in the lifetime of the settlor without leaving any children or a child by the settlor or her surviving then the trustees shall hold the trust fund in trust for Muriel Clara Selina Thoms sister of the beneficiary absolutely."

Consequently, the trusts are in effect these: as regards an equal one-third part the beneficiaries in order are the children or child living at the death of the settlor by the wife; as regards two equal third parts thereof the first trust is for the wife absolutely with a trust for the children if the wife dies within the lifetime of the settlor leaving children or a child surviving her ; finally if the wife outlives the settlor and there are no children living of the settlor by her then the wife takes an absolute interest and if she does not—i.e., if she dies within the settlor's lifetime—her sister takes instead.

Those are the trusts and they are comparatively simple in outline. The claim is made by virtue of s. 405 of the Income Tax Act, 1952, which provides:

> "(1) If and so long as the settlor has an interest in any income arising under or property comprised in a settlement, any income so arising during the life of the settlor in any year of assessment shall, to the extent to which it is not distributed, be treated for all the purposes of this Act as the income of the settlor for that year and not as the income of any other person . . .
>
> "(2) For the purpose of sub-s. (1) of this section, the settlor shall be deemed to have an interest in income arising under or property comprised in a settlement if any income or property which may at any time arise under or be comprised in that settlement is, or will or may become, payable to or applicable for the benefit of the settlor or the wife or husband of the settlor in any circumstances whatsoever . . ."

There is no question of any income becoming payable to or applicable for the benefit of the settlor, but it is contended that in certain circumstances the income of this trust fund might become payable to or applicable for the benefit of the settlor's wife by virtue of the power of advancement contained in s. 32 of the Trustee Act, 1925. I described this as a very long shot and I still think that as a statutory provision it is a remarkable effort at bringing in things which are looked at from a very long range. Section 32 (1) provides:

> "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs."

In the present case, of course, the wife is entitled contingently on surviving the settlor to two-thirds of the capital of the property and there will be added to that two-thirds the appropriate part of the income which was accumulated during the settlor's lifetime.

Then the first proviso limits the amount of the advancement to one half of the presumptive or vested share. The important proviso is (c) which provides that:

> "no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application."

It is plain that the settlor takes no interest in the income of the trust fund and his wife takes no interest in the income of the trust fund except contingently on its being added to the capital and her surviving the settlor. It seems to me that the claim of the Crown depends entirely on s. 32 being available in such a way that during the lifetime of the settlor income comes to his wife in some way or other. Consequently the application of s. 32 is vital to the contentions of the Crown.

There is another section which is applicable and this is one of the first points in the case. Section 69 (2) of the Act of 1925 provides as follows:

> "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument."

The first point which was argued before the commissioners on behalf of the taxpayer was that a contrary intention was expressed in this settlement. I have been referred to certain cases which are not directly in point on this section. They were concerned with s. 31 (1) (ii) of the same Act, which deals with maintenance and more particularly provides that, after the beneficiary reaches the age of twenty-one but is still not entitled to a vested interest in the income, the trustees are to pay the income of the trust fund to him until he dies or ceases to become entitled to an interest. In regard to that section there are three cases—*Re Spencer, Lloyds Bank, Ltd.* v. *Spencer* (1), *Re Ricarde-Seaver's Will Trusts, Midland Bank Executor & Trustee Co., Ltd.* v. *Sandbrook* (2) and *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner* (3). The only case which seems to me to be of any real assistance in the present matter is the last of those cases, which is a decision of the Court of Appeal. Although the provision in s. 31 is expressed in an imperative form, it was held by the Court of Appeal in that case that it was not imperative, as it was merely a power. There was a provision for accumulation in the relevant will, and, as s. 31 was merely a power, that provision for accumulation was an expression of a contrary intention for the purposes of s. 69 (2) of the Trustee Act, 1925, and negatived the provision contained in s. 31 (1) (ii).

Now that was on a different section, but it seems to me that the decision of the Court of Appeal may be applicable in the present case for this reason: from the way this settlement is drawn and in particular from the fact that cl. 2 of the settlement is an entirely separate provision from cl. 3 and in the plainest possible terms provides for accumulation during the lifetime of the settlor, it seems to me that there is an intention that no income shall be distributed before his death. Though it is true that s. 31 deals directly with income, the matter is very closely allied, since, if the power of advancement be exercised, then the effect is to cut off the appropriate portion of the income after that advancement and of necessity the operation must put an end to the trust for accumulation to that extent. This trust for accumulation seems to me therefore to be inconsistent with the trust for advancement contained in the Trustee Act. Section 32 therefore is not applicable in the present case and accordingly no advances can be made of either capital or income to the wife during the settlor's lifetime. That, of course, is the end of the claim of the Crown under this peculiar section, if it is correct.

The second point was that it was claimed on behalf of the settlor—and this

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(1) [1935] Ch. 533.

(2) [1936] 1 All E.R. 580.

(3) [1936] 2 All E.R. 1435; [1937] Ch. 15.

argument succeeded before the commissioners, but the first one to which I have A
referred did not—that the children of the marriage represent the class whose interest comes within the terms of s. 32 of the Trustee Act, 1925. The section provides under para. (c) that, where there is a prior life or other interest which would be prejudiced if the advancement were made, no such payment shall be made. It seems to me that that argument cannot succeed because, as I indicated in my analysis of the trusts in cl. 3 and cl. 4 of the settlement, as regards two- B
thirds of the capital and the accompanying income the first interest seems to me to be the interest of the wife. Therefore, I cannot see as regards her share how the interest of the possible children—there are none at present—can be regarded as a prior interest at all. They only have a contingent interest which is subject to her first interest and to that extent it seems to me that it would be impossible for the argument to succeed. C

A third point was taken here and not before the commissioners and I will deal with it only briefly. The argument was based on the theory that from a given time—which I gather is still in the future—the wife might be past the age of child-bearing and therefore could not have any more children, that if she had any they might be the only ascertainable persons other than Miss Thoms who might give their consent, that Miss Thoms might also give her consent and that D
a situation might arise in which in certain circumstances (relying of course on the wide words of s. 405 (2) of the Income Tax Act, 1952) they would be the persons who might give their consent and therefore allow s. 32 of the Trustee Act, 1925, providing for advancement, to be operated, on the assumption that it applied to the present settlement. It seems to me that that argument cannot succeed, because for the purposes of the rule against perpetuities—and it would E
appear also from the provisions about accumulation—a woman is not treated as being no longer able to become the mother of children, whatever her age. It is quite true that the Court of Chancery as a practical matter and as a matter of administration, on being satisfied by reason of age or for medical reasons that a woman is past the age of child-bearing, will allow the distribution of a fund, thus exonerating the trustees of a will or settlement from what otherwise might be F
a breach of trust. However, it seems to me that, in a technical matter such as taxation, it is not right to invoke such a rule of administration in order to aid the Crown to claim payment of tax in circumstances which are still highly hypothetical. That view seems to be supported by *Re Dawson, Johnston* v. *Hill* (4), *Re Deloitte, Griffiths* v. *Deloitte* (5) and *Re Hocking, Michell* v. *Loe* (6). It is perfectly true that doubts may have been cast on the decision in *Re Deloitte* G
(7) but from the decision in *Re Blake, Berry* v. *Geen* (8) at any rate it is plain that *Re Dawson* (4) and *Re Deloitte* (7) are binding on me as regards the principle there laid down. Consequently, it seems to me that in the present case the appeal fails, though not for the same reason as that on which the commissioners relied.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Gouldens* (for the settlor, the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(4) (1888). 39 Ch.D. 155. (5) [1925] All E.R. Rep. at p. 122; [1926] Ch. at p. 65.
(6) [1898] 2 Ch. 567. (7) [1925] All E.R. Rep. 118; [1926] Ch. 56.
(8) [1938] 2 All E.R. at p. 367; [1938] A.C. at p. 584.

JOY MUSIC, LTD. *v.* SUNDAY PICTORIAL NEWSPAPERS (1920), LTD.

[Queen's Bench Division (McNair, J.), February 25, 26, 1960.]

Copyright—Infringement—Literary work—Reproduction of substantial part—Parody of words of song—Test to be applied in considering whether parody an infringement—Colourable imitation not a relevant consideration—Disclosure necessary on requesting permission for parody—Copyright Act, 1956 (4 *&* 5 *Eliz.* 2 *c.* 74), *s.* 18 (3), *s.* 49 (1).

A parody that is itself an original version having its origin in the work parodied, is not an infringement of copyright in the work parodied.

The plaintiffs were the owners of the copyright in Great Britain in the words and music of a song called " Rock-a-Billy ", which, as stated on the published sheet music of the song, was to be played in rock-'n'-roll rhythm. The song consisted of four verses each followed by the chorus:

" Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock
Rock-a-Billy, Rock-a-Billy, Rock, Rock, Rock,
Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock
Rock-a-Billy, Rock-a-Billy, Rock, Rock."

The song was first published in April, 1957. On Aug. 4, 1957, the defendants, the publishers and printers of the " Sunday Pictorial " newspaper, published in that newspaper an article concerning the sporting activities of Prince Philip. The article was headed " Rock-a-Philip Rock! Rock! " and it contained a parody of the plaintiffs' song which was in the form of two verses, printed in the same metre as the verses in the song, each verse followed by a chorus, of which the first was:

" Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, Rock!
Never mind the fogies that you shock, shock, shock!
Everybody's got to learn to take a knock,
So Rock-a-Philip, Rock-a-Philip, Rock, Rock! "

The court found as a fact that the defendants published the parody without obtaining licence or permission from the plaintiffs to do so. Evidence was given that the real point, or idea, of the plaintiffs' song was to be found in the words of the chorus as played with a " rock " emphasis. In an action for infringement of copyright the plaintiffs alleged that the words in the article were a reproduction or colourable imitation of a substantial part* of the words of the plaintiffs' song " Rock-a-Billy." Section 18 (3) of the Copyright Act, 1956, defines infringing copy, in relation to a literary work, simply as " a reproduction ".

Held: (i) in considering whether there has been infringement of literary copyright under the Copyright Act, 1956, colourable imitation, as distinct from reproduction, of the work was not a relevant consideration (see p. 706, letter C, post).

(ii) the defendants had not, in their article, reproduced a substantial part of the plaintiffs' song so as to infringe the plaintiffs' copyright since whether a parody was an infringement depended on whether the defendant had bestowed such mental labour on what he had taken and subjected it to such revision and alteration as to produce an original work (see p. 708, letter E, post); applying that test, although the article had its origin in the plaintiffs' song it was produced by sufficient independent labour to make it an original work.

Obiter dicta of Younger, J., in *Glyn* v. *Weston Feature Film Co.* ([1916] 1 Ch. at p. 268) applied.

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* See s. 49 (1) of the Copyright Act, 1956.

Judgment of Lindley, L.J., in *Hanfstaengl* v. *Empire Palace* ([1894] 3 Ch. at pp. 128, 129) considered.

Per Curiam: if it had been necessary to decide whether the defendants got licence to publish the parody, it would not have been established that they did, because it was not established that the purpose of producing the parody (in particular, of including reference to Prince Philip) was ever made plain to the plaintiffs (see p. 708, letter H, post).

[As to infringement of copyright by reproduction of a substantial part of the work, see 8 Halsbury's Laws (3rd Edn.) 427, para. 777.

For the Copyright Act, 1956, s. 18 (3) and s. 49 (1), see 36 Halsbury's Statutes (2nd Edn.) 106, 145.]

Cases referred to:

Chappell & Co., Ltd. v. *Thompson & Co., Ltd.*, (1934), Macg. C.C. 467.

Francis, Day & Hunter v. *Feldman & Co.*, [1914] 2 Ch. 728; 83 L.J.Ch. 906; 111 L.T. 521; 13 Digest (Repl.) 74, *180*.

Glyn v. *Weston Feature Film Co.*, [1916] 1 Ch. 261; 85 L.J.Ch. 261; 114 L.T. 354; 13 Digest (Repl.) 57, *68*.

Hanfstaengl v. *Empire Palace*, [1894] 3 Ch. 109.

Hawkes & Son (London), Ltd. v. *Paramount Film Service, Ltd.*, [1934] Ch. 593; 103 L.J.Ch. 281; 151 L.T. 294; 13 Digest (Repl.) 116, *574*.

Sinanide v. *La Maison Kosmeo*, (1928), 139 L.T. 365; 13 Digest (Repl.) 55, *56*.

Action.

In this action the plaintiffs, Joy Music, Ltd., owners of the copyright in Great Britain in the words and music of a song called " Rock-a-Billy ", claimed against the defendants, Sunday Pictorial Newspapers (1920), Ltd., publishers and printers of the " Sunday Pictorial " newspaper, an injunction restraining the defendants, their servants or agents from printing and publishing in the " Sunday Pictorial " or otherwise any substantial part of the song " Rock-a-Billy " or any colourable imitation of it, and from selling or otherwise disposing of any copies of the " Sunday Pictorial " containing any substantial part of the song or any colourable imitation of it. The plaintiffs also claimed damages for infringement of their copyright in the song, and for conversion; alternatively they claimed an account of profits. The defendants denied that the words complained of in the " Sunday Pictorial " were a reproduction or colourable imitation of a substantial part of the song but contended that if they did constitute an invasion of the plaintiffs' rights the plaintiffs had consented to or acquiesced in the infringement of their copyright. In their reply the plaintiffs alleged that any consent given to the defendants was given without the knowledge, consent or authority of the plaintiffs. In a rejoinder the defendants relied on s. 18 (2) of the Copyright Act, 1956. The facts are set out in the judgment of McNair, J.

K. E. Shelley, Q.C., and *H. P. J. Milmo* for the plaintiffs.

F. E. Skone James and *David Hirst* for the defendants.

McNAIR, J.: The plaintiffs, Joy Music, Ltd., a company incorporated in this country, are the owners by assignment of the copyright in Great Britain in the words, as also the music, of a song entitled " Rock-a-Billy ", and in this action they claim that their copyright in the words of that song was infringed by the publication of the " Sunday Pictorial " of Aug. 4, 1957, which contained a lyric to the exact words of which I will have to refer in a moment. The defendants deny that any such infringement has taken place and assert in particular that the author of the version which is alleged to be an infringement obtained express sanction from the plaintiffs before publication.

The song of which the plaintiffs admittedly are the holders of the copyright is a song which has been published both in record form and in sheet music form, and it is the sheet music form that I have before me. That describes the title of the song as "Rock-a-Billy" and states that it is to be played in "solid rock", and sets out the melody to which it is to be played. In this case I am concerned not with any infringement of the musical side of the song, but purely with an infringement of the song in its literary aspect, namely, as expressed in words. The words are these. First it starts with a chorus of four lines—

"Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock
Rock-a-Billy, Rock-a-Billy, Rock, Rock, Rock,
Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock
Rock-a-Billy, Rock-a-Billy, Rock, Rock."

That is the chorus which follows each of the four verses. I need only read one of those verses, and that is in this form:

"Some people think it came from Tennessee
Then it spread on out to the lone prairie
It's a 'Hill Billy Rock' and a Fiddle-dee-dee
Turns me inside out—Gimme some."

The other verses are of similar character and are not material in the present action.

What is alleged to be an infringement of the words of that song is to be found in a special feature article contained on p. 10 of the "Sunday Pictorial" of Aug. 4, 1957. The article is headed "Rock-a-Philip Rock! Rock!", and after stating that certain persons had been criticising Prince Philip for his activities, including gliding, and referring to the fact that he had occasional accidents with his car, or a fall in the polo field, it continues thus—

> "So what? Give us a chord in 'G' and we'll sing Paul Boyle's version of Rock-a-Billy in support of the dashing Duke",

and then the article sets out two stanzas of the lyric in leaded type and two choruses, or refrains, in italics following the lyric stanzas, which run as follows:

"Never mind what all the fuddy duddies say
Philip's making history in his own sweet way!
If he wants to spread his wings, well, that's okay!
What's the fuss about?

Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, Rock!
Never mind the fogies that you shock, shock, shock!
Everybody's got to learn to take a knock,
So Rock-a-Philip, Rock-a-Philip—Rock, Rock!"

When he's playing polo, it's the same refrain
'Look at Philip sticking out his neck again!'
What's the good of wrapping him in cellophane?
Let him have his shout!

Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, Rock!
Nobody could say that you're a crock, crock, crock!
Every little tumble just improves your stock,
So, Rock-a-Philip, Rock-a-Philip—Rock, Rock!"

The article ends:

> "With acknowledgments to Joy Music, Ltd., publishers of the Guy Mitchell hit song 'Rock-a-Billy'."

The factual position as regards the song is that it was first published in this country in April, 1957, and for some time was an extremely popular song both as judged by the sale of records and by the sale of sheet music. It seems to have reached its zenith of popularity in the month of May, and was still a popular song the words and tune of which were in the knowledge and recollection of those interested in such matters by July, 1957, about the time of the publication of this article.

The question which I have to determine, it seems to me, under the Copyright Act, 1956, is whether in Paul Boyle's version of " Rock-a-Billy " which I have read, it can be said that the defendants, to use the words of s. 49 of the Copyright Act, 1956, have reproduced " a substantial part of the work ". That is the issue of fact to which I have to direct myself, have the defendants reproduced a substantial part of the work the copyright of which is vested in the plaintiffs? In the statement of claim, para. 4, the allegation is that the

> " said words are a reproduction or colourable imitation of a substantial part of the words of the said song ",

but it seems to me the words " or colourable imitation " are not strictly relevant to the case under the Copyright Act, 1956, especially in relation to an alleged infringement of literary copyright. The words " colourable imitation " do appear in some of the earlier cases, and particularly in s. 35 (1) of the Copyright Act, 1911, in the definition of infringement, but when the Act of 1956 came to define infringing copy, as it did in s. 18 (3), the words " colourable imitation " are not to be found (1). Accordingly, it seems to me today, when considering infringements of literary copyright, colourable imitation is not a relevant consideration. The question is: Has there been a reproduction of a substantial part of the words of the song?

I have had evidence called before me on behalf of the plaintiffs that, at any rate from the point of view of someone who is selling the song as a song accompanied by music, or from the point of view of someone who is hoping to sell a record of the words and music, the real point of " Rock-a-Billy "—the plaintiffs' " Rock-a-Billy "—is to be found in the words of the chorus, and it is said that the gimmick, or stunt, or leading idea of this work is to be found in the chorus, and in the chorus really as played with a " rock " emphasis, that being the particular form of musical emphasis embodied in the modern rock-'n'-roll. That I can quite understand; and the same witness also said that from the point of view of public performance the verses are quite immaterial and, indeed, may never be played at all. I can quite understand that that may well be so if this work is regarded as a musical production, but from the point of view of literary copyright it seems to me that similar considerations may not apply; I have got to look at the whole of the words of the song bearing in mind that special emphasis or weight has to be given to the words of the chorus because the words of the chorus are repeated four times as against the single reproduction of each verse. Now, whether or not there has here been a reproduction of a substantial part of the plaintiffs' work would, if I had been sitting with a jury as I well might have been, be a pure jury question which a jury would have to determine as a matter of fact, but before they could determine that question they would have to receive directions from the presiding judge how they were to approach the matter. It is on the question of this direction that I have been referred to a number of authorities (2), mostly not in this division, where similar questions have been discussed, and it is quite clear that the question of substantiality is not determined solely by any process of arithmetic. It would not be right merely to say, the whole of the original copyright consisted of so many lines, the lines which appear in the alleged infringing copy were only so-and-so, therefore it was not a substantial part. You have really got to look, it seems to me, to a large extent at the primary—I will not say "idea" because idea cannot be the subject of copyright—but at the essential feature of the work which is alleged to have been subject to copyright. It has been said that the only leading directive in the cases is such as is given by Lindley, L.J., in *Hanfstaengl* v. *Empire Palace* (3), that is, to bear in mind that the whole conception of copyright is based on monopoly, and the Acts accordingly have to be construed with reference to the protection of the owner's monopoly, but that care must be taken always not to allow the Copyright Acts to be made instruments of oppression and extortion.

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(1) Section 18 (3) of the Copyright Act, 1956, provides: " . . . 'infringing copy '—(a) in relation to a literary . . . work . . . means a reproduction otherwise than in the form of a cinematograph film ". Section 35 (1) of the Copyright Act, 1911, which Act was repealed by the Act of 1956, defined infringing copy as " any copy, including any colourable imitation, made . . . in contravention " of the Act of 1911. By s. 49 (1) of the Copyright Act, 1956, any reference to a reproduction includes a reference to a " reproduction . . . of a substantial part of the work."

(2) The following cases were cited to the court in addition to those mentioned in the judgment: *Francis, Day & Hunter* v. *Feldman & Co.*, [1914] 2 Ch. 728; *Chappell & Co., Ltd.* v. *Thompson & Co., Ltd.* (1934), Macg. C.C. 467; *Sinanide* v. *La Maison Kosmeo*, (1928), 139 L.T. 365; *Hawkes & Son (London), Ltd.* v. *Paramount Film Service, Ltd.*, [1934] Ch. 593.

> "It is on such considerations as these that fair reviews of literary works, although containing lengthy extracts from them, are not infringements of the copyrights of them; that a representation of part of a dramatic piece, if confined to some comparatively insignificant part of it, is not an infringement of the copyright in such piece."

Lindley, L.J., also observed (3) that

> ". . . in doubtful cases the extent to which the copying has been carried and the object sought to be attained . . . are matters which must be considered . . ."

Then, after dealing with the sketches in question in that case, a case in which the court had to consider whether a reproduction in sketch form of some dramatic tableaux vivants, which themselves were based on the plaintiff's work, were infringements or not, Lindley, L.J., decided that, on his appreciation of the facts, no unfair use had been made of the plaintiff's original copyright, and that there had been no substantial taking. That was sufficient to settle the case, but he continued and gave this illustration of a use which was not an infringement (4), namely:

> "The amusing sketches in 'Punch' of the pictures in the Royal Academy are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves."

There it seems to me the learned judge is saying: "These are not infringements judged by the purpose and intention with which they had been produced".

It is clear to me that what Mr. Boyle, who was responsible for this feature item in the "Sunday Pictorial", did was, as he states in the article itself, to make his own version of "Rock-a-Billy". He did not actually reproduce the words; he did not actually reproduce any part of the plaintiffs' song; but he made his own version of it. Now, it seems that there is no decided case on the question whether a parody of a copyright work is an infringement. It is clear that the mere use of an idea is not protected by copyright, and I have not been referred to any case where it has been held that the use of a particular metre, at any rate in a literary work, is the appropriate subject-matter of copyright. In *Glyn* v. *Weston Feature Film Co.* (5), brought in 1916, Younger, J., states (6):

> "Making all allowance for the fact that prior to the Act of 1911 literary copyright did not include the acting right, it certainly is remarkable that no case can be found in the books in which a burlesque even of a play has been treated as an infringement of copyright, although burlesque, frequently more distinguished than the thing burlesqued, is as old as Aristophanes, to take Mr. Hartree's example. It may well be that as far as English law is concerned one reason for this striking state of things is that the older cases insist upon the necessity of establishing that the alleged piracy is calculated to prejudice the sale or diminish the profits or supersede the objects of the

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(3) [1894] 3 Ch. at p. 128.
(4) [1894] 3 Ch. at p. 130.
(5) [1916] 1 Ch. 261.
(6) [1916] 1 Ch. at p. 268.

> original work, whereas it is well known that a burlesque is usually the best possible advertisement of the original and has often made famous a work which would otherwise have remained in obscurity."

Then the learned judge continues (7):

> " More probably, however, the reason is to be found involved in such observations as those of LINDLEY, L.J., in *Hanfstaengl* v. *Empire Palace* (8), or in such a decision as that of the Court of Appeal in *Francis, Day & Hunter* v. *Feldman & Co.* (9), or in the principle that no infringement of the plaintiff's rights takes place where a defendant has bestowed such mental labour upon what he has taken and has subjected it to such revision and alteration as to produce an original result."

His final conclusion is (10):

> " If, therefore, it were necessary for me to express an opinion upon this aspect of the case I should decide that on this ground also the plaintiff fails."

That is by no means an authority binding on me in this case, apart from the fact that the passage I read is obiter but it is a very clear indication to the way in which I should decide this interesting question whether a parody can be held to be an infringement. I think if one had to direct a jury on this question one would clearly tell them of these various tests that have been suggested as guiding them, and it would be proper, it seems to me, to put to them this test which YOUNGER, J., suggested: whether the defendant had bestowed such mental labour on what he has taken and subjected it to such revision and alteration as to produce an original work. I cannot help thinking that a jury with that direction would have said, " Although it is clear that the article in the ' Sunday Pictorial ' had its origin in ' Rock-a-Billy ', it was produced by sufficient independent new work by Mr. Boyle to be in itself, not a reproduction of the original ' Rock-a-Billy ', but a new original work derived from ' Rock-a-Billy '." That being my conclusion of fact, I am not satisfied that the article in the " Sunday Pictorial " does reproduce a substantial part of the words of the song " Rock-a-Billy " of which the plaintiffs have copyright.

That conclusion makes it unnecessary for me to deal at length with certain other aspects of the case, and in particular to deal exhaustively with the issue as to licence or permission, but seeing that witnesses have been called on this point it is right that I should express my views on it.

[HIS LORDSHIP, having said that the onus of establishing the grant of a licence or permission was on the defendants, and having reviewed the evidence, continued:] It seems to me that anyone who desires to obtain informal licence to use copyright material must explain clearly and fully the purpose or the nature of the proposed infringing material and the purpose for which it was going to be used. Accordingly, if it had become necessary for me to make a firm finding whether the defendants did get licence or permission, I would have held that I was not satisfied that they did, because it does not seem to me that Mr. Boyle, putting his evidence at the highest, ever made plain to the plaintiffs the purpose for which he required permission, namely the production of a parody of " Rock-a-Billy " including references to Prince Philip; if a licence was going to be relied on, it would be essential that that feature of the infringing material should be drawn to the clear attention of the licensor, who might well say that he was not prepared to allow his material to be used for such a purpose. I am not satisfied on the evidence that has been called before me that any licence was obtained from the plaintiffs which would justify the production of the article in the " Sunday Pictorial " if that production had been of such a character as would have, contrary to my view, involved an infringement.

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(7) [1916] 1 Ch. at p. 268.

(8) [1894] 3 Ch. at p. 128.

(9) [1914] 2 Ch. 728.

(10) [1916] 1 Ch. at p. 269.

Having reached those conclusions, it does not seem to be either necessary or desirable that I should express any view on the question of damages. Sufficient for me to say that on the evidence which has been put before me it is clear that this song " Rock-a-Billy " was originally a valuable piece of property for the plaintiffs, inasmuch as the sales of records and sheet music amounted to nearly a quarter of a million copies; but I am also satisfied that by the time this publication was made the value of this particular song had been largely, if not wholly, exhausted. It seems to be common ground or, if it is not common ground, I hold that I am satisfied that this particular type of song has a very evanescent value, and even if it reaches the distinction of being a top hit, or whatever the proper expression is, it seems to be a common feature that it does not retain that eminence for more than quite a short period. This song " Rock-a-Billy " reached its peak in early or mid May, 1957, and as far as I follow the evidence, it had lost substantially the whole of its value by the end of July, 1957, and before the production of this particular article. In those circumstances there will be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Davenport, Lyons & Co.* (for the plaintiffs); *Nicholson, Graham & Jones* (for the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

NOTE.

PEASE *v.* GEORGE.

[Court of Appeal (Sellers, Ormerod and Upjohn, L.JJ.), March 7, 1960.]

Jury—Trial by—Action for damages for severe personal injuries—Application for trial by jury refused—Discretion of judge absolute—R.S.C., Ord. 36, *r.* 1 (3).

[As to the mode of trial being by jury, see 30 Halsbury's Laws (3rd Edn.) 375, 376, paras. 699, 700.

For R.S.C., Ord. 36, r. 1 (3), see the Annual Practice, 1960, p. 811.]

Cases referred to:

Evans v. *Bartlam,* [1937] 2 All E.R. 646; [1937] A.C. 473; 106 L.J.K.B. 568; sub nom. *Bartlam* v. *Evans,* 157 L.T. 311; Digest Supp.

Hope v. *Great Western Ry. Co.,* [1937] 1 All E.R. 625; [1937] 2 K.B. 130; 106 L.J.K.B. 563; 156 L.T. 331; Digest Supp.

Original Motion.

This was a motion on behalf of the infant plaintiff for leave to appeal from an order made by Hinchcliffe, J., sitting in chambers, on Feb. 26, 1960. The infant plaintiff, by his father and next friend, claimed damages for personal injuries caused by the negligent driving of a motor car by the defendant. The injuries suffered by him, as described in the statement of claim, were such as to make him a total invalid and likely to remain so, both mentally and physically, for the remainder of his life. On Feb. 12, 1960, Master Clayton, on the summons for directions, refused to order a trial by jury. The plaintiff having appealed, Hinchcliffe, J., without giving any reasons, dismissed the appeal and refused leave to appeal. Counsel for the plaintiff now moved for leave to appeal and submitted that, having regard to the heavy damages which might be awarded, trial by jury was the appropriate tribunal. He relied on dicta of Lord Goddard, C.J., in *Dolbey* v. *Goodwin* ([1955] 2 All E.R. 166 at p. 167) and contended that, unless there were circumstances to the contrary, the court could exercise its discretion only in favour of the plaintiff's application. He further submitted that the Court of Appeal had power to review the judge's discretion. Counsel for the respondent submitted that the judge's discretion was absolute*, and cited *Hope* v. *Great Western Ry. Co.* ([1937] 1 All E.R. 625).

J. M. Drinkwater for the plaintiff.

E. W. Eveleigh for the defendant.

SELLERS, L.J.: This is a case where the plaintiff sought to have an action for damages for personal injuries incurred through a road accident tried by a jury. The application was refused by the master, and, on appeal to HINCHCLIFFE, J., he likewise in his discretion refused to order a jury. There may be much to be said for having a jury in this particular case where the injuries are very grave indeed, and there is some judicial authority to indicate that a jury is not an improper or unreasonable mode of trial in such circumstances (1). Though there was ample power in the learned judge to have ordered trial by jury in this particular case, he took the view that it was not one in which he would do so, and it seems that under R.S.C., Ord. 36, r. 1 (3), it is in the discretion of the court or the judge to decide one way or the other, and that is an absolute discretion. The decision in *Hope* v. *Great Western Ry. Co.* (2)—a decision of a court of five judges of the Court of Appeal—held that this court would not interfere with the exercise of the discretion in such circumstances. No doubt if, in the view of this court, it was going to create any real injustice, the principle of *Evans* v. *Bartlam* (3) might be invoked. I can see no injustice however, in this particular action being tried by a learned judge alone, as the judge below ordered. This application, therefore, must be refused.

ORMEROD, L.J.: I agree.

UPJOHN, L.J.: I also agree.

Application refused.

Solicitors: *White & Co.* (for the plaintiff); *L. Bingham & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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* R.S.C., Ord. 36, r. 1 (3) provides—" Save as provided by rr. 2 and 3 of this order, the discretion of the court or judge in making or varying any order under this rule is an absolute one." The order for trial with or without a jury was one made under Ord. 36, r. 1 (1); r. 3 of that order was irrelevant to this proceeding. By r. 2 of Ord. 36 the discretion conferred by r. 1 (3) is, as respects actions to be tried in the Queen's Bench Division, subject to s. 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933 (18 HALSBURY'S STATUTES, 2nd Edn., 522). So far as relevant, that enactment provides " . . . any action to be tried in that Division may, in the discretion of the court or a judge, be ordered to be tried either with or without a jury . . .".

(1) See per LORD GODDARD, C.J., in *Dolbey* v. *Goodwin* ([1955] 2 All E.R. at p. 167) and per BANKES, L.J., in *Ford* v. *Blurton* ((1922), 38 T.L.R. at p. 803).

(2) [1937] 1 All E.R. 625; [1937] 2 K.B. 130.

(3) [1937] 2 All E.R. 646; [1937] A.C. 473.

Re C.S.C. (an infant).

[Chancery Division (Roxburgh, J.), February 25, 1960.]

Adoption—Care and possession of infant before adoption—Infant allowed to spend two consecutive nights and another night with mother during the period of three months preceding date of adoption order—Whether infant continuously in the care and possession of adopters during prescribed period—Arrangement for adoption made by local authority—Return of infant to local authority—No jurisdiction to grant stay pending appeal—Adoption Act, 1958 (7 *&* 8 *Eliz.* 2 *c.* 5), *s.* 3 (1), *s.* 35 (3).

Adoption—Legitimation of illegitimate child—Relevancy of choice between legitimation and adoption to exercise of discretion to make adoption order—Legitimacy Act, 1959 (7 *&* 8 *Eliz.* 2 *c.* 73), *s.* 1 (1).

An infant was placed in the care of proposed adopters for a probationary period by a local authority, but the mother subsequently withdrew her consent to the adoption. On an application by the adopters for an adoption order, the court was requested to dispense with the mother's consent, under s. 5* of the Adoption Act, 1958. Within the period of three months before the hearing of the application, the adopters had allowed the mother to have the infant for three nights (two consecutive nights and another night). At the hearing of the application the putative father said that, as soon as the mother (a married woman) was free to marry him, he would marry her. The justices dispensed with the mother's consent under s. 5 (2) of the Act of 1958 and made the adoption order. On appeal by the mother,

Held: (i) the justices had no jurisdiction to make the adoption order, because, on the facts, the infant had not been " continuously in the care and possession " of the adopters for the period of three months immediately preceding the date of the order, within s. 3 (1)† of the Adoption Act, 1958, which accordingly prohibited the order being made (see p. 715, letter H, post).

(ii) as the infant had been placed in the adopters' care by a local authority, he must be returned to the authority within seven days in accordance with s. 35 (3)‡ of the Act of 1958, and the court had no jurisdiction to order a stay (see p. 716, letter D, post).

Per Curiam: in the event of the putative father marrying the mother, the infant would be legitimated under s. 1 of the Legitimacy Act, 1926, as amended by s. 1 (1)§ of the Legitimacy Act, 1959, and the failure of the justices, when exercising their discretion under the Adoption Act, 1958, to consider whether legitimation should not be preferred to adoption vitiated their exercise of their discretion (see p. 714, letter C, post).

Observations on the necessity for justices to comply with the requirements of the Adoption (Juvenile Court) Rules, 1959, r. 8 and r. 9¶.

Appeal allowed.

[As to restrictions on making adoption orders, see 21 Halsbury's Laws (3rd Edn.) 231, para. 506.

For the Adoption Act, 1958, s. 3 (1), s. 5, and s. 35 (3), see 38 Halsbury's Statutes (2nd Edn.) 542, 544, and 567.]

Cases referred to:

Adoption Act, 1950, Re, (July 9, 1958), " The Times ", July 10, 1958; *revsd.*, C.A., (July 28, 1958), " The Times ", July 29, 1958.

J.S. (an infant), Re, [1959] 3 All E.R. 856; [1959] 1 W.L.R. 1218.

M. (Petitioner), 1953 S.C. 227; 28 Digest (Repl.) 633, *723*.

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* The relevant provisions of s. 5 are printed at p. 714, letters D and E, post.

† The subsection is printed at p. 713, letter D, post.

‡ The subsection is printed at p. 716, letter B, post.

§ The effect of s. 1 (1) of the Legitimacy Act, 1959, is stated at p. 714, letter B, post.

¶ The requirements of r. 8 and r. 9 are stated at p. 712, letter H, post.

Motion.

This was an appeal by the mother of an infant from an adoption order made on Dec. 22, 1959, by the justices of the petty sessional division of Abingdon in the county of Berks, on the application of the respondents, a husband and wife, into whose care the infant had been delivered in pursuance of arrangements made by the local authority for the adoption of the infant by the respondents. The justices held that the mother had persistently failed without reasonable cause to discharge the obligations of a parent and that, therefore, her consent to the order should be dispensed with, under s. 5 (2) of the Adoption Act, 1958, and that in the best interests of the infant the application should be granted. The grounds of the appeal were that the decision of the justices was wrong in law and was against the weight of the evidence. The facts are set out in the judgment, which was delivered in open court.

M. Browne for the appellant, the mother.

C. A. Settle for the respondents, the proposed adopters.

ROXBURGH, J.: In my judgment I shall refer to the female proposed adopter as Mrs. C.

This is one of those cases in which the mother constantly changed her mind. It is not necessary for me to deal in detail with that aspect of the case, because that was not the ground of the justices' decision, and, in the view which I take of the law applicable, it is not a material matter for me to consider. The point had arisen before in *Re Adoption Act, 1950* (1), which came before the Court of Appeal. Dealing with that subject-matter (namely, the case of the mother who gives and withdraws her consent more than once) JENKINS, L.J., said:

> " The question of what amounted to the unreasonable withholding of consent, particularly by a mother, had been the subject of some judicial discussion. All one could do was to decide each case according to its particular facts, with the guidance of such broad general principles as could be derived from the authorities. The mere fact that a child would be materially better off if adopted than he could hope to be if he remained the child of his true parents did not suffice in itself to make the withholding of consent unreasonable, but that did not mean that that possible element in a case should be wholly ignored. So, too, the mere circumstance that a child was handed over to proposed adopters for a probationary period of three months in itself could not render the parents' withholding of consent unreasonable. Further, the mere fact that a documentary consent under s. 4 of the Adoption Act, 1950, had been given and subsequently withdrawn did not amount to an unreasonable withholding of consent."

That is the first matter to which I want to draw attention, namely, that that is the present position of the law with regard to the withholding of consent by a mother.

The second point is much more technical, but none the less important. Justices must remember that, as long as there is a statutory appellate court in these matters, they must so conduct the proceedings as to comply with the rules, and make the proceedings intelligible to the appellate court. The Adoption (Juvenile Court) Rules, 1959, (2) are applicable to the proceedings before justices. Rule 8 provides for the appointment of a guardian ad litem of an infant, and r. 9 (2) provides that the guardian ad litem, on completing his investigations, shall make a confidential report in writing to the court. Commenting on that in *Re J.S. (an infant)* (3), I said (4), and I repeat:

> " It seems to me quite plain that the parties have no right to see the

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(1) (July 28, 1958), " The Times ", July 29, 1958.

(2) S.I. 1959 No. 504. Rule 8 (1) reads: " . . . the court shall, as soon as practicable after an application is made, appoint a guardian ad litem of the infant and shall furnish him with a copy of the application, together with the documents attached thereto."

(3) [1959] 3 All E.R. 856.

(4) [1959] 3 All E.R. at p. 859.

> reports except in so far as the justices or the judge think fit to disclose their contents at the hearing. On the other hand it must be the duty of the justices in the case of an appeal to forward to the judge's clerk the confidential reports for the information of the statutory court of appeal which exists for the hearing of these cases."

No such report has been forwarded to me by the clerk to the justices. If I were going to decide the case on that ground, I should have had to adjourn it in order to interrogate the clerk whether there was any such report in the possession of the justices or the clerk, but I do not propose to take that course for two reasons: first, because I have reason to think that the answer would be in the negative; and, secondly, because I propose to decide the case on another ground. None the less, that point is an important one; it might even have been, of itself, enough to compel me to allow this appeal, and that would have meant putting the parties to great expense because the justices did not comply with the rules.

The matter does not stop there, however. In s. 3 (1) of the Adoption Act, 1958, there is a clear and important provision:

> " An adoption order shall not be made in respect of any infant unless he has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order, not counting any time before the date which appears to the court to be the date on which the infant attained the age of six weeks."

My complaint is not that the justices may or may not have reached a wrong conclusion in law on the true construction of that provision, because I should not be surprised if my judgment, which is going to turn on that provision, were reversed in the Court of Appeal; but what I complain of is that the justices never considered whether there had been compliance with s. 3 (1) and, accordingly, they left me with a most confusing and unsatisfactory account of the evidence in relation to that matter, on which they themselves made no findings at all.

The fourth point, which I think is a subtle point but none the less true and important, is the effect on these problems of the Legitimacy Act, 1959. I would not blame the justices for overlooking that question altogether and, therefore, exercising their discretion on what appears to me to be a wrong principle in the sense that they omitted to consider something which was very important, because I am not sure that I should have thought of it unless counsel had drawn my attention to it; but that does not make it unimportant.

The position in this case is the converse of the usual position, which is that the mother is free to marry and the putative father is not. In the present case the putative father is free to marry and the mother is not. Very often the putative father, whichever way one is looking at the problem, does not want the child; that was the position in *Re Adoption Act, 1950* (5). Here there was evidence which, as it seems to me, the justices did not reject—and, indeed, could not reject—but which they did not take into account. The justices did not accept the mother as a truthful witness, but that, I think, does not enable them to reject matters in her evidence on which there was no cross-examination. However, this point does not depend on the mother's evidence, but on the evidence of the putative father. The justices made no hostile criticism in regard to the putative father's evidence, and, indeed, he was not cross-examined on this point. What he said was this:

> " My relationship with [the mother] is that as soon as she is free to marry me I will marry her; for the past two years I have been living with her as man and wife. I am divorced [the decree was produced]. When [the mother] is divorced I will marry her immediately. I am the father of the child. I

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(5) (July 28, 1958), " The Times ", July 29, 1958.

> have seen him on numerous occasions. On three occasions we have had possession of the child away from [Mrs. C.] . . ."

That is a very important piece of evidence with which I shall have to deal later. There was no cross-examination about that, as far as I can see, and I can think of no reason why the justices should have rejected that evidence. The importance of that is this. Section 1 (1) of the Legitimacy Act, 1959, repeals s. 1 (2) of the Legitimacy Act, 1926, which excluded the operation of that Act in the case of an illegitimate person whose father or mother was married to a third person when the illegitimate person was born. Therefore, if a marriage between the putative father and the mother of this infant were to take place, that marriage would legitimate the infant, and it is always important to consider, in connexion with the welfare of the child, whether legitimation is not to be preferred to adoption. The justices never considered that point, because they were not asked to do so, but their failure to do so seems to me entirely to vitiate the exercise by them of their discretion, which they purported to exercise under the Adoption Act, 1958.

The section under which the justices purported to act was s. 5 of the Adoption Act, 1958, which uses the words: " The court may "—and I draw attention to that; it is a pure discretion, and the possible legitimation of the infant is, therefore, clearly one of the matters which has to be considered. Section 5 (1) reads:

> " The court may dispense with any consent required by para. (a) of s. 4 (1) of this Act [which includes the consent of the mother] if it is satisfied that the person whose consent is to be dispensed with—(a) has abandoned, neglected or persistently ill-treated the infant; or (b) cannot be found or is incapable of giving his consent or is withholding his consent unreasonably."

The justices acted under s. 5 (2), which reads:

> " If the court is satisfied that any person whose consent is required by the said para. (a) has persistently failed without reasonable cause to discharge the obligations of a parent or guardian of the infant, the court may dispense with his consent whether or not it is satisfied of the matters mentioned in sub-s. (1) of this section."

The justices have to do two things; they have, first, to consider whether the case comes within s. 5 (2). They considered that and came to the conclusion that it did. Whether or not there was any evidence to justify their conclusions on that part of the case is a matter which I do not intend to explore, but, having reached that conclusion, they still had a further duty, namely, to consider the question whether, even so, they ought to exercise their discretion, and in that connexion they undoubtedly would have had to take this question of possible legitimation into consideration if they had realised that there was such a possibility. It is true that in this case there may be some question of domicil and that, if a certain state of affairs in relation to domicil was disclosed, the legitimation might not be possible, and, therefore, counsel for the adopters was justified in asking me to admit further evidence as to domicil before I decided the case on this ground. There was no evidence of domicil at all, because the justices had never thought of this point. I am not going to decide the case on this ground, but I draw attention to the importance of it, none the less.

I now come back to the matter on which I propose to decide the case. It is a short point, namely, the requirements of s. 3 (1) of the Adoption Act, 1958. The evidence about the continuous care and possession is, indeed, somewhat fragmentary. Mrs. C. refers to an incident on Nov. 29, 1959, which is well within the three months' period, when she says that the mother took the child for a few hours so that the putative father could see that it would be hopeless, and promised to bring him back that evening. The mother took him at about 5.50 p.m.; he was not back at 11.30 p.m., so Mrs. C. told the police. At 3.30 the next day the mother came to her saying: " You've done it now; [the putative father] will go the whole hog to keep the baby ". Then Mrs. C. said that the infant came back the next day and he was evidently short of sleep. To my mind, that is one plain case, on the evidence, of two nights away with the mother, and it seems to be reasonably certain that there was another case within the prescribed period, although the justices have not found it as a fact. Mrs. C., who obviously had never been warned by her legal advisers that there was any such provision as that in s. 3 (1) of the Act of 1958, volunteered the information that the mother had had the infant for the night on three occasions; but that does not of itself show that they were all within the prescribed period. Again, it can be said of the putative father's evidence, when he said: "On three occasions we had possession of the child away from [Mrs. C.]" that those occasions need not have been within the prescribed period. In the light of Mrs. C.'s admission and the putative father's evidence that the infant had been away for three nights, I do not see how I can reject the mother's evidence on this point, even though the justices did not regard her as a truthful witness, because not only is there that amount of corroboration to which I have already referred, but there is no cross-examination directed to this point. In other words, this part of her evidence had never been challenged, and the importance of it is that she gave a date; she gave the date as Nov. 2, 1959. I believe she thought that there were three occasions; I am not suggesting that the third occasion was within the three months' period, but she gave the date of the second case within the period as Nov. 2, 1959. That was for one day and one night, so that there were three nights—two consecutive nights, plus one which had preceded it—within the period of three months.

The words of s. 3 (1) of the Act of 1958 are "continuously in the care and possession of the applicant for at least three consecutive months . . ." These words are difficult, because, as was pointed out in *M. (Petitioner)* (6), a Scottish case to which I shall shortly refer, they are peremptory. Construed literally, they produce absurd consequences, as counsel for the adopters very properly pointed out. Supposing that the infant went to hospital for a night, on the literal construction of these words the infant would not have been in the care or possession of the applicant during that night. Again, supposing that the infant went to school and stayed there even during the daytime, it would not be in the possession of the applicant during the time that it was under the discipline of the school teacher. I am not the first person to appreciate the difficulty, because in *M. (Petitioner)* (7) the Lord President (Lord Cooper) said this, and I entirely concur in what he said:

> "I shall not attempt to define the words 'care and possession' nor to deal with the difficult border-line cases which may arise . . ."

Where I cannot travel with counsel for the adopters is to say that, if a proposed adopter voluntarily gave up both the care and possession of the child for even one whole night within the three months' period, the requirement of the Act had not been broken. It seems to me that the one thing that the policy of the Act intended to prevent was precisely that sort of thing, and, if one finds, as I do, that the child was in the exclusive care and possession of the mother during the whole of a night and part of a day, that is not consistent with the words "continuously in the care and possession".

It is on this ground that I decide this case, and it is for the following reason that I decide on this, the third, ground. There are several points in this case, and, if I had not decided it on this point of law, I should have had to order a new trial. If I had ordered a new trial and then in the end taken this point of law and decided the case on it, I should have merely put the parties to great expense for no purpose whatever. I realise that the course which I have taken might make a difficulty in the Court of Appeal, because the point of construction is not altogether easy; but, on balance, I thought that that was the right thing to do. Accordingly, the appeal is allowed and the adoption order is discharged.

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(6) 1953 S.C. 227.

(7) 1953 S.C. at p. 229.

There is then the question what happens to the child. The question arises whether I have any jurisdiction to grant a stay. I do not think that I have. I came to that conclusion on the Adoption Act, 1950, in *Re Adoption Act, 1950* (8), which went to the Court of Appeal (9). In s. 27 (4) of the Act of 1950 there was a mandatory provision that, if the court did not make the order, the child should be handed back (10), and I thought that I had no jurisdiction to grant a stay. Section 27 (4) of the Act of 1950 has been repealed and is replaced by s. 35 (3) of the Act of 1958, which reads:

> " Where a notice is given to an adoption society or local authority by any person, or by such a society or authority to any person, under sub-s. (1) of this section, or where an application for an adoption order made by any person in respect of an infant placed in his care and possession by such a society or authority is refused by the court or withdrawn, that person shall, within seven days after the date on which notice was given or the application refused or withdrawn, as the case may be, cause the infant to be returned to the society or authority . . ."

As the adoption in the present case was arranged by the local authority, the subsection requires Mrs. C. to return the child to the local authority, and, as far as I know, I have no power to authorise the adopters to retain the child pending an appeal. I want, however, to make it quite plain that, if I thought that I had jurisdiction, I should grant a stay. It seems to me ridiculous that an infant should be returned to the local authority and then, if there is an appeal which is successful, that the infant should then be brought back to the adopters.

Appeal allowed.

Solicitors: *Barnes & Butler*, agents for *Cecil Bartram & Rogers*, Oxford (for the appellant, the mother); *Preston, Lane-Claypon & O'Kelly*, agents for *Cole & Cole*, Oxford (for the respondents, the proposed adopters).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

Trust and Trustee—Delegation of trusts by trustee during absence abroad—Statutory declaration to be filed with each power of attorney—Trustee Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 19), *s.* 25 (4).

The masters of the Queen's Bench Division have agreed that the practice under s. 25 (4) of the Trustee Act, 1925, is to require a statutory declaration by the donor to be filed with each power of attorney that is filed, and that no exception to this practice can be made.

Mar. 2, 1960.

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(8) (July 9, 1958), " The Times ", July 10, 1958.

(9) (July 28, 1958), " The Times ", July 29, 1958.

(10) Section 27 (4) of the Act of 1950 (which subsection was repealed by the Children Act, 1958, s. 40 (2), and Sch. 3) applied where arrangements for adoption were made by an adoption society, which was the case in *Re Adoption Act, 1950* (July 9, 1958), " The Times ", July 10, 1958.

LENTON *v.* TREGONING AND ANOTHER.

[COURT OF APPEAL (Pearce and Harman, L.JJ.), March 1, 1960.]

Injunction—Form of order—Two defendants—Injunction restraining the defendants from obstructing roadway—Acts of obstruction done by second defendant alone—Whether acts by one defendant alone constituted breach of injunction.

Contempt of Court—Appeal—Committal—Refusal of committal order for alleged breach of injunction—Construction of injunction—Appellate jurisdiction.

The plaintiff obtained an order, dated July 21, 1959, restraining two defendants from obstructing a roadway which passed before the plaintiff's and the defendants' houses and from otherwise interfering with the plaintiff's right of way over the roadway. The words of the order were: " . . . it is ordered that the defendants be restrained from doing whether by themselves or by their servants workmen or agents or any of them or otherwise howsoever the following acts . . ." which were then set out. The second defendant continued to obstruct the roadway after notice of the order had been served on her. On a motion by the plaintiff for an order committing the second defendant to prison for contempt of court, the judge held that the order of July 21, 1959, restrained both defendants jointly and not the defendants severally, and that, therefore, as the obstruction was by the second defendant alone, he could not make a committal order against her. On appeal,

Held: (i) although the second defendant was acting alone in obstructing the roadway, a committal order could be made against her for breach of the injunction of July 21, 1959, because, on the true construction of the injunction, it was contravened if either of the defendants did an act within the prohibition of the injunction.

(ii) as the decision of the judge in refusing to make a committal order was based solely on his construction of the injunction of July 21, 1959, the Court of Appeal, in allowing an appeal from his decision, would not be interfering with the exercise of his discretion; accordingly the appeal would be allowed and a committal order would be made against the second defendant.

Jarmain v. *Chatterton* ((1882), 20 Ch.D. 493) applied.

Appeal allowed.

[As to an appeal from a decision of a judge on an application for an order for committal, see 8 HALSBURY'S LAWS (3rd Edn.) 47, 48, paras. 83, 84; and for cases on the subject, see 16 DIGEST 81, *997-1000*.]

Cases referred to:

Jarmain v. *Chatterton*, (1882), 20 Ch.D. 493; 51 L.J.Ch. 471; 16 Digest 81, *998*.

Marengo v. *Daily Sketch & Sunday Graphic, Ltd.*, [1948] 1 All E.R. 406; [1948] L.J.R. 787; 28 Digest (Repl.) 891, *1210*.

Interlocutory Appeal.

The plaintiff appealed from a judgment of VAISEY, J., given on Dec. 8, 1959, on a motion by the plaintiff for an order committing the second defendant (the wife of the first defendant) to prison for contempt of court in obstructing a roadway in breach of an injunction contained in an order dated July 21, 1959, and made against both defendants. The words of the order of July 21, 1959, were " . . . it is ordered that the defendants be restrained from doing whether by themselves or by their servants workmen or agents or any of them or otherwise howsoever the following acts . . ." which included obstruction of the roadway described in the order. VAISEY, J., held that the order restrained the defendants jointly from doing the acts therein mentioned, and that acts of obstruction committed by the second defendant alone could not constitute a breach of the order. Accordingly, he held that no order should be made on the motion and gave the plaintiff leave to appeal.

J. A. R. Finlay for the plaintiff.

The defendants did not appear and were not represented.

PEARCE, L.J.: This is an appeal from an order of Vaisey, J., dismissing a motion to commit the second defendant for breach of an order made by Danckwerts, J., on July 21, 1959. The order related to a lane, which passed in front of the plaintiff's and the defendants' houses, and it read:

> " And it is ordered that the defendants be restrained from doing whether by themselves or by their servants workmen or agents or any of them or otherwise howsoever the following acts or either of them that is to say (i) obstructing the roadway which passes in front of the premises of the defendants known as Vale View Besore Truro in the county of Cornwall and which continues westward along the southern boundary of the premises of the plaintiff known as Clifton Cottage Besore aforesaid in such a way as to interfere with its use for vehicular traffic and (ii) otherwise interfering with the plaintiff's right of way over the said roadway."

The short point arises before us whether, on the construction of that order, the second defendant can be held in contempt in respect of matters which she did alone although the order does not specify " the defendants and each of them " or " the defendants or either of them ".

Notice of the order of July 21, 1959, was served on the second defendant and at a later stage, when she was clearly in breach of it, the notice of motion to commit was served on her. On Aug. 7 and 9 there was broken glass strewn on the road. That would be a defiance of the injunction if the glass was put there by the second defendant. The solicitors for the plaintiff, who had already written to the second defendant on July 24, 1959, telling her that she must obey the order, wrote a further letter to her on Aug. 13. On Sept. 13 there was an obstruction of the lane by broken glass and old iron. On that day the second defendant assaulted the plaintiff and her husband when they tried to clear away the obstruction. There was a further assault in similar circumstances on Sept. 14 and on that occasion a rude note was left by the second defendant for the plaintiff. On Sept. 22 the order was served, but the obstructions of the lane continued almost daily from then. The various obstructions that were put there were an old wooden door, a tin bath, chests, buckets, sheets of galvanised iron and stones. On Oct. 23 the plaintiff saw the second defendant actually putting obstructions in the lane and on that occasion they consisted of sheets of galvanised iron, biscuit tins, a wooden door, buckets, stones and broken glass. There were other occasions on which she was seen doing similar acts.

On Dec. 8 the motion to commit the second defendant was heard. The learned judge came to the conclusion that he could not make an order of committal on the sole ground of the construction of the order. He came to the conclusion that, as it restrained both defendants jointly and not the defendants severally and as there was no evidence of obstruction by both defendants jointly but only by the second defendant acting alone, he was precluded from making any order. However, he gave leave to appeal.

An appeal does lie from a refusal to commit although, if it is a question of discretion, this court is very loth to interfere with the judge's decision. In *Jarmain* v. *Chatterton* (1) an appeal against a refusal to commit was allowed. The learned lords justices observed that in a matter of discretion they would be slow to allow such an appeal. Brett, L.J., said in his judgment (2):

> " Here the meaning of the order is in dispute, and a considerable question is raised whether the vice-chancellor did not interpret the order in a different way from that in which this court has construed it."

His brethren took the same view, and they allowed the appeal and made the order to commit.

In the present case, if it were a question of discretion on the part of the learned judge, I for my part would hesitate long before I interfered with it; but I think that the learned judge was prevented from exercising his discretion by taking a wrong view of the construction of the order which, it is alleged, has been broken. The words

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(1) (1882), 20 Ch.D. 493.

(2) (1882), 20 Ch.D. at p. 500.

> " . . . the defendants be restrained from doing whether by themselves or by their servants workmen or agents or any of them or otherwise howsoever the following acts . . ."

are very wide. Even if, which I doubt, the use of the words " the defendants be restrained from doing whether by themselves or by their servants workmen or agents " did not make it a contempt for one defendant alone to do an act in contravention of the order, the addition of the words " or any of them " makes it clear that the defendants are liable if either of them does an act in contravention of the order. Moreover, the words " or otherwise howsoever " further emphasise that it is intended that any act in breach of the order shall be prevented. Counsel for the plaintiff pointed out that this order in its exact form, namely, specifying the defendants without adding the words " or either of them ", is in the form suggested by LORD UTHWATT in *Marengo* v. *Daily Sketch & Sunday Graphic, Ltd.* (3). I am satisfied for my part that there has been a breach of the order by the acts of the second defendant.

This is an unhappy case, for the affidavit which we gave leave to read shows that these acts have continued since the hearing of the motion before VAISEY, J. It appears to be clear that the second defendant is a person of not very high intelligence and of considerable obstinacy who is deliberately acting in the way complained of in defiance of the order of the court. The letters which she has written make this plain. It is essential that she should understand that she cannot defy the order of the court, and we must commit her to prison. It is to be hoped that either she will herself appreciate that she has been acting foolishly and wrongly or that some other person will manage to persuade her of that. I have no doubt that, if she makes suitable apology, the court will probably take into account the fact that she is not a person of great intelligence and that she has failed to appreciate the seriousness of what she is doing. However, this is serious and the order must be enforced. I would order that she be committed to prison, but the order must not be issued until the two exhibits to the affidavits of Mr. Nation (4) sworn on Oct. 5, 1959, and Dec. 2, 1959, are produced to the court. I would therefore allow the appeal.

HARMAN, L.J.: I agree and will only add two or three words. For my part I do not applaud the form in which the order was drawn. It would have been much better to have said " and each of them " or " or either of them ", as is more usually done. Nevertheless, I cannot assent to the learned judge's view that without those words the order cannot be enforced against the defendants severally. That point, however, it is not necessary to decide because of the additional words " or otherwise howsoever ", which seem to me to make the matter tolerably clear. We are not interfering with the learned judge's discretion but are only disagreeing with him on a point of construction. As my Lord has pointed out, there is no bar to entertaining the appeal, which should be allowed with the limitation which my Lord has proposed.

Appeal allowed.

Solicitors: *E. P. Rugg & Co.*, agents for *R. L. Frank & Caffin*, Truro (for the plaintiff).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

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(3) [1948] 1 All E.R. 406.

(4) Mr. Nation was an articled clerk with the plaintiff's solicitors. In his affidavits he stated that he had served on the second defendant (a) a true copy of the order of July 21, 1959, duly indorsed and (b) a true copy of the notice of motion dated Nov. 25, 1959 (notice of the motion for committal) and copies of affidavits in support.

NOTE.

A

LEWIS *v.* PACKER.

[CHANCERY DIVISION (Danckwerts, J.), October 15, 1959.]

Mortgage—Remedies of mortgagee—Moneylender's security—Originating summons for repayment—Whether particulars required by R.S.C., Ord. 20, *r.* 10, *and R.S.C., Ord.* 3, *r.* 10, *must be included in summons or affidavit in support—R.S.C., Ord.* 55, *r.* 5A.

B

In an action begun by originating summons under R.S.C., Ord. 55, r. 5A, to enforce repayment of a moneylender's loan and interest secured by mortgage, the requirements of R.S.C., Ord. 20, r. 10 (which govern, by reference to R.S.C., Ord. 3, r. 10, what particulars must be included in a statement of claim for recovery of money lent by a moneylender) are inapplicable and it is sufficient that the evidence in support should be in accordance with the practice under R.S.C., Ord. 55, r. 5A.

C

Adjourned Summons.

The plaintiff, Harris Lewis, a licensed moneylender, applied by originating summons dated Feb. 6, 1957, to recover from the defendant, Reginald Howard Packer, £409 18s. 6d. (being £200 principal and £209 18s. 6d. interest thereon at 48 per centum per annum) and further interest at 48 per centum per annum from the date thereof until judgment, alleged to be due under two promissory notes dated Mar. 25 and Apr. 19, 1955, and pursuant to legal charges of the same dates.

D

By two legal charges dated respectively Mar. 25 and Apr. 19, 1955, and made between the defendant of the one part and the plaintiff of the other part, each reciting that the plaintiff had advanced to the defendant £100 on a promissory note of even date carrying interest at 48 per centum per annum, the defendant charged property, No. 18, Sandilands Road, Baguley, Manchester, by way of legal mortgage with payment to the plaintiff of all sums payable on the promissory note. In or about January, 1958, prior mortgagees of the property sold it. The proceeds of sale were insufficient to pay the amount due to the prior mortgagees.

E

F

A preliminary objection was taken by the defendant that the plaintiff's originating summons did not contain the statements of fact which a statement of claim would have had to contain in order to comply with R.S.C., Ord. 20, r. 10 (and Ord. 3, r. 10) if the action had been begun by writ, as the legal charges were part of moneylending transactions. The affidavit evidence in support of the originating summons complied with R.S.C., Ord. 55, r. 5A. The application, which came before the district registrar at Manchester, was adjourned to the judge. The plaintiff abandoned excess of his claim over £400 and did not ask for costs before the filing of his affidavit in reply in which such particulars as would have been required by R.S.C., Ord. 20, r. 10, and Ord. 3, r. 10, were given.

G

E. W. H. Christie for the plaintiff.

The defendant appeared in person.

H

DANCKWERTS, J., said that the objection taken by the defendant had common sense to recommend it, and it might be that the rules should be changed, but the objection failed because, although proceedings commenced by originating summons were an action, the originating summons was not a statement of claim and R.S.C., Ord. 20, r. 10, did not apply to it. It had sometimes been said that the affidavit in support of an originating summons was equivalent to a statement of claim, but it was not in fact a statement of claim and compliance with the requirements of proof under R.S.C., Ord. 55, r. 5A, was sufficient for an originating summons brought under that rule.

I

Judgment for the plaintiff.

Solicitors: *L. A. Lewis & Co.*, Manchester (for the plaintiff).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

SCHLESINGER *v.* SCHLESINGER.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 23, 1959.]

Divorce—Alimony—Assessment—Factors to be considered—Position of parties if marital obligations fulfilled—Wealthy husband living on capital and business expenses—South African domicil of husband—Wife born in America and now resident in England with children of the marriage—Wife's own adultery—Obligation to make order that should be just—Whether jointure principle applicable—Whether high incidence of United Kingdom income tax should be taken into account—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 20 (2).

A wife, who had been born and brought up in the United States of America, of a husband domiciled in South Africa was granted in England a decree of judicial separation on the ground of the husband's adultery, the court exercising its discretion in respect of her own adultery. She was given by consent custody of the two children. The wife was living and intended to live in England, and her decision to reside there was reasonable in the circumstances. She now applied for permanent alimony. The husband was the head of a large commercial organisation in South Africa and during the marriage the parties had lived together in luxury. The husband received a salary of £18,000 a year, on which tax of about £10,000 annually was paid, but he lived largely on capital and expenses and it was agreed that he should be treated as having a notional income of £110,000 a year. The wife had no capital or income of her own. The registrar awarded the wife alimony at the rate of £12,000 a year for herself and maintenance for each child, and stated in effect that any larger order would merely result in the husband paying more money to the British Revenue without any substantial benefit to the wife. Under the law of South Africa alimony payable by the husband would be deductible from his income in assessing him to tax. On appeal by the wife,

Held: (i) under the Matrimonial Causes Act, 1950, s. 20 (2), the court had to award a sum which was just, taking into account the position in which the parties were and the position in which the wife was entitled to expect herself to be and would have been if the husband had properly discharged his marital obligations (observations of LORD MERRIVALE, P., in *N.* v. *N.*, [1928] All E.R. Rep. at p. 466, applied) and the registrar was in error in taking account of the high incidence of taxation when making his award.

(ii) in the circumstances, and taking due account of the wife's own adultery, the proper award would be the sum of £20,000 a year for the wife (that amount being such as, after allowing for payment of tax, would leave her with £5,000 to £6,000 a year).

Observations on the inapplicability of the jointure test as referred to in *Kettlewell* v. *Kettlewell* ([1898] P. 138) and *Gilbey* v. *Gilbey* ([1927] All E.R. Rep. 662); see p. 727, letter D, et seq., post.

Appeal allowed.

[**Editorial Note.** In considering the income tax aspect of the award made in this case, it will be observed that the amount of the award exceeded what, on the evidence, was apparently the income receivable by the husband so that, it would seem, he would be left with no income taxable as his own.

As to the amount of permanent alimony allotted, see 12 HALSBURY'S LAWS (3rd Edn.) 429, para. 963; and for cases on the subject, see 27 DIGEST (Repl.) 604, *5648-5660*.

For the Matrimonial Causes Act, 1950, s. 20 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 408.]

Cases referred to:

Clear v. *Clear*, [1958] 2 All E.R. 353; [1958] 1 W.L.R. 467; 3rd Digest Supp.

De Hoghton, Re, De Hoghton v. *De Hoghton*, [1896] 2 Ch. 385; 65 L.J.Ch. 667; 74 L.T. 613; 40 Digest (Repl.) 639, *1316*.

Gilbey v. *Gilbey*, [1927] All E.R. Rep. 662; [1927] P. 197; 96 L.J.P. 55; 137 L.T. 31; 27 Digest (Repl.) 617, *5771*.

J. v. *J.*, [1955] 2 All E.R. 617; [1955] P. 215; [1955] 3 W.L.R. 72; 3rd Digest Supp.

Kettlewell v. *Kettlewell*, [1898] P. 138; 67 L.J.P. 16; 77 L.T. 631; 27 Digest (Repl.) 619, *5785*.

N. v. *N.*, [1928] All E.R. Rep. 462; 138 L.T. 693; 27 Digest (Repl.) 618, *5772*.

Summons.

This was an appeal by way of summons by the wife against an order for alimony made by Mr. Registrar KINSLEY on July 17, 1959.

On Dec. 23, 1953, the wife filed a petition for judicial separation on the grounds of the husband's cruelty and adultery. At the hearing of the petition before DAVIES, J., on May 12, 1958, the husband withdrew his answer and the wife was granted a decree. An order was made by consent that she should have the custody of the two children. On May 13, 1958, the wife gave notice of application for permanent alimony for herself and maintenance for the two children. The wife also appealed against her own decree and on Dec. 18, 1958, the Court of Appeal amended the form of the decree ([1959] 1 All E.R. 155). On June 8, 1959, on appeal from the registrar's refusal to order discovery, it was agreed between the parties that for the purpose of the present proceedings the husband's income should be treated as £110,000 a year. The wife's application for alimony came before Mr. Registrar KINSLEY on July 17, 1959, when the following cases were cited: *Sykes* v. *Sykes*, [1897] P. 306; 66 L.J.P. 162; 77 L.T. 150; 27 Digest (Repl.) 491, *4305*; *Kettlewell* v. *Kettlewell*, [1898] P. 138; 67 L.J.P. 16; 77 L.T. 631; 27 Digest (Repl.) 619, *5785*; *Hulton* v. *Hulton*, [1916] P. 57; 85 L.J.P. 137; 114 L.T. 449; 27 Digest (Repl.) 617, *5770*; *Dean* v. *Dean*, [1923] P. 172; 92 L.J.P. 109; 129 L.T. 704; 27 Digest (Repl.) 603, *5639*; *Gilbey* v. *Gilbey*, [1927] All E.R. Rep. 662; [1927] P. 197; 96 L.J.P. 55; 137 L.T. 31; 27 Digest (Repl.) 617, *5771*; *Acworth* v. *Acworth*, [1942] 2 All E.R. 704; [1943] P. 21; 112 L.J.P. 37; 168 L.T. 51; 27 Digest (Repl.) 611, *5730*. It was agreed that the parties had lived together in a state of extreme luxury. The registrar was, however, of the opinion that the question of tax had to be considered and awarded £12,000 a year as alimony for the wife and awarded maintenance for each child. In his report dated Aug. 11, 1959, the registrar said:

> "The upper limit for alimony has never been fixed but it seems to me that when the stage is reached at which the husband is paying something like one-eighth of the order to the wife and seven-eighths to the Revenue surely the limit must be near. I repeat, however, that if the husband paid British tax his rebate on surtax would make it possible to make a larger order . . . If the order were for £35,000 as asked on behalf of the wife the husband would be pouring money into the Revenue without any very substantial benefit

> to the wife, and it would be in the nature of punishment so far as the husband is concerned. I think the question of tax must be taken into account in arriving at the amount of the order."

The wife appealed. The application as a whole was dealt with in chambers, as issues relating to payments to be made in respect of the children were also argued. Subsequently, it having appeared that no appeal was entered, SACHS, J., authorised the reporting of so much of his judgment as dealt with principles and their application where a husband was a man of great wealth.

G. H. Crispin for the wife.

J. Stirling, Q.C., and *Victor Williams* for the husband.

Cur. adv. vult.

Nov. 23. **SACHS, J.:** This appeal by the wife as to the amounts payable to herself and to her two children on her decree for judicial separation concerns such large sums and involves such unusual features that I have taken time to await information, provided on Nov. 7, as to the effect of certain provisions of the Income Tax Acts of South Africa and to consider the matter as a whole. The main difficulties arise in assessing what under the provisions of the Matrimonial Causes Act, 1950, s. 20 (2), is the figure which in its discretion the court should conclude is " just ". It being necessary to consider in a broad way the position of the parties as a whole, it is convenient at the outset to mention some salient facts as to both of them.

The husband is domiciled in South Africa. He is head of what has been termed the Schlesinger Organisation or Schlesinger Empire, a series of interlocking companies of vast assets; he is what a leading counsel of his described as an important figure; and, indeed, he appears in the Dominions to be a front-page figure or headline character. It is common ground that at all material times he has lived and continues to live in a very luxurious manner, described by himself as " lavish ", and by his wife as " grandiose ". In an affidavit dated Mar. 19, 1957, he swore that the value of all his assets as at Feb. 18, 1957, amounted to a total of £159,753. By an affidavit dated July 7, 1958, after that figure had been challenged, he swore on May 15, 1958, that his net assets were valued at £1,819,057, and that the total annual income derived from them was £263; that in addition he had a salary of £18,000 per annum on which he paid tax of about £10,000; and that the lavish style in which he lived was, in effect, largely due to the exigencies of his business affairs and to a considerable extent paid for by the organisation of which he was head. He denied that his personal expenditure approached the figure of £75,000 per year, but he has not anywhere stated an affirmative figure.

It is a proper inference from the above facts that he is a man who is capable of arranging, and a man who, in fact, chooses to arrange, his affairs so that he can draw indefinitely on capital rather than have an income from his investments, and so that in addition he can obtain great benefits in the way of " expenses " either by way of allowances or in kind. By an agreement between counsel reached on June 8, 1959, in order to avoid the expense, delay and potential cumbersomeness of proceedings for discovery, it was agreed that he should be treated as having a notional income of £110,000 per annum, to include the above mentioned sums of £18,000 and £263. Also by agreement no further figures have been supplied to the court of a later date than those set out in the above July 7, 1958, affidavit, and it has been assumed that since then no material alteration has occurred in the husband's financial affairs or in the incidence of South African taxation.

The wife, who was born and brought up in the United States of America, has no capital or income other than that which she may receive from the husband; she has for several years been living in this country; and she has been given the custody of the two children. The wife lives at present in a furnished flat in Gloucester Road, S.W.7, but is due to leave those premises on the expiry of the lease.

I will first deal with certain points which were raised in argument but which can conveniently be disposed of before further dealing with the main issue. In the affidavits and, indeed, to some extent in argument, it was expressly or impliedly suggested that the husband was, on the financial side, in some way entitled to have taken into account in his favour that the wife had elected to take up her residence in this country. [HIS LORDSHIP then referred to the evidence and material before him on this issue and stated his conclusion as follows:] Accordingly, my view of the present matters before me proceeds on the basis that the wife has acted reasonably in taking up residence with her children here. Another point that was argued, this time on behalf of the wife, was that the husband had made no offers which would mitigate the difficult tax position which any substantial order for alimony involves. The court cannot, however, deal with matters differently than it otherwise would because no such offers have been made. If offers are in fact made, then and only then can they be taken into account.

Thirdly, there was the argument raised with success before the registrar which resulted in his expressing a view that the upper limit for alimony must surely be near when the stage is reached that the husband is paying " something like one-eighth of the order to the wife and seven-eighths to the Revenue ". If, as would appear, this means that an order which would otherwise be just should not be made merely because the Revenue take so much of the allotted sum, that view is, to my mind, wrong. Fourthly, I must refer to the registrar's further statement in relation to the facts of this particular case to the effect that the size of the order would be different if the husband could get a British surtax rebate. This view, which he stated in the words:

> " I repeat, however, that if the husband paid British tax his rebate on surtax would make it possible to make a larger order ",

is really another way of putting his previous point as to the upper limit and is thus not correct in principle. Moreover, it would appear that when he made that statement he cannot have had put before him the true facts, now agreed by both parties, as to the tax position in South Africa.

Naturally, the tax position of both parties is relevant and is not infrequently an important factor in these cases; but South Africa, like this country, has its system of allowing payments made direct to the wife under a court order to be deducted from taxable income for tax purposes. Thus, if an order for £18,000 per annum is made in the present case the husband would save the £9,336 tax to which he refers in para. 10 of his July 7, 1958, affidavit. Moreover, to suggest that because a lavishly living man with a notional income of £110,000 per annum has so arranged his affairs that only £18,000 attracts tax he can here pray that fact in aid against his wife's just claims is clearly erroneous. Further, there is something unreal in speaking of an otherwise just order that leaves a guilty husband with a real annual spending power as truly enormous as in this case as " punishment " (a word used by the learned registrar but not defended by counsel for the husband). I have thus no doubt that the learned registrar has

A been led into error of principle on more than one count in this matter and, accordingly, I am going to approach the main issue de novo with a fresh mind.

[HIS LORDSHIP then turned to consider a factor that had been pressed in argument, namely, that the court should take into account against the wife her adultery with one named man, disclosed in her discretion statement. HIS B LORDSHIP intimated that it was not a plea which could be put forward with grace on behalf of the husband in view of his own conduct; moreover, leading counsel on behalf of the husband at the trial had proclaimed his client's desire that the wife and children should have proper maintenance. HIS LORDSHIP continued:] None the less, the husband is, in my view, entitled to have consideration given to whether that conduct of his wife should be taken into account. (I C pause to mention that both counsel have agreed that as regards alimony after a decree of judicial separation all the material tests, at any rate in the present case, are the same as if there had been a decree of divorce, and so I have not further examined the law on this point.) I propose, however, to approach this issue on the basis that the court's function is to arrive at whatever figure is just, taking D the position as a whole, and not on the basis that in some way the wife has forfeited all her rights and must win her way back step by step. I would add that if that latter approach is one that the learned registrar interpreted from *Clear* v. *Clear* (1) as being proper, I respectfully find myself in disagreement with him. [HIS LORDSHIP stated that he had read with care the transcript of the whole of the evidence before DAVIES, J., at the trial, and also details of the E discretion statement, and added that nothing that he had seen of the wife in the course of proceedings, some of which had been conducted by her in person, had led him to think that her statements of relevant facts in the documents were other than completely truthful. HIS LORDSHIP continued:] On the basis of the truth of her evidence and discretion statement, I consider some account F should be taken of her conduct, but by no means to the extent urged by counsel for the husband.

I now turn to the question of the amount which should, having regard to the facts as a whole, be paid to the wife, a by no means easy matter. A number of authorities relating to really wealthy parties has been cited. They all concern G circumstances in periods before the Second World War. Since that war, however, taxation has risen to heights which the learned registrar rightly described as fantastic; the purchasing power of money has decreased enormously; and there has arrived an era in which it is well known that there are rich men who live on capital, very often on capital profits, much more than they do on income. No authority has been cited to me where the combined effect of these changes H has been discussed, and it is those changes which cause the difficulty in the present case. It still remains, of course, the function of this court to endeavour to show that degree of practical wisdom and to look at the realities of the case in the way that LORD MERRIVALE, P., laid down in *N.* v. *N.* (2). There are two general criteria which have won approval in the past. One is that referred to I in that case (3) in the words:

> " I conceive that I must take into consideration the position in which the parties were, and the position in which the wife was entitled to expect herself to be and would have been, if her husband had properly discharged his marital obligation . . ."

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(1) [1958] 2 All E.R. at p. 357.
(2) [1928] All E.R. Rep. 462.
(3) [1928] All E.R. Rep. at p. 466.

This was approved by HODSON, L.J., as recently as *J.* v. *J.* (4) where the husband's standard of living had nothing to do with his taxable income. A The other can be described as the jointure test, which, in relation to husbands with large incomes, is referred to in *Kettlewell* v. *Kettlewell* (5) (when income tax was 8d.) and then in other large income cases, including *Gilbey* v. *Gilbey* (6), when £4,000 was awarded to a wife who would have had to pay 4s. in the £ income tax, and B an average of less than 1s. 3d. supertax on income above £2,000 per annum.

For reasons with which I will deal later, it seems best to consider what in the light of all the circumstances is the sum which should be paid to the wife as being just, taking into account all those factors to which the authorities refer, other than the jointure test, and then to examine whether that latter test should be applied and if so what its effect would be. C Whilst the wife was living with her husband she was receiving £3,000 per annum tax free by monthly instalments of £250. In addition, all her clothing was being paid for by her husband, and over and above that she had at her disposal the residences, cars and world travel facilities which, taken with all other matters, resulted in her leading a life of that sumptuous nature that can only be provided by a husband who has vast sums at D his disposal and is prepared to spend them. It is a scale of living which cannot do otherwise than involve an annual expenditure of five figures several times over. Taking the facts as a whole it is clear that the husband was not only prepared so to live but enjoyed so doing. His suggestion of having, in effect, been compelled to live on that scale for business reasons must be taken with a strong grain of salt E —though no doubt many travelling and other expenses were, under the arrangements earlier referred to, legitimately paid for by the organisation of which he was head.

The wife's present position is that she is living here, is taking that course reasonably, and is liable to the consequent taxation. (I pause only to note that if she had gone to the United States of America, taxation might not prove much F lower there than in this country, and the views of the courts there on alimony might be found to relate to higher levels of payments than here.) The wife has no capital out of which to provide herself with a house, the appropriate furniture, or a car and its replacements. She is expected at least to live in a style which is reasonable as one having the custody of the two children; that is, a style which G the husband, indeed, has put higher than is my own view—it is he and not the wife who has spoken in terms of a flat in Grosvenor Square. The wife herself is not suggested to have been otherwise than a good wife until sometime after the commencement of those matters which are referred to in her evidence before DAVIES, J., and it has always been common ground that she has been a good mother to the children. H In the result, whilst in all the circumstances it does not seem to me that she is entitled to expect to live on that astonishingly high "Rolls Royce plus" standard of the days when she was in South Africa, she is yet, to my mind, entitled to live on a really high standard, to be able to travel, and to be able out of her income to provide such furniture and such car as may be appropriate.

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What then is the just figure at which the court in its discretion should fix the wife's alimony, having regard to that "generous ambit within which reasonable disagreement is possible" on such a matter? To my mind, the wife should have available, after payment of tax, something between £5,000 and £6,000 a year, and taking a broad view and taking into account those matters which I have previously mentioned, and the figures agreed at the Bar as to the effect today of taxation, I would fix the gross figure at £20,000 a year. It is to be noted that this figure will result in the husband having to pay about £9,000 a year less tax than previously, and out of a notional income of £110,000 per annum gross, and about £100,000 after tax (I am taking the pre-decree figures), he will thus now be left with about £90,000 per annum after tax instead of the previous £100,000. (Those figures I have, of course, calculated in each case without taking into account any sums which he may have to pay to or in respect of the children.) Further, the figure which I have fixed would not, in the upshot, seem to be very different from what the learned registrar might have thought just if he had not been misled in his mind on the question of " punishment " via the high incidence of taxation. It is an order which, taking due account of taxation, provides the wife with less than half the purchasing power achieved by the *Gilbey* (7) order of £4,000 per annum; and it is not the highest annual figure that can be found in the records of this court. Strangely enough, despite its apparent great size, my only real doubt has been whether it ought not to be somewhat higher.

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(4) [1955] 2 All E.R. at p. 620; [1955] P. at p. 242. (5) [1898] P. 138.
(6) [1927] All E.R. Rep. 662; [1927] P. 197.

Returning now to the jointure test much stressed by counsel for the husband, the first question is what is meant by the word " jointure " in the context in which it was used in the various cases relating to the maintenance of rich men's wives. If the word was used in the technical sense in which it has been said that the power of jointuring is peculiar, stands on its own footing and is, in effect, a substitute for dower, it, of course, relates to something which is no longer in general current use. If, however, as seems more probable, it is used in what STIRLING, J., in 1896 considered to be its prima facie sense, i.e., ". . . a provision made for the wife after the death of the husband " (see *Re De Hoghton, De Hoghton* v. *De Hoghton* (8)) then the word has a broader sense. In that case the phrase " reasonable jointure " in so far as it means " reasonable provision " adds very little to the word " just " as incorporated in the modern statutes relating to alimony. Nor does the fact that jointures were not necessarily confined to provision commencing on the death of the husband add to the assistance that phrase can render here in relation to matters of amount.

Moreover, on any proper interpretation of the word jointure it is clear that it connotes a provision by way of income that would normally be charged on land or securities producing or capable of producing some fixed or, at any rate, fairly steady interest. It originated in the days when a relict was expected to retire quietly either to a dower house or to some other suitable residence, and it continued to be used in the era when to say of a man of substance that he lived on capital might well be defamatory, and the effect of death duties was not a major factor. Today, when high standards of living can often only be maintained by wealthy men if they use either capital or capital profits, the idea that a millionaire would necessarily or even normally make his sole provision for a good wife by means of some fixed income charged on capital has an element of unreality. Whether by settlement or by will, he might well be expected to provide a substantial capital sum on terms that she not only had a life interest in it, but that the trustees could under appropriate powers make available part of it for purchasing a house for her. One would also expect there to be other powers for raising moneys out of capital so that she might maintain a relevant standard of living without unduly attracting taxation. As regards the class of cases under consideration, it thus seems doubtful whether the jointure test can today be usefully employed as the second of the criteria previously mentioned. In particular it hardly seems apt when a husband lives to any material extent on capital. Indeed, it may well on occasions conflict with the first of those criteria, viz., that a good wife should during her husband's lifetime be entitled not to have her standard of living lowered simply because her husband had made life with him intolerable—a conflict which would seem inevitable where, for instance, death duties would affect the position after the husband's death or where the facts are of the type discussed in *J.* v. *J.* (9).

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(7) [1927] All E.R. Rep. 662; [1927] P. 197.

(8) [1896] 2 Ch. at p. 392.

An additional point against the use here of the jointure test is that (speaking with considerable diffidence, but not without having made some inquiries) an assessment of what here would be a " proper jointure " not only involves for me a considerable element of speculation, but might well raise amongst those better versed in jointures an area of doubt greater if anything than that engendered by the simple word " just ". Thus I do not think that the jointure test can help in this case, even if, which I doubt, it is applicable. Accordingly I adhere to the gross figure of £20,000 previously mentioned as being that which, to my mind, is just. I would add, however, that the facts of this case point somewhat sharply to the desirability of considering whether the Matrimonial Causes Act, 1950, might not be so amended as to enable the courts to order husbands in a position comparable to that of Mr. Schlesinger to make on the wife a proper settlement framed on modern lines.

[HIS LORDSHIP then turned to the question of the sums to be paid for the children, and, after deciding those, continued:] The result is that this appeal is successful and that the registrar's order dated July 17, will be varied by substituting for the present figure appearing therein the following sum, as regards payment to the wife, £20,000 per annum. All the other provisions of the order [save those regarding payments for the children] remain as previously.

Order accordingly.

Solicitors: *Culross & Co.* (for the wife); *Crossman, Block & Co.* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

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(9) [1955] 2 All E.R. 617; [1955] P. 215.

THE BOSWORTH (No. 2).

OWNERS, ETC. OF STEAM TRAWLER WOLVERHAMPTON WANDERERS *v.* OWNERS OF MOTOR VESSEL BOSWORTH, HER CARGO AND FREIGHT. OWNERS, ETC. OF STEAM TRAWLER FARADAY *v.* OWNERS OF MOTOR VESSEL BOSWORTH, HER CARGO AND FREIGHT.

[CONSOLIDATED ACTIONS]

[COURT OF APPEAL (Hodson, Willmer and Devlin, L.JJ.), February 29, March 1, 2, 1960.]

Costs—Consolidated actions—Payment into court—Actions consolidated by defendant—First plaintiff recovering more and the other less than his apportioned part of money paid into court—Whether defendant liable for whole costs of first plaintiff.

Two sets of plaintiffs each brought a salvage action against the same defendants in respect of the same occurrence. Each set of plaintiffs was represented by separate solicitors and counsel. The two actions were consolidated at the instance of the defendants on Oct. 10, 1958. On Oct. 19, 1959, when substantially all the costs save those of the trial itself (which began on Nov. 2, and ended on Nov. 12, 1959) had been incurred, a payment into court made by the defendants was apportioned between the two claims. During the trial certain time was occupied solely with the case of the second plaintiffs. Eventually the first plaintiffs were awarded more than their apportioned part of the sum paid in, and the second plaintiffs less than their apportioned part of this sum. The trial judge ordered the defendants to pay to the first plaintiffs " their costs of this action and of the consolidated action, *excluding those costs directly attributable to the claim of the [second plaintiffs]* ". There was no item of costs (such, e.g., as the cost of a witness giving expert evidence relevant to the cases of both sets of plaintiffs) which might have been incurred by one set of plaintiffs and have necessitated some distinction being made between what was attributed to the first or to the second plaintiffs. On appeal by the first plaintiffs,

Held: the order for costs would be varied by deleting the limiting words printed in italics above, because that limitation could refer only, in the circumstances of the case, to the first plaintiffs' costs of being represented at so much of the trial as was concerned solely with the second plaintiffs' claim and, the action having been consolidated at the instance of the defendants, the first plaintiffs were entitled to those costs as against the defendants.

English v. *Bloom & London Passenger Transport Board* ([1936] 2 All E.R. 1592) distinguished.

SEMBLE: if in the circumstances the defendants thought that they should not pay the first plaintiffs' costs in full, their proper remedy would have been to ask that any costs attributable to the second plaintiffs' claim which the defendants had to pay to the first plaintiffs should be added to the defendants' order for costs against the second plaintiffs (see p. 731, letter D, and p. 732, letter F, post).

Appeal allowed.

[As to costs after payment into court, see 30 HALSBURY'S LAWS (3rd Edn.) 424, para. 802; and for cases on the subject, see DIGEST (Practice) 874-876, *4156-4163*.

As to the consolidation of actions, see 30 HALSBURY'S LAWS (3rd Edn.) 389, 390, para. 725; and as to the consolidation of salvage actions, see 1 HALSBURY'S LAWS (3rd Edn.) 85, 86, para. 182.]

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Case referred to:

English v. *Bloom & London Passenger Transport Board, Siegenberg* v. *Bloom & London Passenger Transport Board*, [1936] 2 All E.R. 1592; [1936] 2 K.B. 550; 105 L.J.K.B. 659; 155 L.T. 286; Digest Supp.

Appeal as to costs.

The owners, master and crew of the steam trawler Wolverhampton Wanderers brought a salvage action against the owners of the motor vessel Bosworth, her cargo and freight. The owners, master and crew of the steam trawler Faraday instructed separate solicitors and counsel and brought a separate action against the same defendants in respect of the same salving. On the application of the defendants the two actions were consolidated on Oct. 10, 1958. The defendants made payments into court which, pursuant to the decision of KARMINSKI, J., dated Oct. 9, 1959 (reported ante p. 146), were on Oct. 19, 1959, apportioned as to £4,500 in respect of the claim of the Wolverhampton Wanderers and as to £13,000 in respect of the claim of the Faraday. By the date of this apportionment substantially all the costs save those of the trial itself had been incurred. The trial began on Nov. 2, 1959, and ended on Nov. 12, 1959, when the President (whose decision is summarised ante, at p. 151) awarded £11,400 (i.e., more than that part of the sum paid in apportioned to their claim) to the Wolverhampton Wanderers, and £8,260 (i.e., less than that part of the sum paid in apportioned to their claim) to the Faraday. The President ordered the defendants B C D

> " to pay the plaintiffs the owners master and crew of the steam trawler Wolverhampton Wanderers their costs of this action and of the consolidated action, excluding those costs directly attributable to the claim of the owners master and crew of the steam trawler Faraday from the date of payment into court." E

The President ordered the owners, master and crew of the Faraday to pay certain costs to the defendants. On appeals against the amounts awarded by the President the Court of Appeal affirmed the award to the Wolverhampton Wanderers and increased the award to the Faraday to £12,260 (i.e., less than the £13,000 of the sum paid in apportioned to the Faraday's claim). The Wolverhampton Wanderers then appealed, by leave of the President, against the limitation of their order for costs by the words " excluding those costs directly attributable to the claim of the . . . Faraday . . ." and asked that the order for costs should be varied by deleting therefrom these words of exclusion. F

J. Franklin Willmer for the first plaintiffs. G

D. H. Hene for the defendants.

The second plaintiffs did not appear and were not represented.

HODSON, L.J.: This is an interlocutory appeal, by leave, from an order of the President dated Nov. 12, 1959, in respect of costs. The matter arises out of salvage actions in which there were two plaintiffs—the Wolverhampton Wanderers as the first plaintiff and the Faraday as the second plaintiff. The defendants in each action were the owners of the Bosworth. The two actions were consolidated by the order of the Admiralty Registrar dated Oct. 10, 1958, at the instance of the defendants. It was obviously the right and natural course for the defendants to pursue to have the actions consolidated, which must necessarily (I should have thought) save a great deal of time and expense. Of course, when the actions were tried counsel for both plaintiffs were present during the whole of the proceedings, notwithstanding that they were not necessarily interested in the evidence given by witnesses from the vessel of the other party. H I

The payment into court which was made in this case was finalised on Oct. 19, 1959, when £4,500 was apportioned to the claim of the Wolverhampton Wanderers and the balance of the £17,500 paid in, namely, £13,000, was apportioned to the claim of the Faraday. In the event, the Wolverhampton Wanderers succeeded in obtaining a larger award than the amount of the payment in, and, in accordance with the normal practice, counsel for the plaintiffs the Wolverhampton Wanderers asked for an order for costs. That is the order which the Wolverhampton Wanderers seeks to obtain today. The President was persuaded by counsel for the defendants not to make the order in the ordinary form but to add to it a phrase which would, on the face of it, limit the costs which the Wolverhampton Wanderers would be entitled to recover. The order reads:

> " The defendants are to pay the plaintiffs the owners, master and crew of the steam trawler Wolverhampton Wanderers their costs of this action and of the consolidated action, excluding those costs directly attributable to the claim of the owners, master and crew of the steam trawler Faraday."

It appears that when that payment into court was made on Oct. 19, substantially all the expenses had been incurred except for the trial, which began on Nov. 2. The object of counsel for the defendants was, admittedly, to avoid, if he could, his clients paying the expense of counsel on the other side attending in court for a number of days which were taken up because of the claim of the Faraday. He did not make, as he might have done, the application that any costs which were attributable to the Faraday's claim which he had to pay to the Wolverhampton Wanderers should be added to his order for costs against the Faraday; but he sought to obtain the limitation which I have mentioned.

It is clear to my mind that the President did not really intend that the Wolverhampton Wanderers' proper costs should be limited at all. During the course of discussion he made observations to that effect more than once. Counsel for the Wolverhampton Wanderers was asking for the straight order for costs from the defendants, even if they were directly attributable to the claim of the Faraday. He said:

> " Supposing your Lordship took the view, or it was held by the taxing master, that this trial went on for two days extra because the Faraday was here, it might be said then that all my costs of the two days of the hearing were directly attributable to the Faraday and on that basis I would not be allowed to recover my costs for the two days."

The President did not accept that. He said:

> " I should have thought that that would have been a wholly inartistic way of taxing costs, when everybody has been concerned every day right up to the end."

Counsel for the Wolverhampton Wanderers said:

> " But why should any of my costs be knocked off at all? (The President): They will not be, as I understand it."

Later counsel for the defendants was pressing for the form of order for which he asks today, and counsel for the Wolverhampton Wanderers protested:

> " . . . either this cuts out some costs I have incurred, or it does not. (The President): No, it helps to define them. It tells the taxing master that he has to be careful not to give the costs which are directly attributable to the other man."

In my judgment, the authority which seems to have been used with persuasive effect does not assist the defendants in this case. It was a decision of SINGLETON, J., in *English* v. *Bloom & London Passenger Transport Board, Siegenberg* v. *Bloom & London Passenger Transport Board* (1), where actions were commenced by two individuals by separate writs issued by the same solicitors on the same date claiming damages against the same defendants in respect of personal injuries sustained in the same accident. After separate statements of claim and defences admitting liability had been delivered, the actions were consolidated. The defendants paid into court £225 in one claim and £125 in respect of the other claim. The plaintiff in one case recovered £185, £60 more than the payment into court, and the other plaintiff recovered £200, £25 less than the payment into court. It was held that the right order for costs in that case was that judgment for one plaintiff should be given for £185 with costs, including the costs of the consolidated action, except in so far as directly attributable to the claim of the other, after the date of payment into court; and in the other case judgment was given for the plaintiff for £200 and costs up to the date of payment into court, that plaintiff to pay to the defendants any costs of the consolidated action arising after the date of payment into court which were directly attributable to his being a party to the consolidated action. The necessity for that form of order was (as I understand it) due to the fact that there was one solicitor acting for both plaintiffs throughout. It might well be that certain items of costs incurred in respect of work done by the solicitor might have to be halved, since the same solicitor was acting for the two plaintiffs.

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(1) [1936] 2 All E.R. 1592; [1936] 2 K.B. 550.

No such necessity arises for drawing any distinction here between work done on behalf of one plaintiff and work done on behalf of the other. Each of these plaintiffs was acting independently throughout, and indeed there was no solicitor acting jointly for them. Of course, if joint expenditure has been incurred and one solicitor helps the other, that matter can be dealt with on taxation in the ordinary way. But so far as the order for costs is concerned, I think that the contention for the Wolverhampton Wanderers is correct, namely, that these plaintiffs are entitled to the order for the whole of the costs which they have incurred against the defendants.

WILLMER, L.J.: I agree. In so far as the effect of the learned President's order was to deprive the successful plaintiffs, the owners, master and crew of the Wolverhampton Wanderers, of some part of their costs, it seems to me that this would not be a judicial exercise of his discretion. Prima facie, a successful plaintiff's costs should be allowed in full. If, in the special circumstances which arose in this case, the defendants conceived that they might be prejudiced by having to pay these plaintiffs' costs in full, their proper remedy would have been to ask for some special order as against the other plaintiffs against whom they succeeded.

DEVLIN, L.J.: I agree that this appeal should be allowed. We are not, of course, entitled to interfere with an order which has been made on costs unless it can be shown that the discretion was wrongly exercised and that there has been some error of principle or that the result would be unjust. In this case I think that the result of the President's order would be unjust. The President clearly did not intend an unjust result; but it has become plain, after the matter has been elucidated, that the order might in fact be used for a purpose that would be unjust, and one which the learned President obviously never intended.

The present case is distinguishable from Singleton, J.'s decision in *English* v. *Bloom* (2) in the way in which Hodson, L.J., has said. Nevertheless, it does not follow that there might not be room, in a case of this sort where there are two plaintiffs, each represented by separate solicitors—not jointly, as in *English* v. *Bloom* (2)—for a proviso of this sort, to make sure that the successful plaintiff did not recover more than he was entitled to have. It is true that the two plaintiffs here are separately represented by solicitors; but there will, for example, be only one bundle of correspondence to be prepared: there will be documents that will be used for the whole purposes of the trial of which only one set need be prepared. Similarly, it might be that there would be witnesses —a surveyor, or someone of that sort—who, if there were two trials, would have to be called at each, but who need only be called once at one trial. There is a danger, in those circumstances, that it may be that the successful plaintiffs' solicitor has borne all these initial costs. It is inconceivable that both solicitors would have separately borne the costs of preparing two sets of documents. What arrangement the solicitors came to the court will not know until the matter is investigated.

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(2) [1936] 2 All E.R. 1592; [1936] 2 K.B. 550.

We have examined that aspect of the matter with some care, and we have been told, and it has not been disputed, that there are in fact no items of that sort which could come into the Wolverhampton Wanderers' bill. In the first place, the payment into court was made comparatively late, only about a fortnight before the trial, and therefore all those items which would have been done in common in regard to the preparation of documents would be recoverable by both plaintiffs anyway. In the second place we have been told that there are no witnesses of the sort that I have described who might be of benefit to both parties.

The learned President did not go into that matter and was not invited to do so; and what he had in mind, I think, is perfectly plain from the nature of the argument that took place before him—that he would put this proviso in simply as a precaution. He had not been into it—perhaps it cannot be thoroughly gone into until the taxing master goes into the matter—but to guard against the sort of danger that I have indicated he decided he would put in this proviso to the normal order.

The passage that HODSON, L.J., has read makes it quite plain that the President had no intention that the order should be used for any wider purpose. When counsel for the defendants was invited to say what sort of items there might be (because by that time we had been into it, and counsel for the Wolverhampton Wanderers had told us there were none that he could think of) that would properly be in the Wolverhampton Wanderers' bill that they ought not to have as successful plaintiffs, the only one he gave was the very item that the President clearly did not intend to allow him, namely, the costs of the two days extra (or whatever it was) that were attributable to the fact that the actions were consolidated. Not only is it clear that the President did not intend him to have that, but it is equally clear to me that he ought not to have it. The defendants were the parties who applied for consolidation. Consolidation brings with it certain advantages and certain disadvantages. The most obvious advantage is that the combined trial is shorter than the two separate trials would be. The most obvious disadvantage is that during the combined trial two sets of counsel have to be present throughout, instead of only one set at each single trial. The party who applies for consolidation no doubt weighs these matters and considers which course would be the more advantageous to him in the long run. Here the defendants sought to obtain consolidation. The consequence that the Wolverhampton Wanderers' counsel was present during days when only the Faraday's case was being presented flows directly from consolidation. Having sought consolidation because they preferred its advantages to its disadvantages, the defendants now seek to unload themselves of the disadvantages at the expense of the successful plaintiffs. Quite obviously, it cannot be done.

If this order is left, I am satisfied that, instead of being used for the purpose for which the President intended it to be used, it may be used for a wholly different purpose. An argument can well be put up on the lines that counsel for the Wolverhampton Wanderers indicated to us, viz., that the taxing master would be invited to say—"Well, there are no items to which this proviso can apply if it is interpreted simply as meaning items which are jointly incurred; but it must be there for some purpose, and the only reason why it is there is so that I might be asked for the days which the Faraday's case took extra as being attributable to their case." It may very well be that the taxing master would yield to that argument and that that, in the circumstances which we know now, might be accepted as a proper interpretation of the order.

It is because there is, therefore, a danger of what would manifestly be an injustice, and one which (I repeat) the President never intended, that we ought to allow this appeal.

Appeal allowed: order below varied accordingly. Leave to appeal to the House of Lords refused.

Solicitors: *Holman, Fenwick & Willan* (for the first plaintiffs); *Keene, Marsland & Co.* (for the defendants).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA *v.* BROWN.

[PRIVY COUNCIL (Viscount Simonds, Lord Radcliffe, Lord Tucker, Lord Jenkins and Lord Morris of Borth-y-Gest), January 25, 26, 27, 28, March 9, 1960.]

Criminal Law—Murder—Uncontrollable impulse—Whether uncontrollable impulse presumed in law to afford evidence of insanity.

Privy Council—Australia—Criminal law—Murder—Insanity—Uncontrollable impulse—Whether the law recognises uncontrollable impulse as ground for inferring insanity without evidence leading to that inference.

There is no presumption of law that uncontrollable impulse is a symptom of legal insanity, nor is it the duty of a judge at the trial of a charge of murder to instruct the jury that uncontrollable impulse may afford a strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of mind as not to know that what he was doing was wrong; but, if there is evidence that irresistible impulse is a symptom of the particular disease from which the prisoner is said to be suffering, the judge should deal with that evidence as with other relevant evidence in the case (see p. 741, letter I, to p. 742, letter C, p. 742, letter F, and p. 743, letter B, post).

Dictum of LATHAM, C.J., in *Sodeman* v. *R.* ((1936), 55 C.L.R. at p. 203), explained.

Dicta of GREER, J., in *R.* v. *True* ((1922), 16 Cr. App. Rep. at p. 167), considered and not followed.

The respondent, who had been taken on as a station hand at a sheep station in South Australia on Nov. 20, 1958, went, at a time a little after 9.15 p.m. on Sunday evening, Nov. 23, 1958, to the bedroom where L., the station manager, was in bed asleep and shot him through the head. No one at the sheep station had given the respondent cause for malice. Some days later the respondent, who had left the sheep station but had not been found, gave himself up to the police. The respondent admitted the shooting but said that he was not responsible for his actions at the time. In answer to a question by the police whether he knew at the time when he shot L. that it was wrong to point a loaded rifle at a person and shoot him, the respondent replied, " Yes. But I couldn't help myself ". The respondent was tried on a charge of having murdered L. In a statement made from the dock at his trial he said, " I shot L., but I do not know why. I had no reason to shoot him ". The defence was insanity, medical evidence being tendered that the respondent had a schizoid personality. Irresistible impulse, however, formed no part of the defence at the trial, the issue being whether, at the time of the shooting, the respondent knew that what he was doing was wrong. In a summing-up which put the defence of insanity before the jury, the trial judge, among other matters, directed the jury that a defence

A of uncontrollable impulse was unknown to the law and that, if the jury thought that uncontrollable impulse was the true explanation of the respondent's act, he was guilty.

Held: the respondent's answer to the police and his statement in the dock justified the trial judge in explaining to the jury that the criminal law of South Australia did not recognise the defence of insanity on the ground of B uncontrollable impulse (see p. 745, letter H, post); nor did the trial judge's direction as to the respondent's guilt, if uncontrollable impulse was the true explanation, amount to a misdirection.

[As to insanity and as to uncontrollable impulse as a defence in a criminal case, see 10 HALSBURY'S LAWS (3rd Edn.) 287, para. 530, 289, para. 533; and for C cases on the subject, see 14 DIGEST (Repl.) 60-64, *234-269.*]

Cases referred to:

M'Naghten's Case, (1843), 10 Cl. & Fin. 200; 8 E.R. 718; sub nom. *McNaughton's Case*, 4 State Tr. N.S. 847; 1 Car. & Kir. 130, n.; 14 Digest (Repl.) 60, *246*.

R. v. *Immer*, *R.* v. *Davis*, (1917), 118 L.T. 416; 13 Cr. App. Rep. 22; 14 D Digest (Repl.) 334, *3235*.

R. v. *Kopsch*, (1925), 19 Cr. App. Rep. 50; 14 Digest (Repl.) 63, *264*.

R. v. *Porter*, (1933), 55 C.L.R. 182.

R. v. *Rivett*, (1950), 34 Cr. App. Rep. 87; 14 Digest (Repl.) 69, *313*.

R. v. *True*, (1922), 127 L.T. 561; 16 Cr. App. Rep. 164; 14 Digest (Repl.) 62, *258*.

E *Sodeman* v. *R.*, (1936), 55 C.L.R. 192.

Appeal.

Appeal by special leave by the Attorney-General for the State of South Australia from an order of the Full Court of the High Court of Australia (SIR OWEN DIXON, C.J., McTIERNAN, FULLAGAR, KITTO and TAYLOR, JJ.), dated May 20, 1959, allowing an appeal by the respondent, John Whelan Brown, from F an order of the Full Court of the Supreme Court of South Australia (NAPIER, C.J., MAYO and PIPER, JJ.), dated Apr. 15, 1959, dismissing the respondent's appeal from a conviction of murder in the Supreme Court of South Australia (ABBOTT, J., sitting with a jury) on Mar. 20, 1959, when he was sentenced to death. The facts are set out in the judgment of the Board.

T. G. Roche, Q.C., *D. A. Grant* and *W. A. N. Wells* (of the South Australian G Bar) for the appellant.

L. J. Elliott (of the South Australian Bar) for the respondent.

LORD TUCKER: On Mar. 20, 1959, the respondent was found guilty of the murder of Neville Montgomery Lord on Nov. 23, 1958, after a trial before ABBOTT, J., and a jury in the Supreme Court of South Australia at Adelaide. He H was sentenced to death. From this conviction he appealed to the Full Court of the Supreme Court of South Australia (NAPIER, C.J., MAYO and PIPER, JJ.), who dismissed his appeal. From that judgment the respondent appealed to the High Court of Australia (SIR OWEN DIXON, C.J., McTIERNAN, FULLAGAR, KITTO and TAYLOR, JJ.), who allowed his appeal, quashed the conviction and ordered a new trial. The Attorney-General for South Australia obtained special leave by I Order in Council dated Aug. 12 to appeal from this decision of the High Court and the appeal was heard by the Board on Jan. 25, 26, 27 and 28, 1960.

The following summary of the facts relating to the killing of Mr. Lord which were not in dispute are taken from the judgment of the High Court. Shortly before Nov. 20, 1958, he (i.e., the respondent) was engaged in Adelaide as a station hand for Pine Valley which is a sheep station about sixty-five miles north of Morgan. Mr. Neville Montgomery Lord was a member of a family to whom the station belonged and he had been the manager of the station for some years. He was thirty-two years of age and lived at the homestead with his wife and two young children. There was a station cook, a woman whose room was adjacent A to but not part of the main building. The men station hands, of whom there was only one other, lived in the men's quarters, perhaps seventy-five to a hundred yards away. On the morning of Thursday, Nov. 20, 1958, the respondent was picked up in Adelaide by a car proceeding to Pine Valley and taken to his new job. He met Mr. Lord on arrival at the station that afternoon. He was given his room in the men's quarters and made the acquaintance of the other station hand B and the cook. The latter saw him at meal-times during the next three days and he helped her with the drying of dishes. Nothing occurred to excite comment. The respondent seemed quiet and well-behaved. Mr. Lord saw little of him and all were sure that nothing had passed between them that could excite any hostility in the respondent to Mr. Lord. The other station hand went off for the weekend. In his room there stood visible from the door a .303 rifle and there were some C cartridges in the room with soft-nosed bullets for shooting kangaroos. On Sunday night, Nov. 23, Mr. Lord went to bed about a quarter past nine. Mrs. Lord busied herself for a little longer and went to the children's room between which and the bedroom there was a communicating door. She was attending to a child when, as she says, she heard the electric light go on in the bedroom. Then there was a shot. She ran through the communicating door and saw her husband D lying on the bed shot—shot through the head. She threw herself on the bed. The respondent came back through the passage door. She screamed and he told her to be quiet, and, after trying to quieten her he ran out of the bedroom door into the hall or passage. That led to the front door, about a yard distant, and also to the back door. She described him as looking bewildered and explained that she meant that she thought that he might have been taken aback that she had E come from the next room, not knowing there was a door between. She did not see him again. She found the cook in her bedroom and they telephoned for help. A doctor and a policeman arrived two or three hours later. Her husband was dead. The respondent had disappeared. A search for him extended over the next four days. On the morning of Friday, Nov. 28, he came from some disused buildings some twenty-five miles from the homestead of a station named Canegrass and F gave himself up. Canegrass homestead itself is twenty-four miles south of Pine Valley homestead. As the respondent gave himself up he asked " Is he dead? " He had carried the rifle for a time but had abandoned it at a place about six miles from Pine Valley homestead. He answered the questions put to him by the police then and thereafter without any apparent reservation. According to his answers, he had gone to bed in his quarters at about half-past eight on the Sunday G night. He remained awake thinking and then got up and got the rifle from the room of the other station hand and there tested the loading of the rifle on the bed. He took the rifle and cartridges; the magazine was full. He went across to the house, wearing socks but no boots or shoes. The lights were on and through the window he could see Mrs. Lord in another room. He walked in the front door, went to the bedroom, put the rifle up, aimed it at Mr. Lord and shot him. He was H under the blanket and appeared, so the respondent thought, to be asleep. He said he went out of the room to see where Mrs. Lord was. She went into the bedroom and he then returned. He tried to quieten her and then ran out the back way. He went to the cook's quarters to see where she was. In answer to a question why he did so, the respondent answered " Because I thought that she might have rung up and given the alarm." Her light was then on but he could not see her I through the window. He then returned to his quarters and took his hat, the rifle, and a pair of boots from the other station hand's room, and set off. He said that neither Mr. Lord nor any other person there had given him any reason to bear malice or had any argument with him.

The only real issue in the case was whether the defence had discharged the onus of proving on balance of probability that the respondent was legally insane when he shot Mr. Lord. This issue was further narrowed since the medical witnesses for the defence and for the prosecution agreed that the respondent was (i) what psychiatrists refer to as a schizoid personality, (ii) that neither before nor after the shooting was the respondent suffering from any disease or disorder of the mind, and (iii) that, at the moment of shooting, he knew the nature and quality of his act. Where they differed was that Dr. Forgan for the defence testified that, in his opinion, at the time of the shooting the respondent had lapsed into a temporary state of schizophrenia in which he did not know that what he was doing was wrong. Dr. Shea, on the other hand, was of opinion that the respondent never at any time had schizophrenia and that, even if he did, he not only knew the nature and quality of his act but also that it was wrong as the respondent had told him when he examined him in prison. Dr. Forgan's process of reasoning shortly stated appears from the following questions and answers in cross-examination:

> " Q.—I will see if I can set out in a series of simple steps the process by which you arrive at your opinion. The first thing is you discover a schizoid personality? A.—Yes.
>
> " Q.—The next, you find an unexplained and to you, unexplainable outburst of violence, you deduce from that that the man was suffering for those few minutes from schizophrenia? A.—Yes.
>
> " Q.—You deduce from that in turn that he would be unable to appreciate that his act was wrong? A.—Yes.
>
> " Q.—That's the whole process of your diagnosis? A.—Yes."

Dr. Shea on the other hand was of opinion that there was no such thing as schizophrenia of five minutes' duration which was roughly the period during which Dr. Forgan considered the attack in the present case must have lasted.

It will be convenient at this stage to set out certain questions and answers which appear in Exhibit " G " which is the statement of the respondent made to the police in the form of questions and answers. No objection to this statement being used in evidence on the ground of unfairness or for any other reason has been raised before any of the four tribunals before which this case has come. They are as follows:

> " I said. ' You have told me that neither Mr. Lord nor any other person had ever given you any reason to bear him any malice.'
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> He said. ' Yes.'
>
> I said. ' Is there any reason you wish to offer for your conduct? '
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> He said. ' Even though I do recall everything and I did it, I don't think that I was responsible for my actions.'
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> I said. ' You knew that the rifle was loaded? '
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> He said. ' Yes.'
>
> I said. ' You knew that when you pulled the trigger it would discharge a missile? '
>
> He said, ' Yes.'
>
> I said. ' And that if the missile hit anyone it would at least maim them and probably kill them? '
>
> He said. ' Yes.'
>
> I said. ' Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them? '
>
> He said. ' Yes. But I couldn't help myself.'
>
> I said. ' Do you think that you would have pulled the trigger of that rifle if there had been a policeman standing by you? '
>
> He said. ' No.' "

In order to follow their Lordships' opinion in this case appearing hereafter, it is necessary to set out at some length certain passages in the summing-up of the learned trial judge, as well as the passages in the judgment of the High Court in which they are criticised. The passages in the summing-up are as follows:

> " On the night of the shooting the [respondent] says that he had gone to

bed early and that he got up and got the rifle and ammunition just before A he went into Mr. Lord's bedroom. The [respondent] himself owned no firearms and probably, had he never seen the rifle and ammunition in Dave's room he might never have thought of shooting anybody. You will remember Mr. Elliott drawing your attention to the fact that there was no motive for this alleged crime. Gentlemen, throughout the centuries of civilization, crimes have repeatedly been committed without any apparent or discoverable motive. B That is one of the reasons why, in our childhood, we were taught never to put temptation in anybody's way and what would be temptation for another man, might be no temptation whatsoever to us. You may, perhaps, remember the words of Shakespeare—' How oft the sight of means to do ill deeds makes ill deeds done '. There, standing before his eyes in Dave's empty room was the rifle and ample ammunition and there were the means C to do ill deeds. Do you think that perhaps those means to do ill deeds made the ill deeds done in this particular case? You may, perhaps, think that on Nov. 23, the [respondent], when he shot Neville Lord was acting on an uncontrollable impulse—a dreadful impulse which arose suddenly and which he was unable to control. If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable D impulse is unknown to our law, and if that, in your considered view, is the only explanation of the death caused by the [respondent] on Nov. 23, it is your duty to bring in a verdict of guilty of murder . . .

" You may, if you choose, when you go into the jury room, take with you the statement of the [respondent] signed by him as John Stone. It comprises about seven pages of foolscap. You will recall that he was asked E by Detective Lenton whether he knew anything about the shooting of Lord on the Sunday night and he said, ' Yes '; and he was asked ' What do you know about it? ' and his reply was, ' I don't know how to put it ', whereupon Lenton asked him a number of questions all of which he seemed to answer perfectly sensibly and plainly. On p. 2 of the statement the [respondent] describes very plainly what he did when he shot Lord and how he followed F Mrs. Lord into the room when she was singing out, as he put it, and he then ran out the back way. On p. 4 he was asked, ' After you shot Lord why did you go looking for Mrs. Lord? ' and his reply was ' Because I got scared ', and when asked what he meant by that he said, ' I don't know '. He was asked whether when he went to look for Mrs. Schiller the rifle was freshly loaded, and he said that it was, and he was asked why he went looking for G Mrs. Schiller and the [respondent] said, ' I just wanted to see where she was ', and he was asked ' Why? ' and his answer was, ' Because I thought that she might have rung up and given the alarm '.

" Well gentlemen, you may ask yourselves why the [respondent] should think that anyone should be wanting to give an alarm about him. Might I suggest to you that he then knew that what he had done was wrong. He did H not tell Detective Lenton what he would have done, or whether he would have done anything if he had found Mrs. Schiller, or found that she had given an alarm by telephone. Perhaps, gentlemen, she may think now that she was a fortunate woman that the [respondent] did not find her.

" On p. 5 and p. 6 of the signed statement, Exhibit ' G ', Detective Lenton said, ' Is there any reason you wish to offer for your conduct? ' to which the I [respondent] replied, ' Even though I do recall everything and I did it, I don't think I was responsible for my actions '. The detective said, ' You knew that the rifle was loaded? ' He replied, ' Yes '. Lenton said ' You knew that when you pulled the trigger it would discharge a missile? ' and he replied ' Yes ', and Lenton then asked, ' And that if the missile hit anyone it would at least maim them and probably kill them? ' to which the answer was, ' Yes '. The [respondent] was then asked what you may think was a vital question, in view of the course the defence has taken—' Did you know

> at the time that it was wrong to point the loaded rifle at a person and shoot at them? ' The answer you may regard, if it so appeals to you, as the answer to the problem you have to solve. The answer by the [respondent] to that question, ' Did you know it was wrong? ' was ' Yes, but I couldn't help myself '.
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> " Now gentlemen, if you accept the evidence in that statement Exhibit ' G ', it does not matter whether you think that the [respondent] during that pregnant five minutes on the night of Nov. 23 was or was not suffering from schizophrenia as Dr. Forgan thinks, if he did know, as he told Detective Lenton he did, that it was wrong to point the loaded rifle at a person and shoot at them. If you accept Dr. Shea's evidence you may have no doubt that the [respondent] was not suffering from any mental disease and did know that he was doing wrong. If you will look at Exhibit ' G ' on p. 6, you will see that after saying ' Yes ' to that question, the [respondent] went on to say ' But I couldn't help myself. I knew it was wrong but I couldn't help myself '. These words, gentlemen, may suggest to you that the [respondent] was thereby setting up the defence of ' uncontrollable impulse ' which you may think is the true explanation of what he did. But, as you will remember, gentlemen, I have directed you, if that be the true explanation of what the [respondent] did, that is no defence, and he is guilty in law, of the crime charged. You may not like, gentlemen, to convict a man of murder who ' couldn't help himself ', but if you are satisfied beyond reasonable doubt of the truth of that answer, that may be your duty.
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> " Detective Lenton's next question was, ' Do you think that you would have pulled the trigger of that rifle if there had been a policeman standing by you? ' To that the [respondent] answered, ' No '. Now, if you accept that answer, you may infer if you think proper that the reason the [respondent] answered ' No ' is because, again, he knew that pulling the trigger was wrong.
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> " Mr. Chamberlain points out that if you acquit him, gentlemen, the [respondent] may ultimately kill someone else. Well, gentlemen, you are not to concern yourself with the consequences of your verdict, and if you are satisfied he was not guilty of this crime because of temporary insanity, then the future must take care of itself. Mr. Elliott tells you that if you find him not guilty because of insanity, I must commit him to gaol to await the Governor's pleasure. How long the Governor may be prepared to detain a man whom no one will now say is insane may be problematical but again that is no concern of yours. Even if you find him guilty, the Executive Council may refuse to allow him to hang, but that again is no concern of yours."

The passages in the High Court's judgment are the following:

> " After setting out the facts relating to this and recalling [the respondent's] statement that he had gone to bed on the Sunday night and had then got up and taken the rifle, the charge to the jury proceeded in a manner which we think very much open to objection. It is desirable to set out the passage in full. ' The [respondent] himself owned no firearms and probably, had he never seen the rifle and ammunition in Dave's room he might never have thought of shooting anybody. You will remember Mr. Elliott [who was counsel for the respondent] drawing your attention to the fact that there was no motive for this alleged crime. Gentlemen, throughout the centuries of civilisation, crimes have repeatedly been committed without any apparent or discoverable motive. That is one of the reasons why, in our childhood, we were taught never to put temptation in anybody's way and what would be temptation for another man, might be no temptation whatsoever to us. You may, perhaps, remember the words of Shakespeare—' How oft the sight of means to do ill deeds makes ill deeds done '. There, standing before his eyes

in Dave's empty room was the rifle and ample ammunition and there were the means to do ill deeds. Do you think that perhaps those means to do ill deeds made the ill deeds done in this particular case? You may, perhaps, think that on Nov. 23, the [respondent], when he shot Neville Lord was acting on an uncontrollable impulse—a dreadful impulse which arose suddenly and which he was unable to control. If that view should commend itself to you, it is my duty to direct you that that is no defence in law. The defence of uncontrollable impulse is unknown to our law, and if that, in your considered view, is the only explanation of the death caused by the [respondent] on Nov. 23, it is your duty to bring in a verdict of guilty of murder '.

" At a later point in his charge to the jury the learned judge returned to the answer that [the respondent] had given to the question of the police officer whether he knew at the time that it was wrong to point a loaded rifle at a person and shoot him, namely the answer ' Yes. But I could not help myself '. His Honour said, ' These words, gentlemen, may suggest to you that the [respondent] was thereby setting up the defence of " uncontrollable impulse " which you may think is the true explanation of what he did. But, as you will remember, gentlemen, I have directed you, if that be the true explanation of what the [respondent] did, that is no defence, and he is guilty in law, of the crime charged '.

" The objections to these passages which of course must be taken together are, we think, very serious. The foundation of the case in support of the plea of insanity was that [the respondent's] act in shooting Mr. Lord as he lay asleep lacked any motive actuating a sane mind. Upon this the evidence was entirely one way. Irresistible impulse as such had not been raised as a defence and no one had suggested that it could amount to a defence. The manner in which the first of the foregoing passages discounted the importance or effect of the absence of ascertainable motive put this cardinal matter, to say the least of it, in a false light. It was not at all unlikely to produce an adverse effect upon the jury with respect to that very element in the case for [the respondent] which if one were guided by the evidence there was no reason to doubt. What follows immediately concerning temptation and the sight of the means to do ill deeds might not carry any very clear meaning to the jury but its tendency could hardly be anything but prejudicial. For it might be taken by them as suggesting that the [respondent], finding a weapon available, was prompted to use it to shoot Mr. Lord, for a reason which existed but was not ascertainable. Then the possibility is introduced of the jury thinking it was uncontrollable impulse. The result is a direction about uncontrollable impulse which, if understood literally, is clearly erroneous in point of law. For it is a misdirection to say that if the jury think that the true explanation of what the accused did was that he acted under uncontrollable impulse, that is no defence and he is guilty in law of the crime charged. It is a misdirection the operation of which might be to exclude the prisoner's defence and to determine the verdict. Whatever the learned judge may have had in mind in using the word ' only ' when he first gave the direction about uncontrollable impulse the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder and they must convict the [respondent]. It may be true enough that although a prisoner has acted in the commission of the acts with which he is charged under uncontrollable impulse a jury may nevertheless think that he knew the nature and quality of his act and that it was wrong and therefore convict him. But to treat his domination by an uncontrollable impulse as reason for a conclusion against his defence of insanity is quite erroneous. *On the contrary it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The law has nothing to say against the view that mind is*

> *indivisible and that such a symptom of derangement as action under uncontrollable impulse may be inconsistent with an adequate capacity at the time to comprehend the wrongness of the act. This was put succinctly by* GREER, J., *during the argument of the case of* R. *v.* True (1), *in stating how in an earlier case he had directed the jury. His Lordship said, ' What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in* M'Naghten's Case (2), *but that men's minds were not divided into separate compartments, and that if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong. ' Uncontrollable impulse ' in this event would bring the case within the rule laid down in* M'Naghten's Case (2). *For that reason, even if no more had been said than that uncontrollable impulse does not amount to a defence, the fact that the subject was mentioned would make it necessary to put before the jury the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree . . .*
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> " It is not outside the province of a judge at a criminal trial to put to the jury a view which he may take of a piece of evidence or of facts. How far he should go must depend upon circumstances. But if he does so and puts views adverse to the prisoner it increases the importance of his putting clearly and in its true light the case made for the prisoner, or for that matter the case for him that fairly arises on the evidence, however little validity in fact the judge may be inclined to ascribe to it. It is difficult to resist the impression that the position taken up by Dr. Forgan was not placed before the jury by the summing-up in a way which could be understood and appreciated. Perhaps that arose from the evident difference between the view expressed by the learned judge about the absence of known motive and the central significance the witness placed upon the motiveless character of the act. Doubtless it is true, as the learned judge pointed out, that the jury might reject the views of the experts but this possibility leaves untouched the defect in the summing-up. Nor did the rejection of the view that [the respondent] had suffered from schizophrenia necessarily dispose altogether of the question whether there had existed a disease or disorder of the mind which might satisfy the prerequisite condition required by the formula. In all the circumstances we think that the cumulative effect of the positive objections to those passages in the charge which we have discussed is such that the conviction ought not to be allowed to stand."

It is the concluding lines of the penultimate paragraph beginning with the words " On the contrary " now printed in italics which, in their Lordships' view, give rise to questions of great importance and far-reaching consequences in the administration of the criminal law. They would naturally be read by the judge who presides over the new trial and by all judges in similar cases in states where the English common law prevails as requiring them to tell the jury *as a matter of law* and in the absence of any medical evidence to that effect that irresistible impulse is a symptom of some disease or disorder of the mind which, although not preventing the patient from knowing the nature and quality of his act, yet does prevent him from knowing that it is wrong.

The words " the true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree " must imply that the law knows and recognises uncontrollable impulse as a symptom of legal insanity within the meaning of the rule in *M'Naghten's Case* (2) and, in conjunction with the language used at the beginning of the passage in question, that it is the judge's duty to instruct the jury that it may afford strong ground for the inference that the prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. Furthermore, this direction is required not only in a case where there may have been no medical evidence but even in a case, such as the present, where the medical evidence for the defence was to the effect that the [respondent] when he committed the act was suffering from a specific disease or disorder of the mind known as schizophrenia which, although not preventing him knowing the nature and quality of his act, did prevent him from knowing it was wrong, but of which it was never suggested that irresistible impulse was a symptom or that it played any part in helping the medical witness for the defence to arrive at his diagnosis. So much so that counsel for the respondent on the present appeal, far from relying on irresistible impulse, contended that the trial judge should never have mentioned the subject in his charge to the jury as it formed no part of the case for the defence. Their Lordships can find no support for the view that this accurately represents the criminal law.

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(1) (1922), 16 Cr. App. Rep. 164 at p. 167.

(2) (1843), 10 Cl. & Fin. 200.

At various times in the past attempts have been made to temper the supposed harshness or unscientific nature of the M'Naghten rules. These attempts were supported by the high authority of Sir James Fitzjames Stephen but, in the end, the rules remain in full force and their harshness has in this country been to some extent alleviated by the recent legislative enactment (3) affording the defence of diminished responsibility. While the High Court, of course, fully recognise the binding force of the M'Naghten rules, their Lordships think that the directions which they have indicated as appropriate for use by trial judges would, in effect, make a very considerable inroad into those rules as hitherto interpreted. Moreover, unless the law is presumed to take cognisance of irresistible impulse as a symptom of legal insanity, whence does the judge derive his knowledge of these matters, it not being permissible for him to make use of what he may have learned from evidence given in other cases?

Their Lordships must not, of course, be understood to suggest that, in a case where evidence has been given (and it is difficult to imagine a case where such evidence would be other than medical evidence) that irresistible impulse is a symptom of the particular disease of the mind from which a prisoner is said to be suffering and as to its effect on his ability to know the nature and quality of his act or that his act is wrong, it would not be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial. *Sodeman* v. *R.* (4) is an Australian example of such a case. The actual decision in that case related to the burden of proof in cases where the defence of insanity is raised and to the sufficiency of the trial judge's direction thereon, but, in the course of the judgments, references were made to "irresistible impulse" and its possible bearing on the defence raised by the medical evidence in that case to the effect that, if a man has an obsession and if he gives way to that obsession and does the thing which is always before his mind as the thing he wants to do, then in doing it he does not know the quality of his act, he does not know what he is doing, and does not know whether it is right or wrong. (Vide the judgment of LATHAM, C.J. (5)). The learned chief justice later used these words (6):

> "But, on the other hand, it should be remembered that, as already stated, the law recognises that mental disease manifested in, for example, what is called 'uncontrollable impulse', may also be manifested in lack of knowledge, or incapacity to have knowledge, of the nature and quality of an act or its character as a wrong act. Such an impulse may be evidence of this very lack or incapacity. *Indeed, that was the effect of the medical opinions given in evidence in this case, and this aspect of the case was definitely put to the jury by the judge.*"

This passage must be read in the light of the concluding sentence now italicised.

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(3) Homicide Act, 1957, s. 2; 37 HALSBURY'S STATUTES (2nd Edn.) 174, 175.

(4) (1936), 55 C.L.R. 192.

(5) (1936), 55 C.L.R. at p. 203, lines 8-13.

(6) (1936), 55 C.L.R. at p. 205.

So read, their Lordships would not question it. But if the word " recognises " in the first sentence is construed to mean that the words which follow are matters of law which must or may be accepted and acted on by juries without evidence it would not, in their Lordships' opinion, be an accurate statement of the law. The word " recognises " would seem to have been used in contrast to the rejection of irresistible impulse per se and means no more than that the law will not refuse to listen to evidence to the effect stated whereas it will refuse to listen to evidence of irresistible impulse per se. The presumption that the law takes note of such matters without evidence is implicit in the language of the High Court's judgment in the present case. It is this that their Lordships, with great respect, feel unable to accept.

It may be observed in passing that, in *R.* v. *Porter* (7) the charge to the jury by DIXON, J., in which he dealt with the workings of the human mind appears to have been based on the medical evidence given in that case. (Vide " The medical evidence included explanations of the course of mental conditions in human beings generally " (8)). This distinction between what the law presumes and what the law will listen to is of the first importance in the present case, since counsel for the respondent has disclaimed any reliance on irresistible impulse either per se or as an element in the particular kind of mental disease relied on to support the defence that the respondent, although aware of the nature and quality of his act, did not know that it was wrong, and submitted that the trial judge should never have referred to it in his charge to the jury.

Their Lordships do not derive much assistance from the interlocutory observations of GREER, J., during the argument in *R.* v. *True* (9). He was speaking from recollection of his summing-up in a case which he had tried two years earlier and in which no medical evidence had been given. No reference was made to his observations by the other members of the court, and no authority has been cited in which the Court of Criminal Appeal has given its approval to such a direction. In none of the leading cases in recent years, such as *R.* v. *Kopsch* (10) and *R.* v. *Rivett* (11), where the defence of insanity was raised, has there been any suggestion that, although irresistible impulse affords no defence per se, the law will recognise it as a symptom from which the jury may without evidence infer insanity within the M'Naghten rules. In the latter of these cases, the defence of insanity was based on evidence almost identical with the medical evidence in the present case (12). It may, perhaps, be observed in passing that, if such matters were left to a jury without the assistance of medical evidence, there would seem to be two possible views which a layman might take as to the relevance of irresistible impulse to the M'Naghten tests. Some might think that, before an impulse becomes irresistible, there must have been some attempt to resist it, and that the attempted resistance might well be due to knowledge of the wrongness of the act to which the prisoner felt himself impelled. Others might think that the irresistible impulse might impair the reasoning power to such a degree that it would no longer be able to appreciate the wrongness of the act. Why should the law prescribe that one of these views must be presumed to be correct rather than the other without medical evidence as to which is to be preferred with reference to the particular form of mental disease or disorder from which a prisoner is said to have been suffering? Their Lordships are not, of course, suggesting that legal insanity cannot be sufficiently proved without medical evidence. The previous and contemporaneous acts of the accused may often be preferred to medical theory. But where the whole case for the defence is based on the accused having a particular form of mental disease such as schizophrenia, the nature and symptoms of which are known to psychiatrists but knowledge of which cannot be attributed to a jury, the law will not step in to instruct a jury in the absence of medical evidence as to the " true operation of uncontrollable impulse as a possible symptom of insanity of a required kind and degree ".

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(7) (1933), 55 C.L.R. 182.
(8) (1933), 55 C.L.R. at p. 189, line 18, p. 190, line 18.
(9) (1922), 16 Cr. App. Rep. at p. 167.
(10) (1925), 19 Cr. App. Rep. 50.
(11) (1950), 34 Cr. App. Rep. 87.
(12) (1950), 34 Cr. App. Rep. at p. 92.

In arriving at a conclusion different from that of the High Court on a matter of this kind, their Lordships may, perhaps, derive some comfort from the fact that they have had the advantage of a very full and helpful argument from both sides on this aspect of the case, whereas they are informed that this particular matter not having been raised by the defence either in the Full Court or the High Court but having been taken by the court in the course of argument in the High Court, counsel may not have developed their arguments quite so fully or had so much opportunity of considering the matter as they have now been afforded. Moreover, they could not of necessity address their minds to the language in which the High Court eventually expressed its considered judgment.

Their Lordships now turn to other matters, which, though no doubt of great importance in the present case, are not of such a nature that their Lordships would normally investigate them on appeal from the High Court. As, however, the Board has seisin of the appeal and as they are relied on by the respondent as alone sufficient to justify the High Court in quashing the verdict and judgment at the trial they must be dealt with. They are as follows: 1. It was contended by counsel for the respondent: (i) That the judge should never have mentioned irresistible impulse at all. This criticism is not to be found in the judgment of the High Court and is, indeed, contrary to its tenor, but it was strongly pressed by counsel for the respondent. (ii) That the judge's references to irresistible impulse were so worded that the jury would or might infer that, even if they were satisfied that the respondent did not know that what he was doing was wrong, they must, nevertheless, find him guilty of murder if they thought he was acting on an irresistible impulse. (iii) That the judge misdirected the jury in his references to the absence of motive. (iv) That there was misdirection in the judge's reference to the consequences of the jury's verdict. (v) That there was misdirection in the judge's reference to Mrs. Schiller. (vi) That the case for the defence was not sufficiently or fairly placed before the jury.

Points (ii) to (vi) inclusive were relied on by counsel before the Board and appear in the judgment of the High Court. Points (i), (ii), (iii) and (v) were not raised by counsel on the appeal to the Full Court of the Supreme Court of South Australia or on appeal to the High Court. Numbers (ii), (iii) and (v) emerged in the course of the High Court hearing and No. (i) appeared for the first time before the Board. Their Lordships are not for one moment suggesting that the High Court were not entitled and, indeed, bound to take and act on these points if they considered that they amounted to serious misdirections, but the result has been that neither the High Court nor the Board have had the advantage of the views and experience of the Full Court of South Australia on four out of six of the matters now complained of, and which had apparently escaped the notice both of counsel, who had been astute to draw the judge's attention after the jury had retired to what he submitted were defects in his summing-up and to remedy one of which the judge had re-called the jury, and of all three members of the Full Court of South Australia.

It will be convenient to deal first with Nos. (iv) and (v). There is no reason to suppose that the High Court would have considered these matters by themselves as justifying quashing the verdict and judgment of the trial court. It would seem probable that the High Court, being minded to order a new trial by reason of what they considered serious misdirections with regard to the law of insanity, referred to them in order that they should not be repeated at the trial. Their Lordships feel bound, however, to say that, in their opinion, the observations of the trial judge on these matters were not open to criticism. With regard to No. (iv), the Board were informed that it is common practice for counsel in South Australia in their addresses to juries in murder trials to refer to the consequences of their verdict. If such a practice is permitted, it is incumbent on the judge to instruct the jury that such matters are not their concern and are completely irrelevant to any issue that they have to determine. Their Lordships do not regard the language which the trial judge used on the present occasion as open to criticism. It was as follows:

> "Mr. Chamberlain points out that if you acquit him, gentlemen, the [respondent] may ultimately kill someone else. Well, gentlemen, you are not to concern yourself with the consequences of your verdict, and if you are satisfied he was not guilty of this crime because of temporary insanity, then the future must take care of itself. Mr. Elliott tells you that if you find him not guilty because of insanity, I must commit him to gaol to await the Governor's pleasure. How long the Governor may be prepared to detain a man whom no one will now say is insane may be problematical but again that is no concern of yours. Even if you find him guilty, the Executive Council may refuse to allow him to hang, but that again is no concern of yours."

No. (v) concerns the judge's reference to Mrs. Schiller. The respondent in his statement to the police had said that, after having shot Mr. Lord and after Mrs. Lord had gone into the bedroom where Mr. Lord was, he (the respondent) had gone to see what the cook (i.e., Mrs. Schiller) was doing. He was asked "Why did you go looking for Mrs. Schiller ?" He replied "I just wanted to see where she was". He was asked "Why?" and replied "Because I thought she might have rung up and given the alarm". In the written statement which he read from the dock (13) he said:

> "On the Sunday evening when it happened I seemed to be acting in a dream. I do not remember why I chose Mr. Lord rather than Mrs. Lord or the lady cook."

The judge's reference in his summing-up to the respondent's answers to the police on this matter have already been set out. The conduct of the respondent immediately after the shooting was relevant to the state of his mind at the time of the shooting, and the observation with regard to Mrs. Schiller's good fortune would seem to have been fully justified on any view of the case, having regard to the respondent's statement from the dock.

The more serious criticisms of the judge's summing-up involved in Nos. (i), (ii), (iii) and (vi) above must now be dealt with.

No. (i), viz., that the judge should never have referred at all to irresistible impulse, was, as already stated, a point taken by counsel for the respondent before the Board. It could not have been taken at an earlier stage, because the possible significance or irresistible impulse only emerged on reading the judgment of the High Court. Their Lordships do not consider it valid. It is true that it formed no part of the respondent's defence of insanity on the medical evidence adduced in support of this plea, nor was it relied on by his counsel as having any relevance to his defence, but the respondent in his statement from the dock (13) and in his answer "Yes. But I couldn't help myself" to the police officer's question "Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them" fully justified the judge in explaining to the jury in appropriate language that the criminal law of South Australia does not recognise the defence of insanity on the ground of irresistible impulse.

This leads to question No. (ii), viz., whether the language used by the judge was appropriate or whether, as the High Court thought, it might lead the jury to infer that, even if satisfied that the respondent did not know that what he was doing was wrong, they must find him guilty of murder if they thought he was acting under an irresistible impulse. The passages in the summing-up dealing with this matter and the High Court's criticism thereof have already been set out in full and it is not necessary to repeat them. They must, of course, be considered in the context of the summing-up taken as a whole and the course which the trial had taken. The sole issue had been whether the respondent had discharged the onus which lay on the defence of satisfying the jury that, on balance of probability at the time when he shot Mr. Lord, he was labouring under a defect of reason due to disease of the mind by reason of which he did not know that what he was doing was wrong. The greater part of the evidence and the summing-up and it may be supposed almost the whole of counsel's addresses to the jury would have been quite irrelevant if the short answer to the case had been: " Well he says he could not help it, and if so he is guilty of murder whether he knew it was wrong or not ". Their Lordships do not consider that the language used by the judge could have been so interpreted by a jury who had listened to the whole case and, in particular, to the summing-up which occupies nine pages of the printed record and in which, in no less than seven different passages, the judge in the clearest possible language correctly instructed the jury as to the issues they had to decide and the onus of proof. It will suffice to set out the first and last of these passages. The first is as follows:

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(13) The respondent's statement from the dock began as follows:—"I shot Mr. Lord but I do not know why. I had no reason to shoot him. He was practically a stranger to me. I went to work at Pine Valley Station on Thursday, Nov. 20, and I think I had only one conversation with him from the Thursday to the Sunday when it happened. I had no cross words with him. I hardly knew him, but I liked him. On the Sunday evening when it happened I seemed to be acting in a dream. I do not know why I chose Mr. Lord rather than Mrs. Lord or the lady cook. I can remember taking the gun and going to the house and the bedroom door and firing the gun. I knew what was happening but my mind did not seem to be working in other ways. In my mind there was no reason for what I was doing. In my mind there was no idea that I was doing wrong, or that there would be any consequences, or that I would be punished afterwards . . ."

> " If, after careful consideration of the evidence that has been put before you, you are satisfied on the balance of probabilities, that the [respondent] was, on Nov. 23, labouring under a defect of reason due to disease of the mind, by reason of which he either did not know the nature and quality of his act in killing Neville Lord, or did not know that that killing was wrong, then, and only then, your verdict should be not guilty on the ground of insanity."

He then went on to explain that, in the present case, all the medical evidence was to the effect that the respondent knew the nature and quality of his act and that the real issue was whether he knew that his act was wrong. His last reference to this matter is to be found in the final passage of his charge. It reads as follows:

> " You may find him not guilty on the ground that he was insane at the time he shot the deceased, which would mean that you are satisfied beyond reasonable doubt that he killed Lord, but that at that time he was suffering from the mental disease of schizophrenia and did not know that he was doing wrong and that therefore he is not criminally responsible for his acts. Finally if not satisfied on the probabilities that he was insane you may find him guilty of murder."

The passages complained of have so far been dealt with in their general setting, but even in isolation—though, no doubt, in the light of the criticism to which they have now been subjected they might have been better worded—their Lordships do not think that they would be interpreted by a jury in the way suggested. The statement in the judgment of the High Court that

> " whatever the learned judge may have had in mind in using the word ' only ' when he first gave the direction about uncontrollable impulse the second statement says in plain terms that because the killing was done under uncontrollable impulse, if that were the jury's opinion, therefore it amounted to murder and they must convict the prisoner ",

seems to their Lordships unjustified. The passage in the summing-up starting on p. 65 of the record at line 13 and ending at line 44 has to be read as a whole, and shows that the judge was referring to the series of questions and answers in the respondent's statement to the police officer (Exhibit G) and, in particular, to the question " Did you know at the time that it was wrong to point a loaded rifle at a person and shoot at them " and the answer " Yes, but I could not help myself ". When the learned judge said

> " These words, gentlemen, may suggest to you that the [respondent] was thereby setting up the defence of uncontrollable impulse which you may think is the true explanation of what he did. But as you will remember, gentlemen, I have directed you if that be the true explanation of what the [respondent] did that is no defence and he is guilty in law of the crime charged ",

the " true explanation " refers to the whole answer " Yes, [meaning, Yes I knew it was wrong] but I could not help myself " and is not confined to the words " I could not help myself ". The respondent's answer, if accepted by the jury, in terms negatived the defence of insanity. Their Lordships are, accordingly, of opinion that these passages dealing with irresistible impulse read together did not amount to misdirection.

No. (iii) deals with the direction with regard to the absence of motive. The passage complained of has been set out earlier in this judgment. It is true that what the judge said was more appropriate to a case where it is necessary to instruct a jury that it is not necessary for the prosecution to prove motive in order to establish a case of murder. There was no such need in the present case as the killing had been established beyond doubt and it was common ground that the respondent had no conscious motive for his act. None the less, the reference to Shakespeare's words " How oft the sight of means to do ill deeds makes ill deeds done " was not wholly inappropriate in the present case. The medical witness for the defence was asked the following questions in cross-examination and gave the following answers:

> " Q.—I suppose any action such as shooting a man could be traced to some sort of impulse or emotion? A.—Yes. All human action is the result of some cause. Something led to the impulse in this man to shoot Mr. Lord.
>
> " Q.—It's really traceable to his feelings of inferiority and guilt associated with his masturbation which produced an outburst of violence? A.—Yes.
>
> " Q.—And one of the predominant and conscious characteristics of the human mind, is to justify oneself in one's own eyes? A.—Yes.
>
> " Q.—There would be an element of ' playing big ' in front of himself in this instance wouldn't there? In such an instance as this, an unmotivated crime of this sort, it is ' playing big stuff ' in his own eyes? A.—That could be.
>
> " Q.—It could also be influenced by the sight of a happily married attractive young couple in contrast with his own view of his own inadequacy? A.—That is the thing."

In the light of this evidence, it would seem highly probable that the sight of the rifle and cartridges might have lit up these subconscious motives. However this may be, the absence of conscious motive was, and had been, common ground throughout the trial, and their Lordships do not consider that the judge's observations on this matter could have misled the jury. Moreover, when the jury were re-called in order that the judge might correct the words " the wholly insufficient reason which the [respondent] has given " which he had used in his summing-up and substitute in their stead the words " and wholly failed to give any reason for so doing ", he added " You may think he was mad for having killed the deceased and wholly failed to give any reason for so doing ". The original language had been used with reference to madness in the popular sense of the word as distinguished from legal insanity, and the substituted words must be read in the same context, but the whole passage at p. 69 of the record tends to emphasise the motiveless nature of the crime.

Finally it is said that the summing-up did not put the case for the defence and the medical evidence fairly or sufficiently before the jury. On this aspect of the case, the Full Court of the Supreme Court of South Australia subjected the judge's charge to the jury and the evidence at the trial to a careful and detailed scrutiny, they referred to the authorities which have stated the principles—if they can properly be so called—on which an appellate court in a criminal case will quash a conviction on the ground of misdirection or nondirection with regard to the evidence given at the trial or the presentation of the defence, and came to the conclusion, to quote their words:

> "In the present case it is manifest that the point upon which Mr. Elliott relied, was before the jury from first to last through the whole hearing. Applying the rule laid down in [*R.* v. *Immer*, *R.* v. *Davis* (14)] we think that the summing-up of the learned trial judge was sufficient."

Their Lordships have gone through the same process and are content to adopt as their own the words quoted above.

In the result, for the reasons indicated, their Lordships, after anxious consideration of the questions raised in this appeal, some of which are of great importance in the administration of justice in murder cases involving the defence of insanity, are of opinion that no sufficient grounds have been established in this case to justify an appellate court in quashing the verdict and judgment of the trial court. In conclusion, their Lordships may, perhaps, permit themselves to refer to the concluding words of the judgment of the Full Court of the Supreme Court of South Australia:

> "While we have really no doubt that the verdict was right in point of law (in so far as the [respondent] must be taken to have known what he was doing and that it was wrong) nevertheless we think that there is ground for surmising that the [respondent] may have suffered from some such abnormality of mind as might, under the recent amendment of the law in England, be held to diminish his responsibility. That opinion is based very largely upon the evidence of Dr. Shea",

and, without expressing any view one way or the other with regard to the correctness of the verdict which they think would be outside their province, to express their concurrence in the concluding words of the observations quoted above.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the High Court set aside and the verdict and judgment of the trial court restored.

Appeal allowed.

Solicitors: *Blyth, Dutton, Wright & Bennett* (for the appellant); *Lawrence Jones & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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(14) (1917), 118 L.T. 416.

STROUD BUILDING SOCIETY *v.* DELAMONT AND OTHERS.

[CHANCERY DIVISION (Cross, J.), January 22, 26, 27, 28, 1960.]

Mortgage—Receiver—Tenancy—Acceptance of tenant of mortgagor as mortgagee's tenant by receiver—Mortgagor's power of leasing restricted to leasing with consent in writing of mortgagee—Tenancy granted without consent—Receipt of rent by receiver appointed by mortgagee—Notice to quit given by mortgagee and containing statement that tenant held as tenant of mortgagee.

A mortgage of a house to a building society provided that no lease was to be granted by the mortgagor without the consent in writing of the society. The mortgagor granted a tenancy to W. in 1948 without obtaining the consent of the society. The mortgagor became bankrupt. On Jan. 13, 1958, the society, in exercise of the power conferred by s. 109 of the Law of Property Act, 1925, appointed a receiver of the income of the mortgaged property and on the following day the receiver notified W. of his appointment and requested her to pay rent in respect of her tenancy to him. In March, 1958, in reply to an inquiry from W. as to the terms and conditions of the tenancy, the society's solicitors replied that they were the same as between W. and the mortgagor. On July 1, 1958, the society sent to W. notice to quit the premises " which you hold as tenant of " the society. W. did not give up possession and proceedings for possession were ultimately brought by the society in May, 1959, claiming that W. was a trespasser. It was common ground that if there was a tenancy between W. and the society, the notice to quit was void as the tenancy was a tenancy of business premises and the notice did not comply with statutory requirements.

Held: although the receipt of rent by a receiver appointed under s. 109 of the Law of Property Act, 1925, did not create a tenancy between the tenant and the mortgagee, because the receiver was the agent of the mortgagor (dictum of HARMAN, J., in *Lever Finance, Ltd.* v. *Trustee of Property of Needleman*, [1956] 2 All E.R. at pp. 382, 383, followed), yet such a tenancy could be created by the mortgagee's consenting to accept the mortgagor's tenant as his own; on the facts the society had accepted W. as their tenant, notwithstanding the receivership, and accordingly W. was not a trespasser and the society were not entitled to possession.

[**Editorial Note.** If the mortgagee intervenes by virtue of his paramount title and claims rent from the mortgagor's tenant of the property mortgaged, the rent paid to the mortgagee thereafter is prima facie under a new tenancy, usually from year to year (see per LORD SELBORNE, L.C., in *Corbett* v. *Plowden* (1884), 25 Ch.D. at p. 682).

As to recognition of a mortgagor's tenant by a mortgagee as his tenant, see 27 HALSBURY'S LAWS (3rd Edn.) 256, para. 468.

As to the mortgagee's right to possession, see 27 HALSBURY'S LAWS (3rd Edn.) 277, para. 511, and as to leases granted by a mortgagor ultra vires, see ibid., p. 255, para. 464; for cases on the latter subject, see 35 DIGEST 335-339, *776-816*.]

Cases referred to:

Doe d. Wilcockson v. *Lynch*, (1771), 2 Chit. 683; 30 Digest (Repl.) 383, *269*.

Lever Finance, Ltd. v. *Trustee of Property of Needleman*, [1956] 2 All E.R. 378; [1956] Ch. 375; [1956] 3 W.L.R. 72; 3rd Digest Supp.

Loewenthal v. *Vanhoute*, [1947] 1 All E.R. 116; sub nom. *Lowenthal* v. *Vanhoute*, [1947] K.B. 342; [1947] L.J.R. 421; 177 L.T. 180; 31 Digest (Repl.) 508, *6334*.

Moss v. *Gallimore*, (1779), 1 Doug. K.B. 279; 99 E.R. 182; 35 Digest 323, *678*.

Adjourned Summons.

This was an application by originating summons, dated May 6, 1959, by the plaintiffs, the Stroud Building Society, as mortgagees, for an order for possession of a house, No. 22, East Saint Helen Street, Abingdon, Berkshire. The first defendant, Mr. Stanley Ernest Delamont, was the mortgagor; the second defendant was his trustee in bankruptcy. The third defendant, Mrs. Mary Alice Waller, was in occupation of the mortgaged property. Neither the first nor the second defendant entered appearance to the summons.

The mortgage was created by a legal charge dated July 31, 1947, between Mr. Delamont and the society, in consideration of an advance of £2,800. Clause 7 (iii) provided that no lease should be made by the borrower of the mortgaged premises without the consent in writing of the society. In March, 1948, Mr. Delamont orally agreed with Mrs. Waller, that she should have a tenancy of the property at the rent of £5 5s. per week. The society did not give its consent in writing to the creation of this tenancy.

On June 27, 1956, Mr. Delamont was adjudicated bankrupt; and on Jan. 23, 1957, the society served on Mrs. Waller notice to deliver up possession of the mortgaged property on Feb. 9, 1957. Correspondence between Mrs. Waller's solicitor and the society's solicitors made it clear that the society did not recognise Mrs. Waller's tenancy as binding them, since they had not consented to its creation. Mrs. Waller did not comply with the notice to quit and the society took no steps to enforce it.

After the mortgagor's bankruptcy Mrs. Waller paid her rent to the trustee in bankruptcy and she continued to do so throughout 1957. On Jan. 13, 1958, the society, in exercise of their powers under s. 109 of the Law of Property Act, 1925, appointed their secretary, Mr. Payne, to be the receiver of the income of the mortgaged property. On Jan. 14, 1958, Mr. Payne gave Mrs. Waller notice of his appointment and requested her to pay all rent then due, or thereafter becoming due, in respect of the tenancy, to him. On Mar. 3, 1958, a letter was written on behalf of Mrs. Waller to the society's solicitors asking that Mrs. Waller should be sent the terms and conditions of the tenancy. On Mar. 10, 1958, the society's solicitors replied that they understood from the society that the terms of the tenancy were the same as those between Mrs. Waller and Mr. Delamont; and that unless all rent due was paid within seven days proceedings would be taken for recovery of possession. Mrs. Waller thereupon paid the arrears of rent due from Jan. 14 to the society by cheque drawn in favour of the society; and she continued thereafter to pay the rent of five guineas by cheque drawn in favour of the society. On July 1, 1958, the society's solicitors wrote to Mrs. Waller as follows:

> "We have been instructed by the Stroud Building Society to send you the enclosed notice to quit and deliver up the above mentioned premises on Jan. 3, 1959, by which date the keys should be forwarded to the secretary of the Stroud Building Society."

The enclosed notice read as follows:

> "I, Allan Frederick Richards Payne, secretary of the Stroud Building Society, hereby give you notice to quit and deliver up to the said Stroud Building Society or to whom they may appoint on Jan. 3, 1959, possession of the premises . . . which you hold as tenant of the said Stroud Building Society."

It was agreed by the parties that in giving that notice Mr. Payne was acting as secretary of the society and not as receiver. The society's solicitors wrote again to Mrs. Waller on Aug. 25, 1958, saying:

> "We have to inform you that the possession of this property will be required on Jan. 3, 1959, as provided by the notice to quit and in the meantime rent due should be paid to the society."

Mrs. Waller continued to pay rent to the society after the receipt of that letter in the same manner as she had been paying it before that date. On Dec. 19, 1958, Mrs. Waller's solicitors wrote to the society's solicitors suggesting, among other things, that the notice to quit of July 1, 1958, was invalid, as the premises were business premises, and the notice did not comply with the statutory requirements. It was agreed between the parties that if Mrs. Waller held a tenancy binding on the society the notice was in fact bad.

Mrs. Waller did not give up possession on Jan. 3, 1959, and on Jan. 30, 1959, the society's solicitors wrote to her solicitors saying they had been instructed to institute proceedings for possession of the property and in view of the nature of the tenancy a fresh notice to quit was being given. No fresh notice was in fact given and in these proceedings the society claimed possession on the ground that Mrs. Waller was a trespasser and that no particular form of notice was required.

E. G. Nugee for the plaintiffs.
A. L. Price for the third defendant.

CROSS, J., related the facts and, after holding that the original tenancy was not binding on the society because they had not given their consent to its creation, continued: When a mortgagor has granted a tenancy which is not binding on the mortgagee the latter can, instead of treating the tenant as a trespasser, consent to treat him as his own tenant or he may act in such a way as precludes him from saying that he has not consented to take him as a tenant. Such an acceptance by the mortgagee of the mortgagor's tenant, whether express or implied, or operating by way of estoppel, must, I think, amount to a creation of a new tenancy between the parties. The tenancy between the mortgagor and the tenant is not one which is merely voidable by the mortgagee if he chooses not to accept it, but which he can confirm by waiving his right to avoid it. It is a nullity as against the mortgagee and so, if the mortgagee is to lose his right to treat the mortgagor's tenant as a trespasser, it must be because the tenant has become the mortgagee's tenant under a new tenancy. The law on the subject is, I think, correctly stated in SMITH'S LEADING CASES (13th Edn.), p. 575, in the notes to the case of *Moss* v. *Gallimore* (1).

In this case it is clear that up to Jan. 13, 1958, the society had done nothing which deprived them of their right to treat Mrs. Waller as a trespasser. It is equally clear that if the society had then called on Mrs. Waller to pay her rent to them and she had done so a new weekly tenancy would have been created between her and the society. Instead of calling on Mrs. Waller to pay them rent, the society appointed Mr. Payne receiver of the mortgaged property. A receiver appointed by a mortgagee does not, of course, pay any rent received to the mortgagor. He either applies it in payment of outgoings or pays it to the mortgagee; but though the mortgagee has the benefit of the rent, the receiver, by reason of s. 109 (2) of the Law of Property Act, 1925, is the agent of the mortgagor. In *Lever Finance, Ltd.* v. *Trustee of Property of Needleman* (2) where, as here, the mortgagor was a bankrupt and the mortgagee had appointed a receiver, HARMAN, J., considered the question whether the receipt of rent by such a receiver created a tenancy between the tenant and the mortgagee and he expressed the view that it did not (3). This was obiter dictum and not part of the ratio decidendi of the case, but I shall accept it as correct. Indeed, counsel for Mrs. Waller has not invited me to do otherwise, but bases his case entirely on what happened after the appointment of Mr. Payne as receiver.

It is a reasonable inference from the correspondence that the society did not appreciate until shortly before the issue of the summons that the fact that they had appointed Mr. Payne as receiver might enable them to continue to treat Mrs. Waller as a trespasser if they so desired, even though they were receiving the benefit of the rent paid by her. Thus, when they were asked on Mar. 3, 1958, what were the terms and conditions of the tenancy, the society through their solicitors answered that the terms of the tenancy were the same as those between Mrs. Waller and Mr. Delamont. The question and answer indicate that both parties thought that a new tenancy between the society and Mrs. Waller would result from her payment of rent. The matter is made still plainer by the words " which you hold as tenant of the Stroud Building Society " in the notice served on July 1, 1958, and in the reference to the nature of the tenancy in the society's solicitors' letter of Jan. 30, 1959. There is after all nothing very surprising in the society making this mistake. The idea that a mortgagee can through the medium of a receivership get the benefit of a tenant's rent, while remaining at liberty to treat him as a trespasser, is a highly artificial one which would not readily occur to a layman or even to a good many lawyers. Counsel for the society, however, argued that the fact that the parties may have thought they were entering into the relationship of landlord and tenant is irrelevant. He points out that the receivership was never terminated, and that in a new rent book which was issued in April, 1959 (by which time no doubt the society had been advised as to the effect in law of receipt of rent by a receiver), the rent is described as payable to Mr. Payne under a tenancy between Mrs. Waller and Mr. Delamont. He also points out that such cases as *Doe d. Wilcockson* v. *Lynch* (4) and *Loewenthal* v. *Vanhoute* (5) show that when an owner of land is entitled to treat someone in occupation of it as a trespasser the fact that a notice, served on him, includes an erroneous statement that the occupier is the tenant of the owner will not itself without more create a tenancy between the owner and occupier. On the basis of those cases he argued that the inclusion in the notice of July 1, 1958, of what, he submits, was an erroneous statement that Mrs. Waller was tenant of the society would not create a tenancy. He also argues that no importance should be attached to the fact that by the letter of Aug. 25, 1958, the society demanded payment of rent and that Mrs. Waller paid the rent demanded since she was only continuing to do what she had in fact been doing since March. He argues that the fact that rent was paid by cheque in favour of the society is not (having regard to the terms of s. 109 (3) of the Law of Property Act, 1925) inconsistent with its being paid to the receiver. Consequently, he says, the reference to the payment of rent to the society made in the letter of Aug. 25, 1958, is capable of being construed as an intimation that Mrs. Waller must go on paying rent, until the notice to quit expires, to the receiver as agent for Mr. Delamont by way of a cheque drawn in favour of the society.

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(1) (1779), 1 Doug. K.B. 279. (2) [1956] 2 All E.R. 378; [1956] Ch. 375.
(3) See the "Semble" at the conclusion of the headnote in [1956] 2 All E.R. 378.

It may well be that if one takes each point which may be said to tell in favour of the creation of a tenancy in isolation from the rest, each can be explained away on those lines, but I must look at the picture as a whole. So far as I know there is nothing in point of law to prevent a mortgagee who has appointed a receiver of mortgaged premises from creating, by virtue of his legal estate in the land, the relationship of landlord and tenant between himself and a tenant of the mortgagor without previously terminating the receivership. Although counsel for the society did not admit that that was so, he was not able to refer me to any case which suggested the contrary. On that footing, I have to say whether (looking at the facts as a whole and putting myself in the position of a juryman) the society had consented to accept Mrs. Waller as tenant notwithstanding the receivership or whether they had not. In my judgment the right inference to draw from all the facts is that the society had consented to accept Mrs. Waller as a tenant. No doubt the society never deliberately abandoned any right which they had to treat Mrs. Waller as a trespasser. They never appreciated that they had any such right, and, if they had appreciated it, they might well have acted differently. This is, however, irrelevant to the question that I have to decide. In the result, therefore, I must refuse this application with costs.

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(4) (1771), 2 Chit. 683.

(5) [1947] 1 All E.R. 116; [1947] K.B. 342.

Order accordingly.

Solicitors: *Crossman, Block & Co.*, agents for *Winterbotham, Ball & Gadsden*, Stroud (for the plaintiffs); *Gamlen, Bowerman & Forward*, agents for *Morland & Son*, Abingdon (for the third defendant).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

UNION OF INDIA v. COMPANIA NAVIERA AEOLUS S.A.

[Queen's Bench Division (McNair, J.), February 22, 1960.]

Shipping—Demurrage—Exception—Strike occurring while vessel on demurrage—Discharge prevented—Centrocon strike clause incorporated in Baltimore Form C charterparty—Whether demurrage payable during strike period.

The plaintiffs were the holders of and the receivers under a bill of lading covering a shipment of wheat in bulk on board the defendants' vessel at Tacoma, for delivery at Bombay. The bill of lading provided that a charterparty dated London, Feb. 20, 1957, should be fully incorporated in the bill, and that the strike clause of the Centrocon charterparty should apply. The charterparty, dated Feb. 20, 1957, made between the defendants as owners of the vessel and Louis Dreyfus Corporation as charterers, was on Form C of the Approved Baltimore Berth Grain Charter. It provided for loading the vessel with a full and complete cargo of wheat in bulk for delivery at Bombay, and allowed the charterers six weather working days of twenty-four consecutive hours, Sundays and holidays excepted, for loading. By a typed clause (cl. 8) of the charterparty it was provided: " Cargo to be received at destination at the average rate of 1,000 tons of 2,240 lb. per weather working day of twenty-four consecutive hours . . ." Demurrage was payable (cl. 9) for time used in discharging in excess of lay time. The charterparty incorporated the strike clause from the Centrocon charterparty which was set out without alteration as follows, so far as is material: " If the cargo cannot be loaded by reason of . . . a strike . . . of any class of workmen, essential to the loading of the cargo . . . or if the cargo cannot be discharged by reason of . . . a strike . . . of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes, provided that a strike . . . of the shippers' and/or receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour . . . In case of any delay by reason of the before mentioned causes, no claim for . . . demurrage, shall be made by the . . . owners of the steamer ". The vessel having arrived at Bombay, the discharging port, lay days for discharging expired at 1356 hours on July 2, 1957; the vessel then went on demurrage. On July 5, 1957, while she was still on demurrage, a strike broke out of workmen essential to the vessel's discharge and prevented discharge from 0700 hours on July 5 to 1700 hours on July 13, 1957, a period of eight days ten hours. The receivers of the cargo were unable to obtain other suitable labour during this period. The receivers of the cargo relying on the Centrocon strike clause now claimed a declaration that they were not liable to the defendants for demurrage during this period.

Held: the receivers of the cargo were liable for demurrage during the strike because the Centrocon strike clause, as incorporated in the Baltimore charterparty, did not on its true construction exclude the operation of the general rule that once a vessel is on demurrage no exceptions operate to prevent demurrage continuing to be payable; this was so for the following reasons—

(i) the words "the time for loading and discharging" meant the time allowed for loading and discharging; accordingly the strike clause was designed to cut out from the time for discharging which was stipulated by the charterparty (viz., from the lay days and not from a period outside the lay days) time lost through strikes (see p. 756, letters G and H, post).

Moor Line, Ltd. v. *Distillers Co., Ltd.* (1912 S.C. 514) applied.

(ii) the words in the proviso "shall not prevent demurrage accruing" did not mean that, contrary to the general rule, the strike clause applied during both the lay days and the demurrage period since on its true construction the proviso merely qualified, in the circumstances set out in the proviso, what had gone before regarding the non-counting of lay days (see p. 757, letter E, post).

Per CURIAM: the sentence "In case of any delay [by strikes] . . . no claim for . . . demurrage, shall be made by the . . . owners of the steamer" is in conflict with, and contrary to, the detailed provisions [of the strike clause] and is merely an inaccurate paraphrase of those provisions (see p. 758, letters D and E, post).

Rederiakt. Transatlantic v. *Compagnie Francaise des Phosphates de l'Oceanie* ((1926), 17 Asp. M.L.C. 216) distinguished.

[As to when demurrage is payable and when demurrage ceases, see 30 HALSBURY'S LAWS (2nd Edn.) 346, para. 525, 348, para. 527.]

Cases referred to:

Moor Line, Ltd. v. *Distillers Co., Ltd.*, 1912 S.C. 514; 49 Sc. L.R. 407; 41 Digest 558, *o*.

Rederiakt. Transatlantic v. *Compagnie Francaise des Phosphates de l'Oceanie*, (1926), 136 L.T. 619; 17 Asp. M.L.C. 216; 32 Com. Cas. 126; 41 Digest 576, *3996*.

Action.

The plaintiffs, the Union of India, were the receivers of goods under a Baltimore Form C Berth Term Grain bill of lading dated May 5, 1957. The bill of lading was issued to the shippers, Louis Dreyfus Corporation, who were also the charterers of the steamship Spalmatori under a charterparty dated London, Feb. 20, 1957, and covered a shipment on board the Spalmatori, at Tacoma, Washington, of 9,950 long tons of wheat in bulk for delivery at Bombay, India, to the Ministry of Food and Agriculture, Bombay. The defendants, Compania Naviera Aeolus S.A., were the owners of the Spalmatori. The bill of lading provided:

> "All terms, conditions and exceptions of charterparty dated London, Feb. 20, 1957, are to be considered fully incorporated herein and if there is any conflict between bill of lading and charterparty, provisions of charterparty to govern . . .
>
> "10 [which was a printed clause] All terms, conditions and provisions of the strike . . . clause of the 'Centrocon' charterparty to apply."

The charterparty dated Feb. 20, 1957, which was on Form C of the Approved Baltimore Grain Charter, was made between the defendants' agents and Louis Dreyfus Corporation, and provided that the Spalmatori should proceed to Puget Sound, there load a full and complete cargo of wheat in bulk, and should then proceed to Bombay. The charterparty went on to provide:

> "Steamer to be loaded according to berth terms, with customary berth despatch, and if detained longer than six weather working days of twenty-four consecutive hours, Sundays and holidays excepted, charterers to pay

> demurrage at the rate of £200 (British sterling) per day, or pro rata, provided such detention shall occur by default of charterers or their agents . . ."

At the end of the printed terms of the charterparty a typed addition provided that typed clauses 7 to 21 as attached and strike clause 30 of the Centrocon charterparty were to be fully incorporated in the charterparty. The following typed clauses were relevant to this action:

> " 8. Cargo to be received at destination at the average rate of 1,000 tons of 2,240 lb. per weather working day of twenty-four consecutive hours (Sundays and holidays excepted even if used) but 500 tons per weather working day of twenty-four consecutive hours (Sundays and holidays excepted even if used) for any portion loaded in deep tanks, it being understood that deep tanks are clean and suitable always provided vessel can deliver at these rates.
>
> " 9. At discharging port receivers to pay demurrage, if incurred, at the rate of £200 (British sterling) per day or pro rata for part of a day, for all time used in discharging in excess of allowed laytime. Receivers to collect despatch if earned, at discharging port at the rate of £100 (British sterling) per day for each and every day or pro rata for part of a day for all laytime saved in discharging.
>
> " 10. Notification of the vessel's readiness to discharge must be delivered at the office of the receivers, or their agents, at or before 4 p.m. (or at or before 12 noon if on Saturday) vessel also having been entered at the custom house, and the laydays will then commence at 8 a.m. on the next business day, whether in berth or not."

After the typed clauses, there appeared in the charterparty the " 'Centrocon' Strike Clause "; this clause was lifted without alteration from the Centrocon charterparty, known as the River Plate Charterparty 14 Homewards, which is designed to cover homeward trade from the River Plate. The Centrocon strike clause as set out in the present charterparty read as follows:

> " If the cargo cannot be loaded by reason of riots, civil commotions or of a strike or lock-out of any class of workmen, essential to the loading of the cargo . . . or if the cargo cannot be discharged by reason of riots, civil commotions, or of a strike or lock-out of any class of workmen essential to the discharge, the time for loading or discharging, as the case may be, shall not count during the continuance of such causes, provided that a strike or lock-out of the shippers' and/or receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the strike or lock-out. In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage, shall be made by the charterers, receivers of the cargo, or owners of the steamer. For the purpose, however, of settling despatch rebate accounts any time lost by the steamer through any of the above causes shall be counted as time used in loading."

The facts, which were agreed, were that lay days at the discharging port, Bombay, expired at 1356 hours on July 2, 1957. The Spalmatori then went on demurrage but three days later, on July 5, a strike of workmen essential to the discharge of the vessel intervened and as a result discharge was prevented from 0700 hours on July 5 to 1700 hours on July 13, 1957. The receivers of the cargo were unable to obtain other suitable labour during this period. In the present action, which was commenced by writ dated Jan. 18, 1960, the receivers of the cargo claimed a declaration that on the true construction of the charterparty and of the bill of lading, of which they were the holders at all material times, and having regard to the facts that (a) the lay days had expired at 1356 hours on July 2, (b) discharge of the cargo at Bombay from 0700 hours on July 5 to 1700 hours on July 13, 1957, was prevented by a strike of workmen essential to the discharge, (c) other suitable labour could not be obtained, they, the receivers of the cargo, were not liable to the defendants, the owners of the Spalmatori, for £1,683 6s. 8d. additional demurrage in respect of the period of 8 days 10 hours, from 0700 hours on July 5 to 1700 hours on July 13, during which discharge of the vessel was prevented by the strike.

J. F. Donaldson for the receivers of the cargo, the plaintiffs.
M. R. E. Kerr for the shipowners, the defendants.

McNAIR, J., having referred to the bill of lading, the charterparty and the Centrocon strike clause incorporated therein and having also stated the agreed facts and the declaration claimed by the plaintiffs, continued: It is a well-settled rule of construction, as set out in SCRUTTON ON CHARTERPARTIES (11th Edn.), at p. 342 and in the current (16th) edition at p. 353, that

> " When once a vessel is on demurrage no exceptions will operate to prevent demurrage continuing to be payable unless the exceptions clause is clearly worded so as to have that effect."

That rule was referred to by BANKES, L.J., in *Rederiakt. Transatlantic* v. *Compagnie Francaise des Phosphates de l'Oceanie* (1), as

> " the ordinary rule that when once a vessel comes on demurrage the time she is detained is to be calculated by running days or calendar days as opposed to charterparty days."

Counsel for the receivers of the cargo urges first that the Centrocon strike clause in its present context, as incorporated into the Baltimore " C " Form charterparty, does make special provision to the contrary of the general rule, so that although the strike occurred during the demurrage period yet nevertheless the charterers and receivers of the cargo are entitled to rely on it. That is a result which he urges arises from the first and second parts (2) of the clause. Further or alternatively he submits that even if that be not right then the like result would follow from consideration of the third part (3) of the clause.

The first question, as it seems to me, for consideration is the meaning of the words, " the time for loading or discharging ". It is clear that those words are, in a sense, proleptic, but the choice merely lies between reading them as counsel for the shipowners would ask me to read them, as being " time stipulated for loading or discharging " or " time allowed for loading or discharging ", and reading them as counsel for the receivers of the cargo submits that they should be read, as meaning " time used for loading or discharging ".

In my judgment, taking those words alone for the moment and not considering what other meaning it may be necessary to assign to them by reason of the proviso, it seems to me to be perfectly clear that what is meant by " the time for loading " or " the time for discharging " is the time allowed for loading or discharging, especially when one reads on in the sentence and sees that it says that this time, so defined, " shall not count during the continuance of such causes ". That seems to me to assume that this strike clause is designed to cut out from the time for loading or discharging which has been stipulated or arranged for by other clauses of the charterparty time that shall not count during the continuance of certain causes. Although in cl. 8, which I have already read, of the typed clauses the obligation as to discharging is not expressed in the words " time

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(1) (1926), 17 Asp. M.L.C. at p. 217.

(2) The court treated as the first part of the Centrocon strike clause the words " If the cargo cannot be loaded " down to " the time for loading or discharging, as the case may be, shall not count during the continuance of such causes . . . " The words " provided that " down to " at rates current before the strike or lock-out " were treated by the court as the second part of the clause. For the full terms of the Centrocon strike clause see p. 755, letters F and G, ante.

(3) I.e., the sentence " In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage, shall be made by the charterers, receivers of the cargo, or owners of the steamer."

A for discharging to be " so much, but by the phrase, " Cargo to be received . . . at the average rate of 1,000 tons " and so on, it is quite clear to me at least that cl. 8 is defining a time for discharging; and the strike clause, when one comes to it, says that that time for discharging, the number of days, will not count during the continuance of the excepted causes.

It is said, however, that when one gets to the second part of the clause, namely, B the proviso, a different meaning must be given to it by reason of the used words " shall not prevent demurrage accruing ". It is quite true that in certain contexts the words " and demurrage shall not accrue " have been held to be sufficient, in the judgment of the Court of Appeal, to exclude the general rule to which I referred earlier in my judgment as to the non-applicability of exceptions which come into play only during the demurrage period, i.e., after the vessel has once C come on demurrage. Such a case was the case to which I referred earlier, *Rederiakt. Transatlantic* v. *Compagnie Francaise des Phosphates de l'Oceanie,* where the charterparty provided (4), inter alia, " lay days not to count during the period of such delay or hindrance and demurrage not to accrue . . ."; and it was held there by Bankes and Scrutton, L.JJ., that, in that " very special charterparty ", to quote the language of Scrutton, L.J. (5), the ordinary rule D was excluded. But it is to be observed that in that clause not only were the words " demurrage not to accrue " used, but there were also the words " lay days not to count ", so it is easy to understand how the result was arrived at and it was held that the intention of the draftsman, as shown by the words used, was that the exception should apply both during the lay days and during the demurrage period.

E In my judgment there is no need, on the words of this proviso, to reach the same conclusion. Once it is accepted, as I think it must be, that according to the proper canon of construction the proviso must be read as a qualification or exception from what has gone before, then it follows, it seems to me, that the proviso is dealing with some qualification against the non-counting of the lay days; and although it is true that it does not use the phrase again in the proviso F " lay days " it expresses the same thought by the use of the words " shall not prevent demurrage accruing ". The working of the proviso is well illustrated by the following example: Time for discharging, ten days. On the ninth day a strike breaks out and continues until the twelfth day. Were it not for the proviso the lay days would not start to run again until the end of the twelfth day; but the proviso says that in a particular class of strike, namely, a strike of receivers' G men when other suitable labour is available, it is not to have that result. It says that such a strike, in such circumstances " shall not prevent demurrage accruing ". It might equally have said, " shall not prevent time counting ". It is merely expressing the same thought in different language. In my judgment it expresses that thought in reasonably clear language; but if I am wrong in thinking that the language is quite clear, I think that the same result in law H would follow, for it has not been stated in clear terms that the general rule shall not apply. Accordingly on my construction of the first two parts of the clause the construction contended for by the receivers of the cargo does not commend itself to me.

Before passing to the third and fourth parts of the Centrocon strike clause, I should mention that I am assisted in the construction of the words " time for I loading or discharging " which I have arrived at by the judgment of Lord Salvesen in *Moor Line, Ltd.* v. *Distillers Co., Ltd.* (6). In that case the clause corresponding to the present clause which I have construed read as follows (7):

> " If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out."

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(4) (1926), 17 Asp. M.L.C. at p. 217.
(5) (1926), 17 Asp. M.L.C. at p. 218.
(6) 1912 S.C. 514.
(7) 1912 S.C. at p. 515.

It was argued on behalf of the shipowners that the words " days for discharging " covered both the lay days and demurrage time. The contrary was argued on behalf of the cargo interests. **Lord Salvesen** says (8):

> " The pursuers maintained that ' days for discharging ' included the ten days for which the charterers were entitled to detain the ship on paying the stipulated rate of demurrage. I cannot so read them. ' Days on demurrage ' are not ' lay days ' or ' days for discharging ' . . ."

The second way in which the case is put on behalf of the receivers is that whether they are right or wrong on the first and second parts of this clause, yet the plain words of the third part are sufficient for them in this case. Those words are:

> " In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage shall be made by the charterers, receivers of the cargo, or owners of the steamer."

Neglecting for the moment the exclusion of claims by the charterers and receivers of cargo, and confining the clause only to claims by the owners of the steamer, it would then read: " In case of any delay by reason of the before mentioned causes, no claim for damages or demurrage shall be made by the . . . owners of the steamer ". That is quite plainly in conflict with, and contrary to, the detailed provisions which have been set out earlier. Taken literally that sentence would mean that if there had been any delay at all, say only a couple of days, by reason of the strike, then the owners were to be disbarred from making any claim for damages or demurrage at all. Quite plainly it cannot mean that. It seems to me that this sentence, if any sense is to be given to it at all, is merely an inaccurate paraphrase of the detailed provisions which have gone before it. It may be that in so far as it excludes claims by the owners for demurrage it is merely leading up to the fourth part of the clause dealing with despatch money, which in effect says, at any rate so far as time used in loading is concerned, that even though the receivers of the cargo get the benefit of allowance for any strikes in their loading time they cannot claim as days saved so that they earn despatch any day where no work has been possible because of strikes during the lay days.

It is clear that this method of lifting a clause from one charterparty into another may create difficulties. This Centrocon strike clause is, of course, designed for fitting into the language of the Centrocon charterparty. It would not be permissible for me, on this occasion, to read on and to found my judgment on other parts of the Centrocon charterparty, so I refrain from referring to the terms of that charterparty in any detail, observing merely that certain of the linguistic difficulties arising in this Centrocon strike clause, when engrafted on to the Baltimore Form " C " charter, do not arise when the clause is read in its natural and native context.

Accordingly in my judgment the receivers of the cargo are not entitled to the declaration for which they ask, and as I understand it has been agreed that if they fail to get that declaration from the court they will regard themselves as liable for the amount of demurrage claimed, there is no need for me to make further order than that the court does not grant the declaration prayed for.

Judgment for the shipowners, the defendants.

Solicitors: *William A. Crump & Son* (for the receivers of the cargo, the plaintiffs); *Holman, Fenwick & Willan* (for the shipowners, the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

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(8) 1912 S.C. at p. 519.

LOUIS DREYFUS ET CIE. *v.* PARNASO CIA. NAVIERA S.A.

[COURT OF APPEAL (Sellers, Ormerod and Harman, L.JJ.), February 19, 22, 23, 1960.]

Shipping—Charterparty—Construction—"Full and complete cargo" within maximum and minimum limits—Shipowners' option to declare quantity within those limits—"Approximative cargo" declared by master—Cargo loaded 3.18 per cent. short of quantity declared—Whether shipowners in breach of contract—Gencon form charterparty.

Under cl. 1 of a charterparty in Gencon form a vessel was to proceed to La Pallice "and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option to be declared by the master in writing on commencement of loading . . . which the charterers bind themselves to ship". At La Pallice the master gave notice purporting to be a declaration under cl. 1 that "the approximative cargo to the holds will be . . . total 10,400 tons". The charterers accepted the notice without complaint. The vessel was down to her winter marks when she had loaded 10,069 tons, i.e., a quantity that was 331 tons or 3.18 per cent. less than 10,400. The charterers claimed to be entitled to damages in respect of expense incurred by them by reason of the failure to ship the 331 tons, which they had had ready.

Held: there had not been any breach of contract by the shipowners because—

(i) the master's notice was a declaration which, particularly as it had been accepted by the charterers, sufficiently defined the quantity for the purposes of the option conferred by cl. 1, and substituted that quantity for the maximum and minimum limits stated in cl. 1, and

(ii) in view of the word "approximative" in the notice some latitude, greater than a de minimis variation, was allowed thereby in the quantity to be loaded and, in the absence of evidence of trade usage, a variation of some three per cent. was reasonable and within the tolerance allowed.

Decision of DIPLOCK, J. ([1959] 1 All E.R. 502) reversed.

[As to the amount of cargo to be provided by the charterer and taken aboard by the shipowner, see 30 HALSBURY'S LAWS (2nd Edn.) 304-307, paras. 497, 498.]

Cases referred to:

Carlton S.S. Co. v. *Castle Mail Packets Co.*, (1896), 2 Com. Cas. 173; *revsd.*, C.A., [1897] 2 Q.B. 485; *affd.*, H.L., [1898] A.C. 486; 67 L.J.Q.B. 795; 78 L.T. 651; 8 Asp. M.L.C. 402; 3 Com. Cas. 207; 41 Digest 447, *2802*.

Chandris v. *Louis Dreyfus & Co.*, (1934), 50 Lloyd's Rep. 141.

Jardine, Matheson & Co. v. *Clyde Shipping Co.*, [1910] 1 K.B. 627; 79 L.J.K.B. 634; 102 L.T. 462; 11 Asp. M.L.C. 384; 41 Digest 645, *4764*.

Morris v. *Levison*, (1876), 1 C.P.D. 155; 45 L.J.Q.B. 409; 34 L.T. 576; 3 Asp. M.L.C. 171; 41 Digest 577, *4013*.

The Resolven, (1892), 9 T.L.R. 75; 41 Digest 325, *1830*.

Appeal.

The shipowners appealed against an order of DIPLOCK, J., made on Feb. 13, 1959, and reported [1959] 1 All E.R. 502, granting declarations in an action by the charterers in respect of alleged breaches of a charterparty dated Nov. 4, 1957, in the Gencon form. DIPLOCK, J., held that, by reason of the failure or refusal or inability of the defendant shipowners to load 336,750 kilos of wheat under the charterparty, they were in breach of the charterparty and were liable to pay the charterers £155 8s. 2d. damages in respect of such breach. The appellant shipowners' grounds of appeal were that the judge misdirected himself in law: (i) in holding that the failure or refusal or inability to load the full amount of 10,400 tons on the s.s. Dominator was a breach of the charterparty; (ii) in holding that a declaration made by the master of the s.s. Dominator pursuant to cl. 1 of the charterparty requiring an "approximative (sic) cargo to the holds" of 10,400 tons constituted a warranty on behalf of the shipowners that the vessel could load 10,400 tons or otherwise obliged them to load that quantity; (iii) if the shipowners were bound to load the quantity stated by the master in his declaration, in holding that the failure to load 336,750 kilos out of the 10,400 tons was a breach of the shipowners' obligations under cl. 1 of the charterparty having regard to the terms of the master's declaration; and (iv) if the failure to load the 336,750 kilos constituted a breach of cl. 1 of the charterparty, in holding that the shipowners were not exempted from liability in respect of such breach by cl. 2. The facts appear in the judgment of SELLERS, L.J., post.

A. A. Mocatta, Q.C., and *M. R. E. Kerr* for the shipowners.

R. A. MacCrindle for the charterers.

SELLERS, L.J.: This is a claim by way of declarations involving no more than £155 and, in my judgment, it can be answered in favour of the appellant shipowners, on one of the three grounds on which they rely, viz., that the shipowners took on board approximately 10,400 tons, which was in fact a full and complete cargo. If they did that, they were under no obligation to do more on any view of this case which has been advanced before us.

By a charterparty of Nov. 4, 1957, the defendant shipowners, as owners of the s.s. Dominator, chartered her to the plaintiff charterers. Clause 1 of the charterparty provided that the vessel should proceed to La Pallice

> " and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option, to be declared by the master in writing on commencement of loading . . . which the charterers bind themselves to ship, and being so loaded the vessel shall proceed to Karachi . . ."

The freight was on a tonnage basis. The vessel proceeded to La Pallice and, on Nov. 23, the master gave the notice purporting to be a declaration in writing under cl. 1 of the charterparty in this form:

> " I the master V. Roussos of the steamer ' Dominator ' . . . notify you that I shall require 300 tons wheat in bags for loading and the approximative cargo to the holds will be as following: No. 1 hold 1,600 long tons, 2 hold 3,000 long tons, 3 hold 2,000 long tons, 4 hold 2,150 long tons, 5 hold 1,650 long tons, total—10,400 tons."

It was signed by Captain Roussos, the master. The vessel was down to her marks (winter marks) when she had loaded 10,069 tons, i.e., 331 tons short of 10,400 tons. The charterers were ready to load the whole of the 10,400 tons, and incurred the expense claimed in the action by reason of the balance of the goods not being shipped.

DIPLOCK, J., held that, once the master had declared the quantity to be carried, the quantity of cargo which the ship was bound to load and the charterers were bound to ship was the quantity so declared. The learned judge then stated that " approximative " was a word which had no defined limits of tolerance and he construed the declaration as if it was for 10,400 tons with an obligation limited only by those limits of tolerance which the de minimis rule imports. The master was a Greek and when he said " approximative " in my view he was saying the same thing in respect of quantity as the agents had said in a letter of Nov. 8: " it is anticipated the vessel will lift a cargo of about 10,400 long tons ".

I would regard 331 tons deficiency in a cargo of 10,400 tons, a deficiency of just over three per cent., as fulfilling the obligation to ship about 10,400 tons: see *Morris* v. *Levison* (1) and *The Resolven* (2). In the absence of any trade evidence on the matter, it is in my opinion within a reasonable commercial margin in respect of such a cargo.

Counsel for the charterers argued strenuously that a declaration by the master at the commencement of loading could be and was intended to be precise, and to

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(1) (1876), 1 C.P.D. 155; 3 Asp. M.L.C. 171.

(2) (1892), 9 T.L.R. 75.

A state " about " was not in accordance with the requirement. The declaration was accepted without complaint, however, and I do not think that it should be read by either party in assessing their rights and obligations as if " approximative " was not there. It is still a statement of quantity much narrower in its latitudes than the wide range in the charterparty.

That is sufficient to decide this case in favour of the shipowners. Counsel B for the shipowners invited us, however, to go further and to hold that the declaration had not the effect alleged by the charterers and found by the learned judge, that whatever quantity the master declared within the limits specified in the charterparty was to be deemed to be a full and complete cargo for the purposes of the charterparty. He submitted that such a declaration by the master could not be interpreted so as to alter the contractual liability under the charter- C party, and was merely an intimation to the charterers as a matter of convenience to give them a closer idea of the anticipated cargo required within the very wide limits of 8,550 to 10,450 tons. The alternative submission was that the declared quantity became the maximum quantity the ship could demand in substitution for the charterparty maximum of 10,450 tons. As, apart from the declaration, the charterers were not only obliged but entitled to load a full and D complete cargo up to 10,450 tons, if the master was able to declare a lower quantity which became binding whether the ship was fully loaded or not, he could, in variance of the charterparty, deprive the charterers of their right to load a full cargo if they wished to do so. If the declared quantity was to be deemed a full and complete cargo, then, it was said, no meaning remained in the words " and there load a full and complete cargo ".

E These are substantial arguments, and it is perhaps surprising that charterers are prepared to contend that the phrase

> " quantity in owners' option to be declared by the master in writing on commencement of loading ",

does make drastic inroads on what would without it have been their rights. Without the declaration, the charterparty would require the charterers to load F and the shipowners to receive a " full and complete cargo " within the limits specified, and, as the learned judge states, if that were all, the obligation of the parties would have been that the owners warranted a minimum capacity of 8,550 tons before the vessel was fully loaded, and the charterers were under an obligation to provide a full and complete cargo up to 10,450 tons (if the vessel were capable of holding so much), but under no obligation to provide more even G if there remained capacity in the ship to take more: see *Carlton S.S. Co.* v. *Castle Mail Packets Co.* (3), and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.* (4).

Notwithstanding the force of the submission of counsel for the shipowners, and the reliance that he placed on the observations of a very experienced commercial judge, MACKINNON, J., in *Chandris* v. *Louis Dreyfus & Co.* (5), cited by the learned judge, I have come to the conclusion that, once the declaration was properly H made, the quantity stated therein became substituted for the wide range of maximum and minimum quantities stipulated in the charterparty and established the quantity to be loaded. I doubt whether it is right or necessary to say that such a quantity is deemed to be a full and complete cargo, although that might often be the effect. It becomes the maximum which the charterers are required to load, but I am inclined to think that, in this case and with this I declaration, if the vessel had not been fully laden with 10,400 tons, the charterers could have required the acceptance of a similar margin, say three per cent., above that quantity, relying on the provision that she was to take a full and complete cargo limited only by the declared quantity, i.e., the shipowners could not have relied on the minimum quantity of his declaration.

At first sight it seems an unlikely option for charterers to grant or accept in the charterparty, as it would appear more of a detriment to the charterers than a benefit to the shipowners. I felt doubt at one time whether the option could benefit the shipowners to whom it was given, but, if it served their purpose, by the declaration of the master they could take less cargo than a full and complete cargo and thereby speed the dispatch of their ship from the loading port, or leave room for the intake of cheap bunkers and stores, e.g., subsequently to loading the charterparty cargo. The exercise of the option, unless it is a precise calculation of what cargo will bring the vessel down to her load line, would operate, it would seem, to the prejudice of the charterers, as the master (to whom the stowage of a cargo may often be an uncertain factor) would tend to stipulate for less than a full cargo to be on the safe side against such a claim as has arisen here. The benefit to the charterers, it is said, is that they are informed of the precise amount of cargo which they will be required to ship, and can make arrangements accordingly with the minimum of expense, as they would not provide surplus cargo. The master in the present case no doubt intended to be on the safe side, but erred in calculating on a summer load line when the ship had shortly before changed to winter marks. As it happened, the ship just took the minimum of the amount he stipulated as I have felt it ought to be interpreted.

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(3) (1896), 2 Com. Cas. 173; *revsd.*, C.A., [1897] 2 Q.B. 485; *affd.*, H.L., [1898] A.C. 486; 8 Asp. M.L.C. 402.

(4) [1910] 1 K.B. 627; 11 Asp. M.L.C. 384.

(5) (1934), 50 Lloyd's Rep. 141.

Before Diplock, J., the shipowners had also relied on an exceptions clause in the charterparty. This point had been found against them and the finding was subject to appeal, but it became unnecessary in the view the court took of the declaration and it was not argued before us. I would allow the appeal and refuse the declarations which the learned judge gave.

ORMEROD, L.J.: I also would allow this appeal. On the question of the construction of the first clause of the charterparty, I am in full agreement with the view expressed by my Lord, and would add nothing. I only add a few words on the meaning to be put on the captain's declaration, as we are differing from the learned judge on that question.

The learned judge took the view that it was right for him to construe the declaration as one (6) " complying with the terms of the contract, if such a construction is open to me ". In his view, such a declaration was one which purported to declare an exact quantity within such limits of tolerance as would come within the de minimis rule. He then came to the conclusion that, as the word " approximative " was one without any defined limits of tolerance, it should be so construed as referring only to such tolerance, and he held therefore that the notice was a good notice. Whether a declaration allowing a greater limit of tolerance than that suggested by the learned judge would be a good declaration under this charterparty is a question on which I feel some doubt. But the charterers accepted this declaration as a good declaration and it is on that basis that I would approach this question.

I find it difficult to accept the conclusion of the learned judge that the word " approximative " gives to the parties no more tolerance than would the de minimis rule. To do so means that the word was inserted into the declaration for no purpose whatsoever. It is true that the master of the ship was Greek, and his use of the word " approximative " is some indication of his lack of command of English. But that does not seem to be sufficient reason for failing to give effect to the language of the document as it is before us. In my judgment, " approximative " refers to something more than the tolerance suggested by the learned judge. How much more depends on the surrounding circumstances. The ship was unable to load the 10,400 tons referred to in the notice by 331 tons, which is a difference of 3.18 per cent. In the circumstances of this case, in my judgment, this comes within the tolerance imported into the declaration by the word " approximative ". I would therefore allow the appeal on this ground.

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(6) [1959] 1 All E.R. at p. 506.

HARMAN, L.J.: I agree. I do not feel any doubt that the judge rightly construed the words of the charterparty, and that all of them form part of the contract, i.e., that the option phrase does not consist merely of " words of expectation ", the phrase rejected in *Morris* v. *Levison* (7). What then do these words mean, regarded of course in the light of the surrounding circumstances? The meaning of the words preceding the reference to the option is not in doubt, having regard to the authorities, *Carlton S.S. Co.* v. *Castle Mail Packets Co.* (8) and *Jardine, Matheson & Co.* v. *Clyde Shipping Co.* (9), cited by my Lord. They are a warranty by the shipowners that not less than 8,550 tons shall be carried. They give the charterers the right to load up to the higher figure, if the vessel will take so much, but no more, even though she could carry more. Thus an inroad is made on the primary meaning of " full and complete cargo ". The option that follows is an option to the shipowners by their agent, the master, to put a further limit on this same right by declaring the quantity. This declaration need not, in my judgment, be made. It is truly an option. If, however, the option be exercised within the limits set by the document, then the figure declared by the master must be read into the contract, and, as between the parties, will constitute, a full and complete cargo. The drafting is not elegant. It would be better expressed by some such words as " such tonnage not more than about 10,400 tons, nor less than about 8,550 tons, as the master shall in writing declare before loading starts, this to be treated as a full and complete cargo ". I think, however, that the meaning is tolerably clear.

The next question is of the meaning of the notice. The judge thought that " quantity " in the option must be construed as " exact quantity ", that ut res magis valeat the words in the notice must be made to comply, and that the quantity should be read as 10,400 tons precisely, notwithstanding the word " approximative ". He therefore felt bound to give to the latter word an unnatural meaning, and treat it as a reference to such trifling differences as would be implied in its absence under the doctrine of de minimis. I see no necessity to desert the cardinal principle applicable to the construction of all documents, viz., to give its natural meaning to every word, if possible. I think " approximative " must be given its natural meaning of " about " or " more or less ", and that whatever tolerance is appropriate to that expression becomes no less a part of the contract than the reference to 10,400. This, of course, works both ways. If the ship could have carried more, then the shippers could have asked for the excess; if less (as proved to be the case) then they must be content with less. Both sides appear to have assumed that the quantity can be well declared by such words as " 10,400 more or less ", and I think that is right. But, if it is wrong, the charterers should have objected at the time and insisted on a more exact definition. Alternatively, the option was never exercised at all, and in that case there was no breach because a full and complete cargo was in fact loaded.

It remains to consider whether the deficiency in carrying capacity, some 3.18 per cent., leaves the quantity within the tolerance indicated. I think that it does. It is not so great a difference as alters the obligation so substantially as to make it a different bargain. I would conclude that there was no breach of contract.

Appeal allowed. Judgment for the shipowners on claim and counterclaim. Leave to appeal to the House of Lords refused.

Solicitors: *Holman, Fenwick & Willan* (for the shipowners); *Richards, Butler & Co.* (for the charterers).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

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(7) (1876), 1 C.P.D. 155; 3 Asp. M.L.C. 171.

(8) (1896), 2 Com. Cas. 173; *revsd.*, C.A., [1897] 2 Q.B. 485; *affd.*, H.L., [1898] A.C. 486; 8 Asp. M.L.C. 402.

(9) [1910] 1 K.B. 627; 11 Asp. M.L.C. 384.

Re THE JEWISH ORPHANAGE ENDOWMENTS TRUSTS. SEBAG-MONTEFIORE AND OTHERS *v.* ROTHSCHILD EXECUTOR & TRUSTEE CO. AND ANOTHER.

[Chancery Division (Cross, J.), February 4, March 17, 1960.]

Charity—Scheme—Investment clause—Power for governors to alter scheme by resolution—No alteration to involve deviation from "main principles" of scheme—Alteration of investment clause by resolution, so as to extend range of investments—Whether valid.

In July, 1876, the Charity Commissioners made a scheme in relation to a charity, cl. 75 of which scheme provided that if "any alteration or modification of this scheme" should be required for any purpose and meetings of the governors should adopt and confirm the alteration or modification "such alteration . . . shall thereupon be made and take effect . . . provided that no alterations . . . shall be made involving a deviation from the main principles of this scheme". Clause 56 of the scheme was an investment clause which permitted the investment of the funds of the institution in a specified range of investments which was wider than that authorised by the Trustee Act, 1859. In 1959 a resolution was passed and confirmed by the governors for the alteration of the investment clause in the scheme so as to limit the power of investment with regard to one-third of the funds to investments authorised by law for the investment of trust funds but to permit the remaining two-thirds to be invested in first-class equities.

Held: the resolution effectively extended the range of permissible investments because—

(i) cl. 75 could validly be used for the purpose of extending the range of permissible investments, and

(ii) the proposed extension of the investment clause in the scheme did not involve a deviation from the "main principles" of the scheme under the proviso to cl. 75.

Dictum in *Re Tobacco Trade Benevolent Assocn.* ([1958] 3 All E.R. 353) not followed on (i) above.

[As to the alteration of charitable trusts under express powers, see 4 Halsbury's Laws (3rd Edn.) 317, para. 653.]

Cases referred to:

French Protestant Hospital, Re, Hospital for Poor French Protestants & Descendants Residing in Great Britain, Governors & Directors v. *A.-G.*, [1951] 1 All E.R. 938; sub nom. *Re French Protestant Hospital*, [1951] Ch. 567; 13 Digest (Repl.) 240, *655*.

Holloway's Trusts, Re, Greenwell v. *Ryan*, (1909), 26 T.L.R. 62; 54 Sol. Jo. 49; 8 Digest (Repl.) 487, *1985*.

Tobacco Trade Benevolent Assocn., Re, Sinclair (Baron) v. *Finlay & Co., Ltd.*, [1958] 3 All E.R. 353; [1958] 1 W.L.R. 1113; 3rd Digest Supp.

Originating Summons.

The affairs of the Jewish Orphanage, a charity, were governed by a scheme sanctioned by the Charity Commissioners in 1876 by which power was given to the governors to alter the rules provided that the alteration did not involve a deviation from the main principles of the scheme. By originating summons dated Nov. 6, 1959, the plaintiffs, who were the managing trustees of the charity applied for determination of the question whether, on the true construction of the scheme, a resolution passed on July 15, 1959, (a) was valid and effective to extend the range of investments in which moneys held on trust for the charity might properly be invested or (b) was invalid by reason of the fact that the alteration proposed thereby involved a deviation from the main principles of

A the scheme or for any other reason. The defendants to the originating summons were the custodian trustee of the charity's funds and the Attorney-General. The facts appear in the judgment.

L. H. L. Cohen for the plaintiffs.
Martin Roth for the first defendants.
B *B. J. H. Clauson* for the Attorney-General.

Cur. adv. vult.

Mar. 17. **CROSS, J.**, read the following judgment: On July 7, 1876, the Charity Commissioners made a scheme amalgamating the Jews' Hospital at Lower Norwood and the Jews' Orphan Asylum, at Tenter Ground, into one institution to be called " The Jews' Hospital and Orphan Asylum ". By cl. 3 C of the scheme the objects of the new institution were stated to be

> " the providing of a home in the institution for, and the maintaining, educating, clothing and apprenticing to industrial employments of poor children of the Jewish religion, including as well those deprived of both parents . . . and those deprived of one parent only . . . as others, and the relief D of poor aged persons of the Jewish religion."

Clauses 4 to 45 of the scheme contain provisions for the government of the institution which it is not necessary for me to refer to in detail. It is sufficient to say that there was to be a board of governors consisting of subscribers to the institution which was to meet at least once a year and a committee of management. Clauses 46 to 54 provided for the taking over by the new institution of E the property and debts of the two existing institutions and for the acceptance of gifts and bequests. Clauses 55 and 57 dealt with the appointment of trustees to hold the property of the new institution. Clause 56 was an investment clause which permitted the investment of the funds of the institution in a specified range of investments which was somewhat wider than that then authorised by the Trustee Act, 1859. Clauses 58 to 71 dealt with the conditions of admission F of beneficiaries and the appointment of salaried officers. Clauses 72 and 73 conferred power to make bye-laws and cl. 74 gave power to make other provision for the poor aged beneficiaries. Clause 75 was in the following terms:

> " If, in the opinion of the committee, any alteration or modification of this scheme shall be required for any purpose, the committee shall submit the same to a meeting of the governors. If the said meeting, by a majority G not being less than two-thirds of the persons present thereat, adopt such alteration or modification, the committee shall submit the same to another meeting of the governors, and if the said second meeting shall by a majority of the persons present thereat confirm the same, such alteration or modification shall thereupon be made and take effect. If the said first meeting shall, by a majority, not being less than two-thirds of the persons present thereat, H make any variation in the said alteration or modification, the said variation shall be considered by the committee, and if the same shall be adopted by them, the committee shall submit the said alteration or modification, with such variation, to a second special meeting, and if the said second meeting shall, by a majority of the persons present thereat, adopt the said alteration or modification, with the said variation, the same shall be made and take I effect. Provided that no alterations, modifications, or variations shall be made involving a deviation from the main principles of this scheme."

The scheme established in 1876 was altered from time to time under the provisions of cl. 75. In particular it appears that at some date before 1910, which cannot now be ascertained exactly owing to the loss of the charity's earlier records, the powers of investment contained in cl. 56 of the original scheme were extended to cover a considerably wider range though not so as to include a general power to invest in " equities ".

On June 22, 1928, the Charity Commissioners made a further scheme by which a separate charity to be known as the "Jews' Hospital Pension Charity" was set up to carry on the part of the work of the original charity which was concerned with the relief of poor aged persons, and the name of the original charity was changed to the Jewish Orphanage. Certain investments forming part of the endowment of the original charity were transferred to the new pensions charity. Some of these were investments which were not authorised under the original investments clause but only under the alteration of it made or purported to be made some time between 1876 and 1910.

On July 15, 1959, the committee of the Jewish Orphanage being desirous of further widening the investment powers of the charity submitted a resolution to the board of governors for the alteration of the investment clause in the scheme so as to limit the power of investment with regard to one-third of the funds to investments authorised by law for the investment of trust funds but to permit the remaining two-thirds to be invested in what may be broadly described as "first-class equities". This resolution was duly passed by the board of governors at the meeting on July 15 and confirmed as required by cl. 75 at a further meeting held on Sept. 16, 1959, but the Charity Commissioners have questioned its validity. Accordingly, the present summons has been taken out by the plaintiffs, who are the present managing trustees of the Jewish Hospital, against the Rothschild Executor & Trustee Co., who are the custodian trustees of the charity's funds, and the Attorney-General asking whether the resolution in question "was valid and effective" to extend the range of permissible investments. Alternatively, the summons asks that the proposed extended range be authorised by the court.

Counsel for the Attorney-General puts the case against the validity of the resolution in two ways. First, he says that so far as cl. 75 of the scheme does on its true construction purport to cover an alteration of the range of investments permitted by the scheme as originally framed, it can have no legal effect. Alternatively, he says that cl. 75 of the scheme on its true construction does not cover such an alteration since it would constitute a deviation from the main principles of the scheme.

In support of his argument on the first point, counsel referred me to a dictum of Harman, J., in *Re Tobacco Trade Benevolent Assocn., Baron Sinclair* v. *Finlay & Co., Ltd.* (1). In that case the benevolent association, which was an unincorporated body, by a resolution passed at a general meeting in 1956 introduced a new rule purporting to widen the range of its permitted investments. The association's original rules made in 1860 contained no power of alteration, but in 1871 a rule had been passed at an annual general meeting purporting to confer a power of altering the rules. That rule had been acted on and the association had made various alterations in its rules in particular in those relating to investments. The decision in the case was that as the original rules conferred on the association no power to alter them, the alteration made in 1871 and any subsequent alterations made in pursuance of it were invalid. In the course of his judgment the learned judge said that he doubted (2)

> "Whether, if in the beginning the rules had provided a power to alter them, the body could then make use of that power to widen its investment capacity . . ."

Counsel argued that the doubt expressed by the learned judge was justified. He pointed out that before the Trustee Act, 1859, was passed the three per cents. were the only form of investment which the court recognised as proper for the investment of trust funds. By the various Trustee Acts the range of authorised investments has been greatly widened, but at any given time there are always some investments on which trustees cannot lawfully invest unless the terms of their trust expressly permit them to do so. Although a settlor or testator has always been able to empower his trustees to invest in non-trustee securities, he cannot, so the argument ran, confer on other people, whether they be the trustees themselves or some of the beneficiaries or some outside person or body, a power to extend the investment clause contained in the settlement; nor can the Charity Commissioners insert such a power in a scheme establishing a charity.

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(1) [1958] 3 All E.R. 353.

(2) [1958] 3 All E.R. at p. 355.

In view of the dictum of HARMAN, J., I thought it right to take time to consider the matter, but on consideration I do not think that his doubt was justified. If a testator or settlor can himself empower his trustees to invest in forms of investment not authorised by law for the investment of trust funds, I do not see on principle why he should not be entitled to confer on someone else a power to enlarge the original investment clause. I do not remember ever having seen such a power in a will or settlement; but that is not surprising, for anyone who was prepared to allow the range of permissible investments to be extended in this way during the life of the trust would normally give his trustees the wider power in the first instance. One can easily conceive of some exercise of such power which would be invalid. Trustees, for example, could not exercise it so as to authorise the investment of trust moneys on loans to themselves (compare *Re French Protestant Hospital* (3)); but no question of that sort arises here. I think, therefore, that the first submission of counsel for the Attorney-General fails.

It remains to consider whether the range of investments originally prescribed by cl. 56 of the scheme was one of its " main principles ". On this point I was referred to *Re Holloway's Trusts, Greenwell* v. *Ryan* (4) where SWINFEN EADY, J., had to consider a somewhat similar restriction on a power of alteration contained in a trust deed establishing Holloway College. There the trust deed was divided into a number of parts with separate headings, one of which was " Nature and Principles of the College ". It was therefore easy to say that anything outside that part could be altered under the power. Here, however, I have nothing of that sort to guide me. It is clear that it would be a deviation from the main principles of this scheme to alter the objects of the charity to something quite different from the objects laid down in cl. 3. But what sort of alteration short of an alteration of the objects would constitute a deviation from the main principles of the scheme? Was it, for example, a main principle of the scheme that all the committee should be appointed by the board of governors? If so, the alteration of cl. 6 in 1933, under which some members of the committee are to be appointed by orphan aid societies, was invalid. Again, was it a main principle of the scheme that the age of admission of orphans should be from two to eleven? If so, the deletion of cl. 63 in 1950 was invalid. Where is one to draw the line? Counsel for the Attorney-General says that however difficult it may be to say on which side of the line some cases fall, a restricted range of investment was in 1876 common form in trusts both private and charitable, and should therefore be regarded as one of the main principles of this scheme. The fact that nowadays it has become common, in private trusts at any rate, to insert a very wide, if not unlimited, investment clause is, he submits, irrelevant. I cannot think, however, that a clause prescribing the manner in which funds can be invested could even in 1876 have been regarded or described as a main principle of a charitable trust. I propose therefore to declare that the resolution in question effectively extended the range of permissible investments.

Declaration accordingly.

Solicitors: *Hyman Isaacs, Lewis, Mills* (for the plaintiffs and first defendants); *Treasury Solicitor* (for the second defendant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

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(3) [1951] 1 All E.R. 938; [1951] Ch. 567.

(4) (1909), 26 T.L.R. 62.

Re BUGLE PRESS, LTD.
Re HOUSES AND ESTATES, LTD.

[CHANCERY DIVISION (Buckley, J.), March 10, 1960.]

Company—Scheme of arrangement—Scheme for transfer of shares to transferee company—Acquisition of shares of dissentients—Fairness of scheme—Burden of proof—Majority shareholders in transferor company holding all shares in transferee company—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 209 (1).

The issued share capital of B., Ltd. comprised ten thousand shares of £1 each of which S. and J. each held four thousand five hundred and T. held one thousand. S. and J. also held all the issued shares (one hundred of £1 each) equally between them of J. & S., Ltd. which company was incorporated in September, 1958, and carried on no business except the transaction next stated. In July, 1959, J. & S., Ltd. offered to acquire T.'s shares in B., Ltd. at £10 per share, on the footing that it was clear that J. and S. (who between them held ninety per cent. of the issued shares of B., Ltd.) would accept the offer of £10 per share. T. refused the offer because he considered that his shares were worth more than £10 each. The offer was based on a valuation by a firm of accountants. T. applied to the court for a declaration under the Companies Act, 1948, s. 209 (1)*, that J. & S., Ltd. was not entitled to acquire his shares. The principal evidence before the court was an affidavit made by T. in which he criticised the valuation made by the accountants, and to which he exhibited that valuation. J. & S., Ltd. filed no evidence on the merits of the valuation.

Held: in view of the fact that the holders of the majority of the shares in B., Ltd. were in substance the persons making the offer for the shares in B., Ltd., the onus must rest on the acquiring company (J. & S., Ltd.) to satisfy the court that the offer was fair; that onus had not been discharged, and accordingly T. would be granted the declaration for which he asked.

Re Sussex Brick Co., Ltd. (p. 772, post) distinguished.

[As to power to acquire shares of dissenting shareholders, see 6 HALSBURY'S LAWS (3rd Edn.) 774, para. 1561; and for cases on the subject, see 10 DIGEST (Repl.) 1093-1096, *7559-7574*.

For s. 209 (1) of the Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 628.]

Cases referred to:

Hoare & Co., Ltd., Re, [1933] All E.R. Rep. 105; 150 L.T. 374; 10 Digest (Repl.) 1095, *7572*.

Press Caps, Ltd., Re, [1949] 1 All E.R. 1013; [1949] Ch. 434; [1949] L.J.R. 1460; 10 Digest (Repl.) 1095, *7574*.

Sussex Brick Co. Ltd., Re, p. 772, post.

Adjourned summonses.

The applicant, Henry Charles Treby, applied by originating summons under R.S.C., Ord. 53B, r. 8 (o) pursuant to s. 209 (1) of the Companies Act, 1948, for a declaration that the respondent, Jackson & Shaw (Holdings), Ltd., was neither entitled nor bound to acquire the shares of the applicant in Bugle Press, Ltd., or any of them on the terms of a scheme dated July 14, 1959, notwithstanding that it had been approved by nine-tenths of the shareholders of Bugle Press, Ltd.

The applicant, by a second summons, sought a similar declaration in respect of his holding of shares in the capital of Houses and Estates, Ltd., the facts being in essentials similar to those relating to Bugle Press, Ltd.

Sir Milner Holland, Q.C., and *M. Finer* for the applicant.

R. B. S. Instone for the respondent.

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* Section 209 (1) is printed at p. 770, letter F, post.

A **BUCKLEY, J.:** These are two applications by a dissentient shareholder under the Companies Act, 1948, s. 209, with the object of obtaining declarations that he ought not to be compelled to sell his shares in accordance with the terms of offers which have been made by a transferee company to acquire the shares in Bugle Press, Ltd. and Houses and Estates, Ltd.

Bugle Press, Ltd. is a company which was incorporated on Jan. 19, 1950, for B the purpose of carrying on the business of booksellers, publishers, newspaper and magazine proprietors and other like businesses that are referred to in the memorandum of association of the company, and its principal business seems to have been the publication of a periodical. The issued share capital of the company consists of ten thousand shares of £1 each, all of one class, four thousand five hundred of which are held by a Mr. George Douglas Shaw, four thousand five C hundred by a Mr. Henry Robert Jackson, and one thousand by the applicant, Mr. Henry Charles Treby. The applicant is therefore the holder of ten per cent. of the issued shares of the company.

The company named Jackson & Shaw (Holdings), Ltd. was promoted by Messrs. Jackson and Shaw, to whom I have referred, and was incorporated on Sept. 5, 1958. Messrs. Jackson and Shaw were the subscribers of the memoran- D dum, and they now hold the issued shares of the company, which are one hundred in number, fifty by Mr. Jackson and fifty by Mr. Shaw. That company (which I will call the " holdings company ") has not, apparently, carried on any business except in relation to the transactions to which I shall refer.

In July, 1959, solicitors acting on behalf of the holdings company wrote to the applicant's solicitor a letter in which they offered to acquire his one thousand E shares in the company at £10 each. In that letter they said—" It is a known fact that Messrs. Jackson and Shaw, the holders of ninety per cent. of the issued capital, will accept this offer "—and they asked to be told by the applicant within fourteen days whether he was prepared to accept. The applicant was not prepared to do so. That offer was based, as regards the price mentioned in it, on a valuation which the holdings company had obtained from accountants, Messrs. F Price Waterhouse & Co., in which Messrs. Price Waterhouse & Co. valued the fair price to be paid by the holdings company for the whole of the share capital of Bugle Press, Ltd. at £100,000. In that valuation Messrs. Price Waterhouse & Co. explicitly state that they have examined the accounts of Bugle Press, Ltd. and have obtained such further explanations as they have required from the secretary of the holdings company and from Messrs. West and Drake. I do not G think that I have any means of knowing precisely what position was occupied by Messrs. West and Drake.

The applicant did not accept that offer because he considered that the value of his holding of shares in the company was considerably more than the amount offered for it. In his affidavit filed in these proceedings on Sept. 25, 1959, he has set out his reasons for considering that the value of the undertaking of Bugle H Press, Ltd., was greater than the value of £100,000 put on it by Messrs. Price Waterhouse & Co. It is not necessary for me to refer to those reasons in detail. Shortly they are that in April, 1959, and in May, 1959, offers had been made either by Messrs. Jackson and Shaw or on behalf of the holdings company for the applicant's shareholding in Bugle Press, Ltd. of sums appreciably in excess of £10,000; and that in correspondence which the applicant had had with other I persons who were experienced in dealing with property of this kind in the publishing and newspaper world he had found that those other people had agreed with his view that the price of £10,000 would be too low. He also expresses the view in his affidavit that in one respect, i.e., in excluding reference to the profits of Bugle Press, Ltd. for the six months ended Apr. 30, 1959, Messrs. Price Waterhouse & Co. had overlooked an important element which the applicant considered that they ought to have taken into account in arriving at their valuation, and that the printing dispute—which was the reason given by Messrs. Price Waterhouse & Co. for ignoring the profits of that half year was in fact a transient matter which could not affect the true value to be put on the undertaking of the company. Moreover, another matter which he mentioned in his affidavit is that the figure given in Messrs. Price Waterhouse's valuation, being the figure for the profits for the half year to which they say they did not pay any attention, was wrong by £5,000. It may be that because they did not pay any attention to the profits for that half year that would not perhaps have influenced Price Waterhouse's view; nevertheless it is another ground for saying that the valuation at any rate deserves to be looked into. In those ways the applicant indicates that he considers that Messrs. Price Waterhouse's valuation is unsatisfactory, and one which is at any rate open to criticism, whether the criticism be well-founded or ill-founded.

The applicant having declined the offer, the transferee company (the holdings company) gave him notice under the section of its intention to exercise its statutory rights of compulsory acquisition under s. 209. In fact, that notice was given before the expiration of the period of four months mentioned in the section, but by agreement between the parties no point has been taken on that and the argument has proceeded on the basis that the notice was duly given and that unless the court thinks fit to say (as it can say under the section) that the section shall not operate, the section will operate as the result of that notice, or as the result of a later notice which has been given since the issue of the summons.

The facts relating to Houses and Estates, Ltd., the company to which the second application before me relates, are substantially the same as the facts with regard to Bugle Press, Ltd., except that the amount of the issued share capital of the company differs, the price offered of course consequently differs, and the ninety per cent. interest in that case was not held by Messrs. Jackson and Shaw only, but by Messrs. Jackson and Shaw and their respective wives. However, in this judgment it will be convenient for me to deal with Bugle Press, Ltd., because the facts of the two cases being in all essentials identical what I say in regard to Bugle Press, Ltd. will also apply with equal force to Houses and Estates, Ltd.

Section 209 (1) of the Companies Act, 1948, is in the following terms:

> " Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as ' the transferor company ') to another company, whether a company within the meaning of this Act or not (in this section referred to as ' the transferee company '), has, within four months after the making of the offer in that behalf by the transferee company been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares, and when such a notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company: . . ."

Then follows a proviso. Counsel for the applicant points out that this is not a section which enables the holders of ninety per cent. of the issued shares of a company, or of a class of issued shares of a company, to acquire the shareholding of the ten per cent. minority: the section expressly prescribes that the transaction must be one between companies, or rather, that the acquiring body must be a company, the subject-matter to be acquired being shares in a company, and no individual can make an offer which, even if it be accepted by ninety per cent.

A of the recipients of the offer, would entitle that individual to acquire compulsorily the shares of the ten per cent. dissentient minority. Counsel says that if individuals who themselves hold ninety per cent. of the shares in a company constitute a transferee company in which they are the only shareholders, it would be contrary to the policy of the section to allow an offer by that transferee company to operate under the section, because the transferee company would B be merely a screen for the ninety per cent. shareholders, there would be no independent majority exercising any sort of disinterested choice in the question whether or not the offer should be accepted, and the device would be merely a device for enabling the ninety per cent. majority to acquire, through the medium of the company formed ad hoc, the shareholding of the minority.

I am bound to say that I see very great force in that argument. Whether, in C such a case, if the court were fully satisfied that the price offered to the minority shareholders was a fair price to be offered for their shares, the section ought to be allowed to operate according to its tenor is, I think, a matter which it is unnecessary for me to decide today because, in my view, on the facts of this particular case, the onus must at any rate rest on the respondents to satisfy the court that the price offered is fair. In the ordinary case of an offer under s. 209, D where the ninety per cent. majority who accept the offer are unconnected with the persons who are concerned with making the offer, the court pays the greatest attention to the views of that majority. In all commercial matters, where commercial people are much better able to judge of their own affairs than the court is able to do, the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide. It has been E recognised in a number of authorities to which I have been referred—*Re Hoare & Co., Ltd.* (1), a decision of MAUGHAM, J.; *Re Press Caps, Ltd.* (2); and a decision of VAISEY, J., in *Re Sussex Brick Co., Ltd.* (3)—that where there is a large majority of shareholders who are only concerned to see that they get what they consider to be a fair price for their shares, and who are in favour of accepting the offer, the burden is a heavy one on the dissentient shareholder to show that the offer F is not one which he ought reasonably to have to accept. As VAISEY, J., said (4):

> " . . . I think that he [the dissentient shareholder] is faced with the very difficult task of discharging an onus, which is undoubtedly a heavy one, of showing that he, being the only man in the regiment out of step, is the only man whose views ought to prevail."

G In a case of that kind the onus must rest on the dissentient shareholder to show that the offer is not one which he ought reasonably to be compelled to accept, and that onus is a heavy onus. The present case, however, seems to me to be quite the reverse of that, because here, although as a matter of law the body making the offer must be regarded as distinct from the persons who hold shares in that body, nevertheless as a matter of substance the persons who are putting H forward this offer are Messrs. Jackson and Shaw, the only two shareholders in the transferee company, and they are the holders of the ninety per cent. majority shareholding, whose acceptance of that offer it is suggested binds the applicant also to accept the offer. In a case of this kind it seems to me that the onus must clearly be on the other side, and that it must be incumbent on the majority shareholders to satisfy the court that the scheme is one with which the minority shareholder ought reasonably to be compelled to fall in.

I I have referred to the evidence filed on behalf of the applicant in this case. The respondent has filed no evidence except an affidavit which has been sworn merely for the purpose of putting in evidence the judgment of VAISEY, J., in *Re Sussex Brick Co., Ltd.* (3). It is true that the applicant's evidence includes as an exhibit Messrs. Price Waterhouse's valuation, but a valuation obtained by the respondent and put in evidence by the applicant merely for the purpose of criticising it is not, in my opinion, of any assistance to the respondent company in discharging the onus of showing that the scheme is one with which the applicant ought to be compelled to fall in. That valuation is not attacked in the sense that it is said to be a forgery or a fraud or anything of that kind, but it is attacked in the sense that the applicant has made it quite clear in his evidence that he does not agree with the valuation that it contains.

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(1) [1933] All E.R. Rep. 105.
(2) [1949] 1 All E.R. 1013; [1949] Ch. 434.
(3) July 22, 1959, see p. 772, post.
(4) See p. 774, letter C. post.

In my view the onus rests on the respondent to substantiate that valuation and to show that the proposed price is fair. To substantiate that valuation they should have filed evidence supporting it, which would have enabled the applicant to cross-examine whatever deponent had sworn an affidavit supporting the valuation, and the court would then have been in a position to see whether or not the valuation was one on which it was reasonable to rely. At the present time not only has there been no opportunity for cross-examination, but also the court is even ignorant of the instructions and information on which the valuation was made. It is true that the valuer says that he has had all the information for which he asked, but it does not follow that he necessarily asked for all the appropriate information.

In my view, therefore, the onus which I consider rests on the respondent has not been discharged, and having regard to the unusual nature of this case, unusual in the sense that Messrs. Jackson and Shaw are holders of ninety per cent. of the shares and are themselves in substance the transferee company, I think that this is certainly a case in which the court ought to " order otherwise " within the meaning of s. 209 (1). In my judgment, the applicant ought not to be compelled to sell his shares at the proposed price in these circumstances.

I propose, therefore, to declare: that the respondent (the holdings company) is not entitled to acquire the shares of the applicant in Bugle Press or any of them on the terms of the scheme, notwithstanding that it has been approved by nine-tenths of the shareholders of Bugle Press, Ltd. In the other case I will make a similar declaration in appropriate terms in regard to that company.

Declarations accordingly.

Solicitors: *Henry E. Goodrich* (for the applicant); *Blakeney & Co.* (for the respondent).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

NOTE.

In *Re Bugle Press, Ltd.*, p. 768 ante, BUCKLEY, J., refers to and distinguishes a decision of VAISEY, J., in *Re Sussex Brick Co., Ltd.*, then unreported. A short report of this decision follows below.

Re SUSSEX BRICK CO., LTD.

[CHANCERY DIVISION (Vaisey, J.), July 20, 22, 1959.]

Company—Scheme of arrangement—Scheme for transfer of shares to transferee company—Acquisition of shares of dissentients—Unfairness—Burden of proof—Companies Act, 1948 (11 *&* 12 *Geo.* 6 *c.* 38), *s.* 209 (1).

Cases referred to:

Hoare & Co., Ltd., Re, [1933] All E.R. Rep. 105; 150 L.T. 374; 10 Digest (Repl.) 1095, *7572.*

Press Caps, Ltd., Re, [1949] 1 All E.R. 1013; [1949] Ch. 434; [1949] L.J.R. 1460; 10 Digest (Repl.) 1095, *7574.*

Adjourned summons.

This was an application of a dissentient shareholder under the Companies Act, 1948, s. 209 (1), by originating summons for a declaration that the respondent, Redland Holdings, Ltd., was not entitled or bound to acquire his holding of shares in the Sussex Brick Co., Ltd.

J. W. Mills for the applicant.

R. B. S. Instone for the respondent.

VAISEY, J.: The applicant in this matter is Mr. Frank Cunningham, who lives in Belfast and describes himself as an engineer, and the respondent to the application is

Redland Holdings, Ltd. The applicant is the holder of five thousand five hundred ordinary shares of 5s. each in the capital of the Sussex Brick Co., Ltd. The matter arises out of an offer made by Redland Holdings, Ltd. to acquire the preference and ordinary shares of Sussex Brick Co., Ltd. on certain terms which are set out in a scheme dated Sept. 16, 1958, sent to the ordinary shareholders with an explanatory letter marked " B ".

The Companies Act, 1948, s. 209, is a long complicated section (1), but only sub-s. (1) is in point. and its effect is sufficiently summarised by SOMERVELL, L.J., in *Re Press Caps, Ltd.* (2). The lord justice said (2):

> " [It] confers a power to acquire the shares of shareholders who dissent from a scheme by which one company desires to obtain the transfer to itself of the shares or any class of shares in another company."

He pointed out that s. 209 corresponds exactly with the Companies Act, 1929, s. 155.

The applicant was unwilling to accept the offer of Redland Holdings, Ltd. and brings this summons to establish his right to refuse to do so. The declaration he seeks is that Redland Holdings, Ltd. is neither entitled nor bound to acquire his shares in Sussex Brick Co., Ltd. or any of such shares on the terms of the scheme or contract dated Sept. 16, 1958, notwithstanding that the same had been approved by the holders of nine-tenths in value of the shares whose transfer was involved. The applicant is an ordinary shareholder and he does not want to have the shares which he holds in Sussex Brick Co., Ltd. replaced by shares in Redland Holdings, Ltd.

The offer, in effect, was that two shares in Redland Holdings, Ltd. should be taken in lieu of every three shares in Sussex Brick Co., Ltd. The matter has been considered in more than one case, and the considerations which govern it are well stated by MAUGHAM, J., in *Re Hoare & Co., Ltd.* (3). Summarising the judgment it really comes to this: that the applicant, taking advantage of s. 209 has, in effect, to show that the scheme is unfair to him, and that is the yardstick which is accepted and adopted as the criterion whether a shareholder may get out of the provisions of the section for the acquisition of his shares. It is admitted that unless the scheme is unfair to the applicant, he is not entitled under the section to obtain a declaration that he is not bound to transfer his shares. In *Re Hoare & Co., Ltd.* (4), MAUGHAM, J., said:

> " One conclusion which I draw from that fact [that is the fact that the court will not ' order otherwise '; that is, allow a man to escape from his obligation] is that the mere circumstance that the sale or exchange is compulsory is one which ought not to influence the court. It has been called an expropriation, but I do not regard that phrase as being very apt in the circumstances of the case. The other conclusion I draw is this, that again prima facie the court ought to regard the scheme as a fair one inasmuch as it seems to me impossible to suppose that the court, in the absence of very strong grounds, is to be entitled to set up its own view of the fairness of the scheme in opposition to so very large a majority of shareholders who are concerned. Accordingly, without expressing a final opinion on the matter, because there may be special circumstances in special cases, I am unable to see that I have any right to order otherwise in such a case as I have before me, unless it is affirmatively established that, notwithstanding the views of a very large majority of shareholders, the scheme is unfair."

Later, His Lordship said (5):

> " The court has been quite properly asked to consider the balance-sheets of the two companies concerned, and quite fair and reasonable contentions have been put before me on behalf of the applicants tending to show that, notwithstanding the facts with regard to the acceptance of the offer which I have mentioned, the offer is not really a fair one. The affidavit of Mr. Sharples on behalf of the applicants is one which I have very carefully considered, but I do not think that it establishes the view which he takes as a correct one—that the transaction, looked at from the question of capital values, is in the least unfair. It is manifest that from modern balance-sheets very little real information can be obtained as to the capital value of assets, even treating the companies as going concerns, and, of course, on the footing of a liquidation the balance-sheet figures are almost useless, but, taking these companies as being sound and solvent concerns, with excellent prospects, I am not persuaded that the offer made by Charrington was an unfair one from the point of view of the value of the shares and cash which were offered to the shareholders of Hoare & Co. . . .
>
> " On the whole, I do not think I am justified in coming to the conclusion that the applicants have established that the offer is one in regard to which the court would think fit to order that the transferee company is not entitled to acquire these shares

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(1) The relevant terms of sub-s. (1) are set out at p. 770, letter F, ante.

(2) [1949] 1 All E.R. 1013; [1949] Ch. 434.

(3) [1933] All E.R. Rep. 105.

(4) [1933] All E.R. Rep. at p. 107.

(5) [1933] All E.R. Rep. at p. 108.

> substantially on the terms of the original scheme. I confess I have some sympathy with people in the position of the applicants. I am myself not quite able to understand why the legislature should ever have passed s. 155 at all, and therefore I am not at all indisposed to consider the objections of such applicants as I have before me."

That is the undoubted law. I think, however, that the present scheme and the present offer are undoubtedly open to criticism, and that a clever business man, well-versed in company law and matters which influence dealings on the Stock Exchange, could find a good many loopholes in this scheme—but does that go far enough? That is the difficulty in the present case. It has not been suggested on behalf of the applicant that there has been any bad faith or any intentional misleading of him. That the scheme is open to criticism there is no doubt, but can it be said, therefore, to be unfair? It is difficult to predicate unfairness in any case in which there has been perfect good faith on the side of the person who is alleged to have been unfair. There being no suggestion of any intentional misleading of the applicant, I think that he is faced with the very difficult task of discharging an onus, which is undoubtedly a heavy one, of showing that he, being the only man in the regiment out of step, is the only man whose views ought to prevail. That is the difficulty with which he is faced in the present case.

The applicant set out certain criticisms in his affidavit which undoubtedly show that a good case could be made out for the formulation of a better scheme, of a fairer scheme, of a scheme which would have been more attractive to the shareholders, if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme might have been evolved; but is that enough? Is it necessary to establish the validity of such an offer as put forward in the present case? A better and fairer offer might have been made, but the fact that the offer that was made is not one hundred per cent. fair or right is not the kind of unfairness with which MAUGHAM, J., was dealing in *Re Hoare & Co., Ltd.* (6). I think that the scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. I do not think that merely finding items in the scheme or details of the scheme which are open to valid criticism is enough. A scheme can be effective to bind a dissenting shareholder without complying to the extent of one hundred per cent. with the highest possible standards of fairness, equity and reason. After all, a man may have an offer made to him and, although he likes something better, may be prepared to accept it, because it is good enough in all the circumstances. It may well be that the grounds for criticising the present scheme are not grounds of such a nature as to render the whole thing unfair in the sense intended by MAUGHAM, J., in *Re Hoare & Co., Ltd.* (6).

Where the statutory majority has accepted the offer the onus must rest on the applicant to satisfy the court that the price offered is unfair. I have some information about the present share values. I have no information about what the present value of Sussex Brick Co., Ltd.'s shares is because they are no longer quoted, but there is no doubt that three shares in that company which were worth at the relevant dates something like 21s. 3d. have now been transposed into two shares in Redland Holdings, Ltd., which are worth 43s. 1d. today on the Stock Exchange quotation. It is a rather curious result that a man who parts under compulsion with property, which all agree was worth something in the neighbourhood of 22s., should both now find himself in possession of property which, according to Stock Exchange quotations, is worth nearly twice that amount, i.e., 43s., and should say that the exchange is unfair. It is a little hard to see that he has driven such a bad bargain. True, the scheme offers specific grounds for criticism, but in this connexion, "unfairness" means patent unfairness, obvious unfairness, convincing unfairness, and that has not been established in the present case.

I am not satisfied that this scheme is unfair in the sense in which MAUGHAM, J., used that word in *Re Hoare & Co., Ltd.* (6) and I decide that the application ought not to succeed.

Order accordingly.

Solicitors: *Baileys, Shaw & Gillett* (for the applicant); *Simpson, Palmer & Winder* (for the respondent).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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(6) [1933] All E.R. Rep. 105.

WESTCOTT *v.* STRUCTURAL AND MARINE ENGINEERS, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), March 10, 1960.]

Building—Building regulations—Guard-rails—Working place more than six feet six inches from ground—"Temporary platform"—Erection of steel chimney on roof of boiler house—Whether roof a "temporary platform"—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 24 (1), (5) (*d*).

In the course of his employment with the defendants the plaintiff was engaged in erecting a steel chimney on a boiler house. The chimney stood on a conical base and the conical base had first to be bolted on to the concrete part of the flat roof of the boiler house. The roof was some eleven feet from the ground. At the time of the accident the plaintiff was standing on the concrete roof trying to tighten the nut on a bolt, connecting the conical base to the roof, by means of pushing on a wrench. Probably because the wrench slipped on the nut the plaintiff lost his balance and fell off the roof injuring himself. By reg. 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, every side of a "working platform or working place" from which side a person was liable to fall more than six feet six inches must be provided with a suitable guard-rail. It was conceded that the roof was a "working place". Paragraph (1) of reg. 24* was subject to para. (5) (d) by which para. (1) did not apply to "a temporary platform" used by steel erectors for bolting-up work of such short duration as to make the provision of a platform with guard-rails unreasonable, if the platform fulfilled certain requirements. In an action by the plaintiff for damages for breach of statutory duty under reg. 24 (1) in failing to provide guard-rails,

Held: "temporary platform" in reg. 24 (5) (d) of the Building (Safety, Health and Welfare) Regulations, 1948, referred to a platform erected temporarily for a particular purpose, but did not apply to a working place such as the fixed structure (viz., the concrete roof which was part of the building) in the present case (see p. 777, letter F, post); the obligation imposed by reg. 24 (1) was absolute, and in the circumstances the defendants were in breach of it and the plaintiff was entitled to damages.

[As to special safety provisions of the building regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 126, para. 206; and as to the cause of action for breach of statutory duty, see ibid., 9, para. 10.

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 24 (1) and (5) (d), see 8 HALSBURY'S STATUTORY INSTRUMENTS 220.]

Action.

In this action the plaintiff, Ernest Leonard Westcott, a chargehand steel erector, claimed against the defendants his employers, Structural Marine Engineers, Ltd., damages for personal injuries suffered and loss and expense incurred as a result of an accident on Oct. 2, 1957, in the course of the plaintiff's employment. On Sept. 17, 1957, the plaintiff was sent to the Royal Air Force station at Ruislip to be in charge of the demolition of two steel chimneys connected to boiler houses and the erection in their place of two similar chimneys. The chimneys were tall steel structures each standing on a conical base. The conical base was attached to the concrete roof of the boiler house, a square brick structure, by bolts; the bolts were embedded in the concrete and stood up some two feet above the concrete passing through lugs in the conical base. There were six bolts in each conical base. By Oct. 1, 1957, one chimney had been demolished and a new one erected in its place; the second chimney had also been demolished and the plaintiff was in the course of erecting the new one to take its place. The first part of the construction was to bolt the new conical base on to the concrete roof of the boiler house and for that purpose the old bolts, which were still embedded in the concrete roof, were used and also the old nuts. At the time of the accident the plaintiff was standing on the concrete roof, which was about eleven feet from the ground, and was trying to tighten up the nut on a bolt in the new conical base with a Stillson wrench. The plaintiff had borrowed the Stillson wrench from an air force engineer because the spanner supplied to him by the defendants was not big enough to engage the nuts. A Stillson wrench is an adjustable spanner which is more usually used for pipework, and to get a greater leverage the plaintiff used a bit of tubular pipe which he put over the handle of the Stillson wrench; the tubular pipe was about two feet six inches long so that together with the top part of the wrench the total length of the implement was about three feet. The plaintiff's recollection of the accident was that he was working with a man called Richards; Richards was putting the wrench on the nut and the plaintiff was pulling towards him on the wrench with his back to the northern edge of the roof of the boiler house where there was a flat roof about one foot long. The plaintiff said that he had one foot on the flat roof and one foot on the concrete on which the conical base was resting; he pulled hard on the wrench and fell over backwards landing on a railway bogie below. Richards gave evidence that it was he who was pulling on the wrench; that the wrench was put on the nut at an angle of ninety degrees to the circumference of the conical base; that he, Richards, with his back to the conical base, pulled while the plaintiff pushed and that something then gave way, probably the wrench slipped on the nut, or the bolt moved in the concrete, causing the plaintiff to be thrown off balance and pitched head-foremost over the edge of the boiler house. The trial judge (LORD PARKER, C.J.) said that he preferred Richards' version of the accident.

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* For the relevant terms of reg. 24, see p. 777, letters A to E, post.

The plaintiff alleged that the defendants were in breach of their common law duty of master to servant in that they negligently failed to provide the plaintiff with a proper spanner; required or permitted him to use a Stillson wrench; required him to work at the edge of a sheer drop of eleven feet without taking precautions to prevent him falling and in the foregoing respects failed to provide proper plant and equipment and exposed the plaintiff to unnecessary risk. The plaintiff also alleged that the Building (Safety, Health and Welfare) Regulations, 1948, applied to the operation on which he was engaged and that the defendants were in breach of reg. 5 and reg. 24 of those regulations. The case is primarily reported on whether the defendants were in breach of reg. 24, LORD PARKER, C.J., having held that they were not in breach of their common law duty and that they were not in breach of reg. 5 of the Regulations of 1948.

W. D. Collard for the plaintiff.
P. H. Ripman for the defendants.

LORD PARKER, C.J., having stated the facts, said that although a better tool than the Stillson wrench might have been supplied or obtained for the plaintiff's job, there was nothing dangerous or unsafe in the use of a Stillson wrench, and HIS LORDSHIP had come to the conclusion that it was a perfectly proper tool to use for the job. HIS LORDSHIP continued: When one comes to the regulations, the position is more difficult. In the first place, I think that the Building (Safety, Health and Welfare) Regulations, 1948, clearly apply. These chimneys, as it seems to me, were part of a building, and the work concerned, the demolition and re-erection of part of a building.

The first regulation relied on is reg. 5, which is dealing with the provision of scaffolds, and provides, so far as it is material:

> " Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground . . ."

For my part, I think that this was work which could be safely done without the provision of a scaffold. When one comes to reg. 24, there is no similar qualification. I need not read the whole of the regulation, but it provides by para. (1) that subject to paras. (3), (4) and (5) of that regulation

> " every side of a working platform or working place, being a side thereof from which a person is liable to fall a distance of more than six feet six inches, shall be provided with a suitable guard-rail or guard-rails . . ."

I do not think that I need read any further.

This concrete on which the two men were working was over six feet six inches from the ground, and it must be, and is conceded, that where they were standing was a working place. Accordingly, prima facie, the obligation arose to provide a guard-rail or guard-rails. That, as I have said, is subject to certain other paragraphs. The only paragraph which could apply is para. (5) (d) of reg. 24. That provides:

> " The requirements of paras. (1) and (2) of this regulation shall not apply to a temporary platform which is used only by erectors of structural steelwork or ironwork for the purposes of bolting-up, rivetting or welding work of such short duration as to make the provision of a platform with guard-rails and toe-boards unreasonable if (i) the platform is at least thirty-four inches wide and (ii) there is adequate handhold and (iii) the platform is not used for the deposit of tools or materials otherwise than in boxes or receptacles suitable to prevent the fall of the tools or materials from the platform."

It is to be observed that whereas para. (1) of reg. 24 is referring to " a working platform or working place ", para. (5) (d), is referring to " a temporary platform ". In my judgment, " a temporary platform " cannot apply to a working place such as this fixed tower with its concrete at the top on which the men were working. That, as I have said, is undoubtedly " a working place ", but I am quite unable to see how it could be said to be " a temporary platform ". It seems to me that the expression in reg. 24 (5) (d) " a temporary platform " points to and covers the case of a platform erected temporarily for a particular purpose, and does not apply to a fixed structure, part of the building, which is being used as a working place for the time being. " Temporary " there is not, I think, referring to the fact that it is used only temporarily, but that the platform is there only temporarily. Accordingly, if that be right, then sub-para. (d) of para. 5, which is really a proviso to para. (1), has no application, and the prima facie obligation under para. (1) is an absolute obligation to provide a guard-rail or guard-rails. I should add that even if I am wrong, I think that it would be difficult to say that there was here " adequate handhold " within the meaning of sub-para. (d).

I confess that I come to that conclusion with some reluctance, because it seems to put a very severe burden on employers in a case such as this, but those who sit in these courts are constantly coming across cases under the regulations where such a harsh burden is put on employers. Often the obligation is qualified by words such as whether it is " reasonable " or " reasonably practicable ". There is no qualification here; it is an absolute obligation. Accordingly, in my judgment, these employers were in breach of the statutory duty imposed by reg. 24 (1) of the Regulations of 1948.

In those circumstances, it is necessary to consider the question of contributory negligence. On the version of the occurrence which I have accepted, that to which Mr. Richards has spoken, all that I think can be alleged by way of contributory negligence is that the plaintiff pushed too hard, or that he ought to have held on to something while pushing. On the other version, it would be said that it was unsafe for the plaintiff to turn his back on the side of the tower so that if anything did happen he would go over backwards. One must bear in mind that these regulations are to save workmen against themselves, and although everyone realises that there is a risk of any spanner slipping while engaged on the job, no workman could be expected to go through the mental process of saying, " If, which does not by any means happen in the ordinary run of affairs, the spanner does slip, then I must be in a position where I shall not fall ". It seems to me this is much more akin to the ordinary case of inadvertence, having regard to the fact that the men are working there and that although spanners do slip, it is not a matter which does happen frequently.

In those circumstances, the onus being on the defendants to prove contributory negligence, in my judgment, they have failed to discharge that burden. [His Lordship assessed the general damages at £750 having stated that the plaintiff, who was now aged fifty, suffered considerable pain from his injuries and that he was unable to have his clothes removed for three days after the accident. The injuries consisted of a sprain of the right sacro-iliac joint and bruising to the back. He had made quite a good recovery although he was unable to work for some time and then he went back to light work for which he earned much less than the large wages he was getting as a chargehand steel erector. It was probable that the plaintiff would soon be able to do steel erecting work again. The special damages were agreed at £893 13s. 7d., making the total award £1,643 13s. 7d.]

Judgment for the plaintiff.

Solicitors: *W. H. Thompson* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

PHRANTZES *v.* ARGENTI.

[Queen's Bench Division (Lord Parker, C.J.), February 23, 24, 25, 26, March 4, 1960.]

Conflict of Laws—Foreign law—Recognition—Dowry—Discretion of foreign court in fixing dowry—Difference in nature of foreign right and of remedies available in English court—Whether right to dowry recognised by English court—Whether right to dowry enforceable.

The defendant and the plaintiff were respectively father and daughter and both were nationals of Greece residing in England. In 1957 the plaintiff married in England according to the rites of the Greek Orthodox Church but the defendant failed to provide a dowry. The plaintiff brought an action in the English courts, to which her husband was not a party, claiming a declaration that under Greek law she was entitled to be provided by the defendant with a dowry and claiming an account of the defendant's property. It was assumed that the defendant was domiciled in Greece.

The facts as to Greek law were that a father, on his daughter's marriage, was obliged to provide a dowry in accordance with his fortune, the number of his children, his social position and the social position of the daughter's husband. If he failed to provide a dowry the daughter alone might bring an action in the Greek courts for an order condemning the father to conclude a dowry contract with her husband before a notary public. In such an action the Greek courts would decide the appropriate dowry and would specify the assets which were to be handed over to the husband. The dowry was not constituted until the father had entered into the contract ordered by the court.

Held: although the plaintiff's right to a dowry would be enforced in this country if it were one which could be enforced according to the remedies available under English law, since its enforcement would not violate any principle of justice or policy of English law (principle stated in *Loucks* v. *Standard Oil Co. of New York* (1919), 224 New York Reports at pp. 110, 111, adopted), yet the right was not enforceable in the English courts for the following reasons—

(i) the inquiries and decisions which were necessary to determine the appropriate dowry were essentially matters for, and in the discretion of, the Greek courts (principle of *Kornatzki* v. *Oppenheimer*, [1937] 4 All E.R. 133, applied; see p. 784, letter A, post); and

(ii) the lex fori, English law, did not provide a cause of action and relief appropriate to the foreign right and the machinery for enforcement in England was so different that, if it were used, it would make the plaintiff's right by Greek law (viz., the right to obtain an order condemning someone to enter into a particular form of contract with a person not a party to the proceedings) become a different right, e.g., a right to payment of a sum of money found to be appropriate in amount (see p. 784, letters C and F, post).

[As to recognition of rights acquired abroad, see 7 HALSBURY'S LAWS (3rd Edn.) 5, 6, para. 3; and as to general principles of jurisdiction of the English courts and their application of foreign law, see ibid., 6-14, paras. 4-25.

As to the application of the lex fori to matters of procedure, see 7 HALSBURY'S LAWS (3rd Edn.) 166-168, paras. 298-300.]

Cases referred to:

Baschet v. *London Illustrated Standard Co.*, [1900] 1 Ch. 73; 69 L.J.Ch. 35; 81 L.T. 509; 13 Digest (Repl.) 102, *439*.

De Brimont v. *Penniman*, (1873), 10 Blatchford's Circuit Court Reports 436.

Howard Undertaking Co. v. *Fidelity Life Assurance*, (1933), 59 South Western Reporter (2nd Series) 746.

Kornatzki v. *Oppenheimer*, [1937] 4 All E.R. 133; Digest Supp.

Loucks v. *Standard Oil Co. of New York*, (1919), 224 New York Reports 99.

Macartney, Re, Macfarlane v. *Macartney*, [1921] 1 Ch. 522; 90 L.J.Ch. 314; 124 L.T. 658; 11 Digest (Repl.) 513, *1287*.

Weidman v. *Weidman*, (1931), 174 North Eastern Reporter 206.

Preliminary issue.

In an action by the plaintiff, Fanny Sybil Phrantzes, married woman, against her father, the defendant, Philip Pandely Argenti, claiming a declaration that she was entitled under Greek law to be provided with a dowry, and an account of the defendant's property, Master LAWRENCE ordered, on Apr. 16, 1959, that a preliminary issue be tried by a judge whether on the assumption that the defendant was at all material times domiciled in Greece the plaintiff was entitled to the relief claimed. The pleadings and the facts are referred to in the judgment of LORD PARKER, C.J.

Gilbert Beyfus, Q.C., and *R. I. Threlfall* for the plaintiff.

J. G. Foster, Q.C., and *Mark Littman* for the defendant.

Cur. adv. vult.

Mar. 4. **LORD PARKER, C.J.**, read the following judgment: The plaintiff is the daughter of the defendant. Both are nationals of the Kingdom of Greece at present residing in this country. The plaintiff on Dec. 4, 1957, married in this country according to the rites and ceremonies of the Eastern Orthodox Greek Church and thereupon, so it is alleged, the defendant under Greek law became by virtue of his relationship to the plaintiff obliged to provide a dowry for her. He has failed to do so and in these proceedings she seeks to enforce that obligation, relying on the fact, as it is alleged, that the defendant is domiciled in Greece. By his defence the defendant alleges that he is not domiciled in Greece and in any event contends that the statement of claim discloses no cause of action and that the plaintiff is not entitled to the relief claimed.

The matter comes before me on a preliminary issue ordered by Master LAWRENCE on Apr. 16, 1959, namely, "whether, on the assumption that the defendant was at all material times domiciled in Greece the plaintiff is entitled to the relief claimed ". By a further defence delivered by leave of the master after the said order the defendant alleged that in any event he had since the issue of the writ provided for the plaintiff under a deed made under the laws of Lichtenstein and that such provision was under Greek law of a character and an extent sufficient to discharge him from providing a dowry. In allowing this further defence to be delivered the master made no alteration in the terms of the preliminary issue even though it was brought to his attention. Accordingly I ruled that the only matter with which I would deal was the issue as ordered which arose under the original proceedings.

The first question which arises is as to the position under Greek law which is, of course, a question of fact. One Greek lawyer was called on each side and while at one time there appeared to be a complete divergence of opinion on certain points, there was in the end little, if any, difference between them. I find the position to be as follows:—

For many centuries it has been the custom and indeed the law in Greece for a father to provide a dowry for his daughter on her marriage. The law was codified in 1940 and the code came into force in 1946. Under that code the relations between parents and children are governed by the law of the last common nationality of the father and child and failing this by the law of the nationality of the father at the time of the birth of the child (see art. 18). The father is obliged to constitute on behalf of his daughter entering on marriage a dowry in accordance with his fortune, the number of his children and his social position, and in accordance with the social position of the daughter's husband. The only exceptions are (1) if, in the light of his other obligations, the father is not in a position to constitute a dowry without endangering his own proper maintenance; (2) if and so long as the daughter possesses a sufficient fortune of her own to constitute a suitable dowry; (3) if the daughter, being a minor, marries without the father's consent; (4) if the daughter has committed such a "fault" as would justify disinheritance (see art. 1495 and art. 1497). If the father is dead or not in a position to constitute a dowry the obligation devolves on the mother (art. 1496). The husband is the head of the family and decides on all matters relating to the marital life (art. 1387). He further bears the burdens of the matrimony (art. 1398).

The dowry is the property granted to the husband either by the wife, if she is possessed of a sufficient fortune, or by the parent on the wife's behalf, to lighten the burdens of matrimony. It is constituted by a contract entered into with the husband, which contract must be entered into by a notarial deed (arts. 1406 and 1402), that is a deed prepared by and entered into before a notary public who is a public servant, after which the assets comprised in it are handed over. The subject of the dowry may either consist of present or of future property, which must, however, be specified (art. 1410). It can consist of land or movables. As regards movables these will become the property of the husband, unless the dowry contract otherwise provides (art. 1412). The husband can, with the consent of the wife, alienate that property (art. 1416). On the other hand immovable property, unless the dowry contract otherwise provides, becomes and remains the property of the wife but the husband will during the marriage have the management and usufruct thereof (arts. 1412 and 1414). The husband can only alienate immovable property with the permission of the court (art. 1417). This permission will only be given in the case of great need or where a profit will result. The produce of the sale will then become the dowry. A dowry may also include by assignment the usufruct to which the father is entitled from property not in his ownership. It may include usufruct arising for a lesser time than the marriage. It may also include the right of habitation in particular premises without paying rent. A daughter also has a right to share in her father's estate. If she has had a dowry that will be taken into account in deciding the amount of her inheritance.

Should the father fail to comply with his obligation in regard to the provision of a dowry, the daughter, and the daughter alone, has a cause of action in the

Greek courts to obtain an order condemning her father to conclude a dowry contract with her husband before a notary public who may or may not be named. If the father is abroad he may be condemned to enter into the contract before the Greek consul or a foreign notary public. In such proceedings the court will decide what in all the circumstances indicated above is the appropriate amount of the dowry and may specify the assets to be handed over. In those proceedings the husband may or may not intervene as he thinks fit. No dowry is constituted until the father has entered into the dowry contract so ordered. If the father refused to enter into the dowry contract, which is unlikely to occur, the experts on Greek law were of opinion that the only courses open were either to secure his imprisonment or to bring an action for damages. The only possible exception to the principle that no dowry is constituted until the dowry contract has been entered into arises when the dowry or part of it is to consist of land and the husband has intervened in the proceedings. In such a case, if the father refuses to enter into the dowry contract it may be that the husband could make a unilateral declaration of acceptance and then register that in the land registry as a document of title.

That being the state of Greek law the contentions put forward on behalf of the plaintiff can be simply stated as follows: (1) The issue to be determined assumes that the defendant is domiciled in Greece. (2) By reason of the relationship or status of the parties, there arose on the plaintiff's birth or on her marriage an obligation under Greek law on the defendant to constitute a dowry on her behalf. (3) The right to have such a dowry constituted is a proprietary right. (4) Prima facie the courts of this country will entertain an action to enforce proprietary rights arising out of status which accrue according to the law of the father's domicil. (5) The case does not come within any of the well-known exceptions, e.g., as being contrary to public policy, penal in character, etc. Granted that no such action has ever been brought in this country before there is nothing in principle, so it is said, to prevent our courts from entertaining such an action.

Points (1) and (2) cannot be controverted. Further it must be, I think, conceded that whether or not the father's obligation to constitute a dowry and the reciprocal right of the daughter to have one constituted on her behalf can be enforced in this country, the obligation and the right are of such a nature as these courts will recognise. But on all other points there is little, if any, agreement.

In the first place it is said on behalf of the defendant that even if what is sought to be enforced here is a proprietary right, which is denied, it will not be enforced unless it comes within one or other of the definite rules enumerated by Dicey (1), e.g., in regard to infants, marriage, succession or bankruptcy. To go outside those rules would lay the way open to the enforcement of a number of rights which it is said these courts have never enforced. For example, the English courts will not enforce the duty under a foreign system of law of a parent to maintain his child or vice versa, cf. Dicey's Conflict of Laws (7th Edn.), p. 403. Again in *Re Macartney, Macfarlane* v. *Macartney* (2) the court was asked to enforce the judgment of a Maltese court condemning the testator's estate to provide maintenance for his illegitimate daughter. Astbury, J., while refusing to enforce the judgment on the ground that the recognition of an illegitimate child's right under Maltese law to be permanently maintained was contrary to public policy, went on to hold that the action could not be entertained on the ground that the judgment obtained was of such a character that it would not have supported an action in England. In advancing this second ground the learned judge followed the New York case of *De Brimont* v. *Penniman* (3). In that case a French citizen had married in France the daughter of two United States citizens. The wife died leaving a child. Under French law the father-in-law and mother-in-law were bound to provide an allowance to the father for the support of the child. The father obtained the judgment of a French court against them while they were in France requiring them to provide an annual allowance. On their return to the United States of America the father sued them in the American courts to recover arrears. Woodruff, J., refused to entertain the action. He held that the French law and the decree made under it were local in their nature and operation, were designed to guard against pauperism and were not of universal acceptance like judgments founded on contract or other recognised rights. He said (4):

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(1) See Dicey's Conflict of Laws (7th Edn.), Chapters 12, 13 and 21.

(2) [1921] 1 Ch. 522. (3) (1873), 10 Blatchford's Circuit Court Reports 436.

> "... the decree in question proceeds upon the declaration of an obligation not in conformity with our laws, not known to the common law, and upon the continuance of the obligation itself after the relationship out of which it is deemed to have arisen has ceased by the death of the person through whom affinity was traced."

He went on to say (4):

> "Whatever obligation or duty lies at the foundation of the claim ... is the creature of positive statute, framed for the people of France, to regulate their domestic concerns, protect the public, and guard against pauperism and its evils. Statutes in some respects similar are found in England, and in most, if not all, of the states of this country. The duty of parents—to provide for the necessary support of those relatives, and prevent their becoming a charge to the public, is declared and is enforced. Such regulations are local in their nature, and in their application, and so are the orders for their enforcement ... Orders of filiation are of a similar character ... The principle upon which foreign judgments receive any recognition in our courts, is one of comity. It does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our own laws, and does violence to what we deem the rights of our own citizens. The courts ... will be slow to hold, that, whenever an American citizen shall visit France, and reside there temporarily, with his family, his son or his daughter, by a rash or imprudent marriage, can cast upon the parents, mother as well as father, the perpetual burden of an annuity for the support of the wife or husband. So long as such residence continues, no doubt, the parents must submit to the laws of France. The orders of her courts may be enforced against them, as those laws may prescribe; but, in a matter of this kind, those laws must be executed there, and such decrees can have, and ought to have, no extra-territorial significance. They rest upon no principle of universal acceptation, like the obligation of contracts, or the protection of generally recognised, private, personal rights. No disposition to deal with foreign judgments ... demands that such decrees should be arbitrarily enforced in our courts."

Some criticism has been made of the decision in *Re Macartney* (5); cf. Wolff's Private International Law (2nd Edn.), pp. 266 and 267; in so far as the second ground of the decision is concerned. Be that as it may, I think that the present case is quite different from *Re Macartney* (5) and *De Brimont* v. *Penniman* (6). There is no question here of the foreign law being a law against pauperism. It is, moreover, intended to have extra-territorial effect since the Greek courts will, as I have said, condemn a father resident abroad to enter into a contract before the Greek consul or a foreign notary public.

Indeed, if this were the only point in the case I would hold that this was a right which could be enforced here. As Cardoza, J., said in *Loucks* v. *Standard Oil Co. of New York* (7):

> "If aid is to be withheld here, it must be because the cause of action in its nature offends our sense of justice or menaces the public welfare. Our own scheme of legislation may be different. We may even have no legislation

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(4) (1873), 10 Blatchford's Circuit Court Reports at p. 440.

(5) [1921] 1 Ch. 522.

(6) (1873), 10 Blatchford's Circuit Court Reports 436.

(7) (1919), 224 New York Reports at p. 110.

A on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has, indeed, B this importance: its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition. The misleading word ' comity ' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles (BEALE, CONFLICT OF LAWS, para. 71). The sovereign in its discretion may C refuse its aid to the foreign right. . . . From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. But that, of course, is a false view. The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." D

The next point taken on behalf of the defendant is that the right under Greek law is not a proprietary right at all. It is, so it is said, only a right in personam; a right to get the court to condemn the father to enter into a dowry contract. This, as it seems to me, must be the correct position. True it is connected with succession, being on account of the daughter's inheritance, but the action is an E action in personam. However, in my judgment it matters not what label is given to the right. It is, I think, a right which could be enforced here if, for instance, it was a right to payment of a fixed sum of money or a definite proportion of the father's fortune simpliciter.

It is, however, at this point that the plaintiff's difficulties occur. The right is not the right to the payment of a sum of money. It is the right to an order F condemning the father to instruct a notary public to draw up a dowry contract in accordance with the directions of the court and to enter into that contract with the son-in-law who may not even be a party to the proceedings. Before the order can be made the court must inquire into the extent of the father's fortune and that of his daughter. The court must further consider the respective social position of the father and son-in-law, that is their positions in the Greek G or other community where each is living, and decide what is the appropriate amount of dowry. It must decide, if the point is raised, whether the daughter has committed a fault within art. 1497. It will often have to decide in all the circumstances what the dowry is to consist of, how much of it shall be land, how much movables, whether any part of it is to consist of the usufruct from property and if so for how long it is to be granted, whether the use of a house H free of rent is to be provided, and in addition what are to be the terms as to ownership of the dowry whether movable or land (art. 1412). Specimen contracts were put in evidence. All these inquiries and decisions are essentially matters for the domestic courts and matters largely for the discretion of those courts and not our courts. It is true that in *Kornatzki* v. *Oppenheimer* (8) FARWELL, J., held that he was able to evaluate the sum which a German court in all the I circumstances of the case would award as payable in discharge of a pre-war debt based on a provision of the German Civil Code which provided that the debtor was bound to effect the performance of his obligations according to the requirements of good faith, ordinary usage being taken into consideration. He came to the conclusion in that case that the evaluation was really a question of fact which could be determined by the court in England and that it was not a matter of discretion at all. He, however, clearly took the view that if discretion had entered into the matter it would have been a matter for the German courts alone and that he would not have had any jurisdiction in the matter. Here it A seems to me that the considerations which I have enumerated above, taken as a whole, must involve a very large measure of discretion and that it would be quite wrong for our courts to claim jurisdiction in the matter.

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(8) [1937] 4 All E.R. 133.

The matter does not end there since in my judgment the lex fori, English law, does not provide a cause of action and relief appropriate to the enforcement of the foreign right, namely, a right to obtain an order condemning someone to B enter into a contract in a particular form with a person not even a party to the proceedings. It is true, of course, that a plaintiff seeking to enforce a foreign right here can demand only those remedies recognised by English law and that the claim will not be defeated merely because those remedies are greater or less than those in the courts of the foreign country; cf. DICEY'S CONFLICT OF LAWS (7th Edn.), p. 1089, and *Baschet* v. *London Illustrated Standard Co.* (9). But the C remedies available must harmonise with the right according to its nature and extent as fixed by the foreign law, cf. CHESHIRE'S PRIVATE INTERNATIONAL LAW (5th Edn.), at pp. 667 and 668. Put another way, if the machinery by way of remedies here is so different to that in Greece as to make the right sought to be enforced a different right, that right would not in my judgment be enforced in this country. This matter has been considered in the United States of America. D Thus the RESTATEMENT OF THE LAW, CONFLICT OF LAWS, para. 608, states:

> " If no form of action is provided by the law of a state for the enforcement of a particular foreign right, no action to enforce that right can be maintained in the state. Comment: (a) The form of action is a matter of procedure. A court will not invent a new form of action, unknown to the law of the forum, in order to give a remedy on a foreign cause of action." E

Again in BEALE'S THE CONFLICT OF LAWS, Vol. 3, p. 1631, it is stated:

> " If the law of the forum does not provide a form of action appropriate for the enforcement of the foreign right the action may not be maintained."

See also *Weidman* v. *Weidman* (10), and *Howard Undertaking Co.* v. *Fidelity Life Assurance* (11). F

In the present case even if the court granted a declaration and embarked on the necessary inquiry as to the extent of the dowry, it could do no more than order payment of the amount found to be appropriate and payment thereof to the plaintiff. That, however, would be to enforce a right which the plaintiff does not possess under Greek law. True, the courts here have power to order a deed to be entered into by a husband to secure payment of maintenance or to order a G settlement of a wife's property, but that is a jurisdiction given by statute, cf. s. 23 and s. 24 of the Matrimonial Causes Act, 1950. Reference is also made to s. 47 of the Supreme Court of Judicature (Consolidation) Act, 1925, dealing with the execution of instruments which a person fails when directed to enter into. But that section does not itself give any right to direct a person to enter into a contract and I know of no power in the court, inherent or otherwise, which would H enable the court to give relief which was consistent with the plaintiff's right under Greek law.

For these reasons I have come to the conclusion that the answer to the question raised in the preliminary issue is " No ". Since it is admitted that the claim fails if, contrary to the assumption in the issue, the defendant is not domiciled in Greece, it follows that the claim must be dismissed. I

Judgment for the defendant.

Solicitors: *Trower, Still & Keeling* (for the plaintiff); *Stoneham & Sons* (for the defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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(9) [1900] 1 Ch. 73.
(10) (1931), 174 North Eastern Reporter 206.
(11) (1933), 59 South Western Reporter (2nd Series) 746.

JONES *v.* CHALLENGER.

[Court of Appeal (Ormerod and Devlin, L.JJ., and Donovan, J.), January 28, 29, March 14, 1960.]

Trust and Trustee—Trust for sale of land—Refusal of trustee to concur in sale—Husband and wife—Matrimonial home purchased jointly out of money provided equally by them—Husband and wife divorced—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 30—*Distinction of position on application under Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17.

In 1956 a husband and his wife purchased the remainder of a lease of a dwelling-house of which ten years remained unexpired. The lease was assigned to the husband and wife (who provided the purchase money in equal shares) on trust for sale with power to postpone sale and to hold the proceeds on trust for themselves as joint tenants. The house was intended to be and was used as the matrimonial home. In 1957 the wife left the husband who obtained a decree dissolving the marriage on the ground of the wife's adultery. The wife re-married, and the husband continued to live in the house which they had purchased. The wife applied under the Law of Property Act, 1925, s. 30, for an order that the house should be sold and the proceeds divided equally between her and her former husband.

Held (Donovan, J., dissenting): the wife was entitled to have the house sold because, the purpose for which the house was bought (viz., providing a matrimonial home) had ended, and the duty to sell under the trust for sale accordingly prevailed; moreover it was not inequitable for the wife to want to realise her investment, for that was the only way in which the beneficiaries could derive equal benefit from their investment (see p. 789, letters B and C, and p. 789, letters F and G, post).

Re Mayo ([1943] 2 All E.R. 440) applied.

Re Buchanan-Wollaston's Conveyance ([1939] 2 All E.R. 302), *Re No. 39 Carr Lane* ([1953] 1 All E.R. 699) and *Bull* v. *Bull* ([1955] 1 All E.R. 253) explained.

Observations on the distinction between an application under the Law of Property Act, 1925, s. 30, and an application under the Married Women's Property Act, 1882, s. 17 (see p. 789, letter I, to p. 790, letter B, post).

Appeal allowed.

[As to applications for orders on trustees for sale of land to sell, see 29 Halsbury's Laws (2nd Edn.) 770, para. 1073.

For the Law of Property Act, 1925, s. 30, see 20 Halsbury's Statutes (2nd Edn.) 483.]

Cases referred to:

Buchanan-Wollaston's Conveyance, Re, Curtis v. *Buchanan-Wollaston*, [1939] 2 All E.R. 302; [1939] Ch. 738; 108 L.J.Ch. 281; 160 L.T. 399; Digest Supp.

Bull v. *Bull*, [1955] 1 All E.R. 253; [1955] 1 Q.B. 234; [1955] 2 W.L.R. 78; 3rd Digest Supp.

Carr Lane, Acomb, Re No. 39, Stevens v. *Hutchinson*, [1953] 1 All E.R. 699; [1953] Ch. 299; [1953] 2 W.L.R. 545; 3rd Digest Supp.

Cobb v. *Cobb*, [1955] 2 All E.R. 696; [1955] 1 W.L.R. 731; 3rd Digest Supp.

Hyde's Conveyance, Re, (Feb. 1, 1952), 102 L.Jo. 58.

Mayo, Re, Mayo v. *Mayo*, [1943] 2 All E.R. 440; [1943] Ch. 302; sub nom. *Re Mayo's Will Trusts*, 112 L.J.Ch. 257; 169 L.T. 205; 2nd Digest Supp.

Appeal.

This was an appeal by the applicant from an order of His Honour Judge Temple-Morris made at Bargoed County Court on Aug. 5, 1959.

By the originating application dated May 13, 1959, the applicant asked for an order that the respondent as co-trustee of the applicant of the trust for sale in respect of premises known as No. 10, Bailey Street, Deri, Bargoed, in the county of Glamorgan, concur with the applicant in offering the said property for sale by auction in such manner and on such terms as the court should think fit, and also, if the respondent should fail to obey such order, that the said premises be sold with the approval of the court, that the conduct of such sale be given to the applicant and that the said premises be vested in the purchaser on such sale for all the estate and interest therein of the applicant and respondent. By his answer the respondent opposed the making of the order. The county court judge dismissed the application.

H. W. J. Ap Robert for the applicant, the wife.
Phillip Wien for the respondent, the husband.

Cur. adv. vult.

Mar. 14. **ORMEROD, L.J.:** I have had an opportunity of reading the judgment about to be delivered by DEVLIN, L.J., in this case. I am in full agreement with it and there is nothing I can usefully add.

DEVLIN, L.J.: This is an appeal from a decision of His Honour JUDGE TEMPLE-MORRIS given in Bargoed County Court on Aug. 5, 1959. The matter before the learned judge was an application under s. 30 of the Law of Property Act, 1925, for an order that the respondent as co-trustee with the applicant of a house known as No. 10, Bailey Street, Deri, Bargoed, should concur with the applicant in offering the property for sale, or alternatively that the property should be sold by order of the court. The respondent and applicant were formerly husband and wife, and, on Mar. 7, 1956, while they were still married, they purchased for £375 the lease of No. 10, Bailey Street. The lease was for ninety-nine years and was created in 1867. So that at the time of the purchase it had about ten years to run. The assignment of the lease was granted to the purchasers as trustees to sell the same with power to postpone the sale thereof on trust for themselves as joint tenants. The learned county court judge has carefully investigated the circumstances in which the house was bought and has reached the conclusion, which is not challenged, that the money which went to buy it was provided by the parties equally. They are thus beneficiaries in equal shares.

Unfortunately, shortly after the purchase, the marriage broke up, and in 1957 the husband filed a petition for divorce on the ground of the wife's adultery and cruelty. It was not defended, and a decree was given against her on the ground of her adultery, which was made absolute on Feb. 9, 1959. Before the divorce proceedings began, the wife had bought another house and was living apart from her husband, and in March, 1959, she re-married. The wife does not want to live in No. 10, Bailey Street; she wants her share of its value in cash. The husband does not want to sell. He has throughout continued to live in No. 10, Bailey Street and wishes to go on doing so. He regards it as his home and does not wish to go into lodgings. There is some prospect that he may marry again, but it is quite indefinite; the lady in question is a married woman and no proceedings have yet been instituted.

Section 30 of the Law of Property Act, 1925, provides that, if trustees for sale refuse to sell, any person interested may apply to the court for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit. The learned county court judge reviewed the cases in which this section has been considered and came to the conclusion that he had a complete discretion to do what was reasonable in the circumstances. He said:

> "I think it would not be reasonable to order a sale at this moment, the effect would probably be to put the respondent out. He is there alone, he has nowhere to go. He is in his own home. His half share is in it. The applicant's half share is quite safe in it. All the circumstances must be

> examined, the applicant has chosen her new life, and is living in her new home with her husband. It may well be in the future, possibly the very near future, the situation will change, but at this moment I think this application is premature. Today, I think the attitude of the respondent is reasonable."

I do not think that on any view the application can properly be described as premature. The marriage broke up three years ago, and applications to divide up the property of a husband and wife are frequently made under the Married Women's Property Act, 1882, s. 17, while the marriage is still alive. This marriage is irretrievably finished, and the application was not made until two months after the decree absolute had been pronounced. I think that the wife is entitled to know where she stands. Apart from the uncertain prospect of the husband's re-marriage, there is no likelihood that the circumstances will change. If circumstances do not change, the effect of the judge's order must be that the husband can continue to use the house as his home for so long as he wants or until the lease expires. The value of the leasehold must be diminishing, and, if the lease runs its course, the wife may lose all the money that she put into it.

There does not appear to be any case in which an order under s. 30 has been made where the trust property consists of what was formerly the matrimonial home. The learned county court judge had no clear authority to guide him in arriving at his decision, and neither have we. After careful consideration of the authorities and some hesitation, I have come to the conclusion that the learned judge applied the wrong test and that the question is not whether it is reasonable or unreasonable that the husband should be allowed to remain in the house.

At the front of his argument counsel for the wife put *Re Mayo, Mayo* v. *Mayo* (1). In this case SIMONDS, J., said (2): " The trust for sale will prevail unless all three trustees agree in exercising the power to postpone." If that dictum governs this case, the wife must succeed. But counsel felt a difficulty in pushing his argument to this extent because of what was said by SIR WILFRID GREENE, M.R., in *Re Buchanan-Wollaston's Conveyance* (3), where he laid down the principle more widely, and said (4) that the court must ask itself

> " . . . whether or not the person applying for execution of the trust for sale is a person whose voice should be allowed to prevail."

The apparent difference between these two dicta is, I think, explained when the different facts in the two cases are considered. *Re Mayo* (1) was a simple uncomplicated case of a trust for sale of freehold property where the beneficiaries were brother and sister and where there was no suggestion that either of them were intended to or even wished to occupy the property. SIMONDS, J., was applying the simple and fundamental principle that in a trust for sale there is a duty to sell and a power to postpone; and that accordingly one trustee may call on the others to perform the duty, but all must be agreed if they are to exercise the power. This simple principle cannot prevail where the trust itself or the circumstances in which it was made show that there was a secondary or collateral object besides that of sale. SIMONDS, J., in his judgment in *Re Mayo* (1) said that if there were mala fides, the position would be different. If it be not mala fides, it is at any rate wrong and inequitable for one of the parties to the trust to invoke the letter of the trust in order to defeat one of its purposes, whether that purpose be written or unwritten, and the court will not permit it. In *Re Buchanan-Wollaston* (3), four owners who each had separate but neighbouring properties, combined to buy a piece of land which they desired to keep as an open space. The land was conveyed to them as joint tenants and consequently a statutory trust for sale came into existence by virtue of s. 35 of the Law of Property Act, 1925. The parties then entered into a covenant in which they agreed in effect to preserve the land as an open space. One of the parties subsequently sold his property and then applied against the opposition of the others to have the piece of land sold. The application was refused and it is plain from the judgment that in such circumstances the court has a complete discretion to do what is right and proper and will not allow the voice of the man who is in breach of his obligation to prevail.

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(1) [1943] 2 All E.R. 440; [1943] Ch. 302.
(2) [1943] 2 All E.R. at p. 441; [1943] Ch. at p. 304.
(3) [1939] 2 All E.R. 302; [1939] Ch. 738.
(4) [1939] 2 All E.R. at p. 308; [1939] Ch. at p. 747.

Three other cases were cited as supporting this wider principle. In *Re Hyde's Conveyance* (5), decided by DANCKWERTS, J., in 1952, two brothers jointly purchased property for occupation by a company in which they were both interested and for the erection of a factory thereon. Subsequently they quarrelled and one brother applied for an order under the Law of Property Act, 1925, s. 30, for the sale of the property. The company was still a going concern and the applicant had abandoned a petition for its winding-up; he had also refused an offer from the other brother based on the full market value of the property as settled by an independent valuer. The application was refused. DANCKWERTS, J., appears to have been satisfied that the applicant was acting out of spite and said that he was endeavouring to use the trust for sale to defeat the purpose for which the land had been acquired.

In *Re No. 39 Carr Lane, Acomb, Stevens* v. *Hutchinson* (6), a husband and wife held property, which was in fact the matrimonial home, on trust for sale as tenants in common in equal shares. A judgment creditor of the husband applied for an order under s. 30, which was refused by UPJOHN, J., on the ground that the creditor was not a person interested. But the judge went on to say that the creditor could in any event have no better right than the husband and that the husband could not have obtained an order which would have turned the wife out of the matrimonial home. This means, as counsel for the respondent rightly submits, that the learned judge would clearly have exercised a discretion in favour of postponing the sale. The case shows, I think, that where property is acquired by husband and wife for the purpose of providing a matrimonial home, neither party has a right to demand the sale while that purpose still exists; that might defeat the object behind the trust, and the court must do what is right and proper in all the circumstances. The case is no authority for the view that the same wide discretion exists when the house is no longer the matrimonial home and the purpose has failed.

Bull v. *Bull* (7) is a case in which the joint occupation was not matrimonial. The house was owned jointly by a mother and son but the son had provided the greater part of the purchase price. The son gave his mother notice to quit, but this court held that as a tenant in common she could not be ejected. DENNING, L.J., said (8) that the son could apply under s. 30, and the court, in order that there might be a sale with vacant possession, could turn the mother out if it was right and proper to do so. I think that this dictum must be considered on the footing that the house was bought for the purpose of providing a home for mother and son and that as the mother was still residing there that purpose had not been brought to an end.

In each of these four cases, *Re Buchanan-Wollaston* (9), *Re Hyde's Conveyance* (5), *Re No. 39 Carr Lane* (6) and *Bull* v. *Bull* (7), there was a trust for sale because there was a joint tenancy, and the joint tenancy had been created for a particular purpose. In the first case this purpose was expressed, and in the other three cases the object of the joint tenancy was clear from the circumstances in which it was created. I see no inconsistency between these four cases and *Re Mayo* (10), in which no collateral purpose was manifest. There is, as I have said, something akin to mala fides if one trustee tries to defeat a collateral object in the trust by arbitrarily insisting on the duty of sale. He should have good grounds for doing so and, therefore, the court will inquire whether, in all the circumstances, it is right and proper to order the sale.

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(5) (1952), 102 L.Jo. 58. (6) [1953] 1 All E.R. 699; [1953] Ch. 299.
(7) [1955] 1 All E.R. 253; [1955] 1 Q.B. 234.
(8) [1955] 1 All E.R. at p. 256; [1955] 1 Q.B. at p. 239.
(9) [1939] 2 All E.R. 302; [1939] Ch. 738.
(10) [1943] 2 All E.R. 440; [1943] Ch. 302.

In the case which we have to consider, the house was acquired as the matrimonial home. That was the purpose of the joint tenancy and, for so long as that purpose was still alive, I think that the right test to be applied would be that in *Re Buchanan-Wollaston* (11). But with the end of the marriage, that purpose was dissolved and the primacy of the duty to sell was restored. No doubt there is still a discretion. If the husband wanted time to obtain alternative accommodation, the sale could be postponed for that purpose, but he has not asked for that. If he was prepared to buy out the applicant's interest, it might be proper to allow it, but he has not accepted a suggestion that terms of that sort should be made. In these circumstances, there is no way in which the discretion can properly be exercised except by an order to sell, because, since they cannot now both enjoy occupation of the property, that is the only way whereby the beneficiaries can derive equal benefit from their investment, which is the primary object of the trust.

It is said that it is hard on the husband that he should have to give up the house which it was his wife's choice and not his to abandon. So it is. But wherever there is a joint occupation, whether it is matrimonial or otherwise, and it is brought to an end, it may involve hardship and inconvenience on the person who would have preferred it to go on. If the wife had died and left her share under the trust to a stranger, I think that the house would obviously have had to be sold. The position is the same if the marriage is ended by divorce, for the court is not concerned under s. 30 with the reasons for the ending of the marriage or the rights and wrongs of it; it can only take note that the object of the trust, so far as it required the preservation of the realty, has been fulfilled.

I think that the result must be the same whether the test to be applied is derived from the language used in *Re Mayo* (12) or from that used in *Re Buchanan-Wollaston* (11). Let it be granted that the court must look into all the circumstances; if when the examination is complete, it finds that there is no inequity in selling the property, then it must be sold. The test is not what is reasonable. It is reasonable for the husband to want to go on living in the house and reasonable for the wife to want her share of the trust property in cash. The true question is whether it is inequitable for the wife, once the matrimonial home has gone, to want to realise her investment? Nothing said in the cases which I have cited can be used to suggest that it is, and in my judgment it clearly is not. The conversion of the property into a form in which both parties can enjoy their rights equally is the prime object of the trust; the preservation of the house as a home for one of them singly is not an object at all. If the true object of the trust is made paramount, as it should be, there is only one order that can be made.

It is, I think, desirable to distinguish the position that may arise when an application is made under the Married Women's Property Act, 1882, s. 17, because we were referred to *Cobb* v. *Cobb* (13), a case decided under that Act. It was a case in which a husband and wife owned a house in equal shares. Matrimonial proceedings were begun but both parties continued to live in the house. The husband applied under s. 17 for an order for the sale of the house, which this court refused. The house was still the matrimonial home and the court had a complete discretion. The judgment of DENNING, L.J., shows (14) that the question of sale can be dealt with somewhat differently in applications under that section, the marriage being still alive. If the court thinks it proper to give one party or the other the right to reside in the house after the marriage is over, it is not then necessarily interfering with the equal division of property held in equal shares. If there is other property to be divided, an overall equality may be reached; or if there is not, the necessary adjustment may be made on the A settlement of alimony or maintenance. So long as in the end the division is in the correct proportion, each party gets his or her rights and the question whether one party shall have the enjoyment of one particular piece of property, such as the house, can properly be decided simply by what seems best to the court and most reasonable. But this can only be done as part of matrimonial proceedings. The order made in this case is tantamount to requiring the wife to contribute B towards the upkeep of the husband's home, and it is too late for that now.

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(11) [1939] 2 All E.R. 302; [1939] Ch. 738.
(12) [1943] 2 All E.R. 440; [1943] Ch. 302.
(13) [1955] 2 All E.R. 696.
(14) [1955] 2 All E.R. at p. 699.

For these reasons, I think that the appeal should be allowed and that an order should be made in the terms set out in the application.

DONOVAN, J. (read by ORMEROD, L.J.): I need not repeat the history of the case leading up to the application to the county court judge for an order C under s. 30 of the Law of Property Act, 1925, that the trust for sale should be enforced. That trust was contained in the assignment of the lease to the applicant and the respondent and was expressed as follows:

> "The purchasers [the applicant and the respondent] shall hold the property upon trust to sell the same with power to postpone the sale thereof, and shall hold the net proceeds of sale and other money applicable as D capital, and the net rents and profits thereof until sale upon trust for themselves as joint tenants."

The language of s. 30 could hardly be more apt to confer a complete discretion on the court which considers an application under the section. The court is, inter alia, to make "such order as it thinks fit". The discretion must, of course, E be exercised judicially, and the principles which govern its exercise are those set forth in this court in *Re Buchanan-Wollaston's Conveyance* (15). The Master of the Rolls there said (16):

> "... it seems to me that the court of equity, when asked to enforce the trust for sale, whether one created by a settlement or a will or one created by the statute, must look into all the circumstances of the case and consider F whether or not, at the particular moment and in the particular circumstances when the application is made to it, it is right and proper that such an order shall be made."

This is what the learned county court judge did in this case. Accordingly, if his conclusion is to be reversed or varied, it must be shown that he misdirected himself in law, or misunderstood or ignored some important relevant fact, or G omitted to deal with the application in its entirety.

The applicant quoted one phrase used by the learned judge in support of a contention that he misdirected himself on a crucial matter. He said, among other things, "The applicant's half share is quite safe". In its context that seems to me to mean no more than that the respondent could not alienate the applicant's share of the joint tenancy without her knowledge or consent; and as H a proposition of law that is correct. The phrase cannot mean (as the applicant contended) that the judge had forgotten that the joint tenancy was of a wasting asset, because only a moment or two before he had said so in his judgment. Nor do I think that the learned judge made the reasonableness of the respondent's attitude the touchstone of his decision not to order a sale. He had to consider all the circumstances, and the reasonableness of the attitude of both parties was I among the circumstances to be taken into account. The judge did say: "I think it would not be reasonable to order a sale at this moment", and he says this immediately after referring to *Re Buchanan-Wollaston* (15) where he says "a sale was not ordered because it would have been unreasonable". The expression actually used in the case cited was "right and proper": but the

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(15) [1939] 2 All E.R. 302; [1939] Ch. 738.
(16) [1939] 2 All E.R. at p. 308; [1939] Ch. at p. 747.

A judge was here clearly using the word "reasonable" merely as a synonym for right and proper, because he also says in his judgment:

> "I can only make an order for sale if satisfied that it is, and these are the important words 'right and proper to do so'."

B It seems to me, therefore, that the learned judge did address his mind to the right question. The reference to the application being premature was no more than another way of saying that at the moment the judge thought it would not be right and proper to order a sale, leaving the way open for a renewed application should the circumstances of either party change. This seems to be a reference to the respondent's contemplated re-marriage, and if another woman were let into C the enjoyment of the applicant's property rights this might well be regarded as a circumstance calling for a different decision. But whether it would or would not cannot alter the existing circumstances, and it was on those that the judge reached his decision. They included the following: The applicant had another house of her own where she was living with her new husband; the respondent was still living in the disputed house which he had originally bought jointly with the D applicant as a home, which purpose, so far as he was concerned, was continuing. It was true that the applicant was obtaining no benefit from the house, but the benefit she had originally contemplated, viz., the right to live in the house, was one which she herself had voluntarily abandoned.

The question now before the court on this part of the case is not whether it would have reached the same conclusion itself; but whether the county court E judge committed some error of law which vitiates the manner in which he exercised his discretion. In my view there is no evidence of any such error. The fact which looms so large in this case, viz., that the property is a wasting asset, is, of course, of great importance; but unless there is to be a rule that in all such cases a sale must be ordered, it remains a matter of discretion.

We were, however, told at the Bar that as an alternative it was argued before F the judge that if he refused to order the sale of the house, at least he ought to put the respondent on terms as a condition of his continuing to occupy it. In his judgment the learned county court judge does not deal with this claim at all and does not purport to exercise any discretion whatever in respect of it. This court must, therefore, do so. It is clear that the applicant does not want the house to be sold merely for the sake of a sale; nor so far as the evidence discloses G does she want to turn the respondent out of the house for the mere sake of doing so. She made her wish quite plain during the course of her evidence when she said: "Give me my half and he can do what he likes with the rest".

In the circumstances the question is whether a proper exercise of discretion under s. 30 requires that the applicant should be paid something now by the respondent in respect of her half share. The facts that bear on this problem are, H first, that the wife provided half the money for the purchase of the house; second, that it is a wasting asset getting less in value year by year and perhaps even month by month; and, third, that even if the wife broke up the marriage, it is no reason by itself for depriving her altogether of her property rights whether temporarily or otherwise.

I think that justice requires that the wife should be paid the value of her I interest in the property if the respondent wishes to continue to live there and that the applicant should thereupon cede her share of the joint tenancy to the respondent. To this end I think the house should be independently valued as at the date when the wife lodged her application under s. 30 in the county court and that the respondent should pay the applicant the amount of the value so found. If, of course, the parties can agree the value in default of a valuation, so much the better. We have not seen the head lease and it may be that there is liability for dilapidations under it when the lease runs out. It would no doubt be proper to take account in the valuation of the wife's share of the liability for such dilapidation up to the date when she left the house and went to live elsewhere. The result of disposing of the matter in this way will be to give the parties what they really want: the applicant the money value of her interest; and the respondent, the right to continue to live in the house without all the disturbance and hazards of a forced sale.

I would therefore allow the appeal to the extent necessary to make such an order.

Appeal allowed.

Solicitors: *Parlett, Kent & Co.*, agents for *Norman Morgan & Davies*, Cardiff (for the applicant, the wife); *W. H. Williams*, Caerphilly (for the respondent, the husband).

[*Reported by* F. Guttman, Esq., *Barrister-at-Law.*]

PEMBERTON AND ANOTHER *v.* BRIGHT AND OTHERS.

[Court of Appeal (Sellers, Ormerod and Upjohn, L.JJ.), March 1, 2, 3, 4, 7, 1960.]

Nuisance—Flooding—Interference with course of stream—Culvert constructed in 1926 by highway authority to carry stream under highway—Entrance to culvert not protected by grid—Property on lower side of highway flooded owing to entrance to culvert being blocked by débris—Liability of highway authority—Liability of occupiers of fields—Apportionment of liability—Injunction.

The plaintiffs were the owners of property situated on the east side of a road at a dip in the road, their house being below the level of the road. In between two fields on the west side of the road was a stream running eastward in a steep gulley. After passing under the road the stream travelled along the northern side of the plaintiffs' property. In 1926 the county council had widened that part of the road and had made a new culvert (a concrete pipe about two feet in diameter) to carry the stream under the road. The western entrance to the culvert was at all times unprotected by any grid. The two fields on the west side of the road came into the occupation of the first defendants in 1934, the western entrance to the culvert being on that land. From time to time a roadman employed by the county council cleaned out the mouth of the culvert to prevent it from becoming blocked by débris coming down the stream. In December, 1956, after some extremely heavy rainfall, the plaintiffs' premises were flooded because the stream could not pass through the culvert as its entrance was blocked with branches of trees, leaves and mud, so that the water had flowed over the road and on to the plaintiffs' property. The absence of a grid was, to some extent at least, responsible for the flooding. In an action by the plaintiffs for damages, the trial judge held that both the first defendants and the county council were liable and apportioned the liability as to twenty-five per cent. to the first defendants and as to seventy-five per cent. to the county council. On appeal,

Held: (i) the county council were liable in damages to the plaintiffs because, by constructing the culvert without a protecting grid in 1926, they had created a potential nuisance which became an actual and actionable nuisance when the culvert became blocked so that it dammed the water flowing in the stream and diverted it on to the plaintiffs' land.

(ii) the first defendants, as the occupiers of the land on which the nuisance existed, were liable in damages to the plaintiffs for having continued the nuisance.

A *Sedleigh-Denfield* v. *O'Callaghan* ([1940] 3 All E.R. 349) applied.
(iii) the court would not disturb the apportionment of damages.
Appeals dismissed.

[As to nuisance caused by interference with natural conditions, see 28 HALSBURY'S LAWS (3rd Edn.) 135, para. 172, and note (m).

B As to the liability of an occupier of land for a nuisance not created by him, see 28 HALSBURY'S LAWS (3rd Edn.) 155, 156, para. 217.]

Cases referred to:

Greenock Corpn. v. *Caledonian Ry. Co., Greenock Corpn.* v. *Glasgow & South Western Ry. Co.*, [1917] A.C. 556; 86 L.J.P.C. 185; 117 L.T. 483; 81 J.P. 269; 36 Digest (Repl.) 290, *368*.

C *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349; [1940] A.C. 880; 164 L.T. 72; sub nom. *Sedleigh-Denfield* v. *St. Joseph's Society for Foreign Missions*, 109 L.J.K.B. 893; 36 Digest (Repl.) 316, *629*.

Appeals.

These were appeals by the first defendants, Henry Bright and Martin Bright, and the second defendants, Devon County Council, from a judgment given by D CASSELS, J., on Feb. 12, 1959, in an action by the plaintiffs, John Boileau Pemberton and Alice Barbara Pemberton, claiming (a) damages for nuisance and (b) an injunction, against both defendants. The plaintiffs were the owners of land and buildings situated on one side of the Axminster to Chard Road. The first defendants were the occupiers (since 1934) of two fields on the other side of the road, opposite to the plaintiffs' premises. In 1926 the second defendants, in E the course of widening the road, constructed a pipe to carry under the road a stream which ran between the two fields, passed under the road, and then into the plaintiffs' land. The entrance to the pipe was on land now occupied by the first defendants and it was at no time protected by a grid. On the night of Dec. 27/28, 1956, after some heavy rainfall, the entrance to the pipe was blocked by débris, and the waters of the stream overflowed across the road and flooded F the plaintiffs' property. The plaintiffs alleged that the pipe with its entrance unprotected constituted a nuisance which had been created by the second defendants and continued by the first defendants and, alternatively, by the second defendants. CASSELS, J., held that both the defendants were liable in damages for nuisance and awarded to the plaintiffs £1,000, with costs. He ordered that £250 and a quarter of the costs should be paid by the first defendants, and £750 and G three-quarters of the costs by the second defendants. He further ordered that the first defendants by themselves their agents or servants or otherwise be restrained from allowing or permitting the pipe which carried the stream under land occupied by the first defendants from becoming blocked by dirt and/or debris or from becoming otherwise obstructed, and that the first defendants be ordered to keep the same at all times clear and unobstructed.

H *N. R. Fox-Andrews, Q.C.*, and *J. F. E. Stephenson* for the first defendants.
G. D. Squibb, Q.C., and *T. Dewar* for the second defendants, the county council.
J. T. Molony, Q.C., and *H. E. L. McCreery* for the plaintiffs.

Cur. adv. vult.

Mar. 7. The following judgments were read.

I **SELLERS, L.J.:** Coaxdon Hall, Chardstock, Devon, of which the plaintiffs have been owners and occupiers since 1953, lies on the east side of the Axminster to Chard Road at a dip in the road about two miles from Axminster. The house itself is below the road level and is about the lowest point of a catchment area of some ninety acres. On the opposite side of the road to the plaintiffs' house and grounds there are two fields, Nos. 1517 and 1488, occupied by the first defendants, Messrs. Bright, who are father and son and who work Coaxdon Farm which lies to the east or at the rear of the Hall. Between the two fields on the western side of the Chard Road there is a stream running eastward in a rather steep gulley or goyle, which has its source about half or three-quarters of a mile from the road. The stream passes under the road, and then travels along the northern side of Coaxdon Hall along a stretch which has throughout the case been described as " the easement ", and then passes on through fields to join the River Axe. The stream passed under the road through an ancient brick culvert no doubt for many years prior to 1926, when it was extended in circumstances which are material in this case.

Over Christmas, 1956, and a day or two before, the rainfall had been heavy and persistent, and this was followed on the night of Dec. 27/28, by even heavier rains, which, though unusual, were not such that they could not have been reasonably anticipated, and the pleaded defence that they amounted to an act of God was not advanced at the trial. On the early morning of Dec. 28, the plaintiffs' house was found to be flooded in the hall at the front of the house facing west and in the drawing room on the south side and in the garage, where the water had reached a height of some two feet two inches. The drive from the main entrance on the Chard Road had been scoured out and even cobblestones in it had been removed.

Although there was a submission to this court that the damage to the drive and to the house might have been caused by water running downhill along the road from Axminster and entering the drive before it reached a large road gulley some twenty-five feet beyond the entrance to the Hall, I am satisfied that the learned judge was right in holding that the damage was done by the water diverted from the stream on the first defendants' land, and that any addition to this water from the road was negligible and was due in any case to the diverted water impeding the flow of the road water to the gulley. The distances between the gullies on the Axminster side of the road were not in evidence, but some comparative figures were given of the run-off of water from the road on one side, and they showed it to be negligible. What had happened was clear from the evidence of Colonel Pemberton and the servants of the Devon County Council who came along on the morning of Dec. 28. The stream had been unable to make its way through the culvert which then existed because the entrance was blocked with tree branches, leaves, mud and débris, which had collected at the mouth to such an extent that very little, if any, water passed through, but it collected and built up until it passed round the sides and over the top of the retaining wall and found its way over the road and down the drive with the full force of the stream pushing it on. The damage inflicted on the plaintiffs and their property was considerable and was agreed at a figure of £680, apart from general damages for inconvenience, and the judge's assessment of a total of £1,000 has not been challenged.

The action was brought by the plaintiffs against the first defendants as occupiers of the two fields through which the stream passes, alleging nuisance and basing this, perhaps with unnecessary particularity, on having a culvert on their land uncovered and/or unprotected at its entrance. The first defendants brought third-party proceedings against the Devon County Council seeking to hold them responsible for the flooding of the plaintiffs' property. Thereafter the county council were made defendants to the claim. CASSELS, J., found the two sets of defendants liable to the plaintiffs, and apportioned the liability between them, awarding £250 as the first defendants' responsibility and £750 as the second defendants'. He further made a mandatory injunction against the first defendants. Both the defendants appeal against the order on the claim and in the third-party proceedings.

In 1926 the Devon County Council, as the highway authority, acquired a strip of land on the west side of the existing Axminster-Chard Road and widened the road. This meant extending the culvert which carried the stream under it from the first defendants' land. There had been a causeway over the stream adjacent to the pre-existing road with a culvert underneath, and, as the widened road encroached on this, the county council extended the culvert thirty feet and made

A a new causeway for the occupiers' use so much further to the west. The first defendants did not come into possession until 1934. The thirty feet extension of the culvert consisted of a concrete pipe of two feet diameter, or perhaps a half inch less. It was of a different character from the ancient drain, with a smaller orifice and of a different shape. The old brick culvert had a flat base of two feet eight inches and was arched to a height of two feet with the sides not quite even. The
B gradient over the new thirty-foot pipe was one in thirty-two and of the adjacent thirty-two feet of the old culvert one in twenty-four, and of the next eight feet one in 11.1, showing a more rapid fall on to the plaintiffs' side. Although the 1926 addition had a reduced superficial area, the circular and smooth piping facilitated the flow of water, and the capacity in cubic feet per minute was somewhat greater with the pipe. When the culvert was in this way altered and
C extended in 1926, the entrance was left uncovered and unprotected, and it was alleged by both the plaintiffs and the first defendants that the work was consequently incomplete and improperly done, as no grid had been placed at a reasonable distance, perhaps eight yards, to prevent anything which might be washed down, particularly at times of heavy rain or storm, from blocking the entrance to the culvert and so holding up and diverting the stream. There was
D evidence that a grid was not usual in that part of the country, or with the culvert as large as two feet in diameter, and was not necessary; but the judge preferred the evidence that a grid should have been provided and I see no reason to take a different view.

When interference with the stream took place in 1926, reasonable foresight should have foreseen that blocking of the culvert might divert the stream on to
E the plaintiffs' premises. They were so situated that heavy rain was always a potential danger unless properly controlled, and this, at least, was a place where a grid would have stopped, or would probably have stopped, débris getting past it. If it had become blocked and had created a dam there, the water would probably have found its way into the culvert some eight yards further on and would not have been diverted across the road on to the plaintiffs' property.

F LORD FINLAY, L.C., stated the broad principle of law in the well-known case of *Greenock Corpn.* v. *Caledonian Ry. Co., Greenock Corpn.* v. *Glasgow & South Western Ry. Co.* (1), where he said:

> " It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary
> G rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable."

The deficiency in the present case was, it was alleged, the unprotected entrance.

In *Sedleigh-Denfield* v. *O'Callaghan* (2) it appears that the appropriate county council, the Middlesex County Council, had placed a pipe or a culvert in a natural ditch which ultimately gave rise to trouble. In that case the Middlesex County
H Council were not before the court, and the action was against the occupiers. It appears that the county council made the culvert and covered the top of it with earth. To prevent the possibility of wood or leaves blocking the opening of the fifteen-inch pipe, it would have been proper practice to fix a grid or grating in the ditch a little way from the opening of the pipe, since there were trees in the hedge, and sticks and leaves would be apt to fall into the ditch. The county
I council recognised the necessity for a grating, and provided one, but their workman, instead of fixing it in the ditch some two feet from the opening of the pipe or culvert, where it would intercept leaves and other refuse, placed it on the top of the culvert, where it was useless. The mouth of the culvert was on the respondents' land. LORD ATKIN, in the course of his speech, said (3):

> " I agree with the finding of the judge, accepted by the Court of Appeal,

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(1) [1917] A.C. at p. 572.

(2) [1940] 3 All E.R. 349; [1940] A.C. 880.

(3) [1940] 3 All E.R. at p. 359; [1940] A.C. at p. 895.

> that the laying of a 15-ins. pipe with an unprotected orifice was, in the circumstances, the creation of a nuisance, or of that which would be likely to result in a nuisance. It created a state of things from which, when the ditch was flowing in full stream, an obstruction might reasonably be expected in the pipe, from which obstruction flooding of the plaintiff's ground might reasonably be expected to result . . . It is probably strictly correct to say that, as long as the offending condition is confined to the defendant's own land without causing damage, it is not a nuisance, though it may threaten to become a nuisance. Where damage has accrued, however, the nuisance has been caused." A B

LORD WRIGHT put the matter this way (4):

> " The interposition of the pipe as the means of carrying the water from the ditch in place of the former open watercourse was not in itself objectionable. The trouble was that no protecting grid was put in place, and there was nothing to prevent the pipe from getting choked. There was thus the risk of a flood, which might spread, as in fact happened, to the appellant's premises, causing damage which in the actual result was considerable. The structure of the orifice of the pipe was on the respondents' land. If the work had been done by or on behalf of the respondents, the conditions requisite to constitute a cause of action for damages for a private nuisance would be beyond question complete." C D

I make one other citation, which is from the speech of LORD ROMER (5):

> " When the Middlesex County Council constructed the culvert without a proper grid to prevent its getting blocked, they created a potential nuisance. That is to say, they did something which in the future might, and did in fact, seriously damage the appellant as the occupier of No. 1, Victoria Road. The respondents did not themselves create this potential nuisance, and cannot, therefore, be held liable for its creation, but an occupier of land upon which a nuisance has been created by another person is liable if he ' continues ' the nuisance." E F

I would hold, as did the learned judge, that in 1926 the Devon County Council created a potential nuisance which became an actual and actionable nuisance when, by reason of the entrance to the culvert being negligently left unprotected, it became blocked so that it dammed the water flowing in the stream and diverted it on to the plaintiffs' land.

Up to his retirement in 1954, Mr. Alner, a roadman or lengthman for this area, employed by the county council, had cleared the mouth of the culvert very often, otherwise, as he said, the water would have come round over the culvert on to the main road. One question he was asked was: " Did you treat this culvert in any different way to other culverts along the road? ", to which he answered: G

> " I used to look at it more often because the water used to come down very fast because it is more steep there. I looked to see if any rubbish came down the gully which would stop on the mouth of the culvert." H

There is no reason to think that after Mr. Alner's retirement similar clearing was not done by his successor, although the county council seem to have been somewhat inexplicably reticent about what was in fact done.

The advantage of a grid, as I see it, is that, in a sudden heavy rainstorm with consequential onset of débris towards the culvert, it would prevent the culvert becoming blocked and probably would have successfully met the situation which occurred on the night of Dec. 27/28. This blockage was not shown to have been due to a failure to inspect and clean out the culvert regularly and as a matter of routine—that may well have been done—but it came about because there was nothing to stop the débris blocking the culvert's entrance if it collected I suddenly and during the night, as it seems to have done here. On the facts found by the learned judge, which in my view the evidence fully justified, the first defendants, as the occupiers of the land on which the nuisance existed, were clearly liable for the damage caused, and, as the Devon County Council created the trouble by their failure to complete the culvert properly with a protection, they also are liable.

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(4) [1940] 3 All E.R. at p. 363; [1940] A.C. at p. 902.
(5) [1940] 3 All E.R. at p. 371; [1940] A.C. at p. 912.

The work in 1926 was necessitated by the road widening and, no doubt, was done with the agreement of the then owners, who would have relied on the county council to do it properly. Counsel for the county council contended that the work was done by the county council merely as contractors for the occupiers and no more. It was probably done in lieu of compensation, but I cannot think that it makes any difference to their liability. We were asked by counsel for the first defendants to find that there was an agreement continuing from the date of the new culvert that the county council would not only construct the culvert but would thereafter maintain it, and that, therefore, the county council were liable to indemnify the first defendants against their liability in this case. Certainly from 1926 until 1954 the county council did, in fact, do the necessary work to keep the entrance clear, and, if the facts were known, it may be that there was an arrangement of some kind. But the county council had powers under s. 67 of the Highway Act, 1835, (6) to do what they did, and I do not find sufficient evidence to support any contractual obligation with the first defendants or their predecessors. In any case I doubt if any ordinary or reasonable attention to the culvert entrance would have prevented this flooding in the absence of a grid. A grid would form an emergency barrier.

This is a case where the same damage has been caused by two sets of wrongdoers and it is perhaps not an easy case in which to decide what is a just and equitable apportionment between them, having regard to the extent of their respective responsibility. The first defendants could, if they had wished, have provided a grid, but from the time when they came into occupation in 1934 they had seen the county council in charge, as it were. They were small farmers, accepting things as they found them. The county council, on the other hand, had failed to put the grid in at the outset or to make amends by putting one in later, which they could in fact have done by the authority of s. 67 of the Highway Act, 1835, (6) if not by negotiation with the occupiers. The county council submitted that all the burden lay on the occupiers who should have kept the culvert clear and that there was no room for any contribution. We were urged on behalf of the first defendants, on the other hand, to vary the order to one hundred per cent. contribution against the county council. I find the relevant factors hard to assess in a case such as this, and I am not prepared to alter the judge's decision on apportionment, especially as this court does not readily interfere in such a matter.

In considering this case, I have regarded the plaintiffs' complaints that the pipe laid in 1926 was not the right size and that the defendants, or one of them, had increased the quantity of water brought on to the plaintiffs' land as no longer in issue or as unsustainable. Also I have disregarded the evidence of some flooding of the plaintiffs' premises in 1957 and of the capacity of the plaintiffs' easement (7), which was itself at least in part artificial, containing, as it did, some small culverts. As the damages were agreed in the event of liability and no attempt was made at the trial to limit them, the conditions of flooding which might have arisen if the culvert had not been blocked on the night of Dec. 27/28 do not call for consideration. I would dismiss the appeals of both the defendants, subject to the modification of the injunction against the first defendants in the way to be indicated by UPJOHN, L.J.

ORMEROD, L.J.: I agree. There is no doubt that the plaintiffs' premises were flooded on the night in question and damage was done to them. A substantial part of that damage was done to the drive, which was badly scoured by reason of the volume of water which flooded down it. It was not seriously disputed that the water in the main came from the goyle in the first defendants' land. On the morning following the flood, the culvert was blocked so that little or no water passed through it and the water in the goyle was still high enough to trickle on to the road. It was common ground that, when the road was widened in 1926, the culvert was extended by the county council not only to the new width of the road but for some feet on to the land now occupied by the first defendants and a causeway was constructed over the culvert on the first defendants' land so that they and their cattle could pass from one field to the other. Counsel for the county council argued that in these circumstances there was no liability on the second defendants to keep the mouth of the culvert clear. His submission was that the work of extending the culvert on to the first defendants' land was " accommodation " work done by the county council, presumably in pursuance of an agreement with the then owners or occupiers of the land, and that the county council were in no different position from the position in which a firm of private builders would be who agreed to build the culvert in those circumstances. That may well be so, but it leaves the question whether the county council discharged their obligation sufficiently at the time when they constructed the culvert. The submission was that the culvert was properly constructed at the time in 1926 and thereby the responsibility of the county council was at an end. It was suggested in the course of the argument that, as the culvert put in by the county council was circular, it was of a less dimension than the original culvert, and that, although the evidence was that it would take an equal or greater flow of water than the original culvert because of the reduced friction in the pipe, there was a greater danger of the orifice being blocked because of its smaller area. This argument, however, does not seem to carry the case much further, and the consensus of evidence appeared to be that, so far as the culvert itself was concerned, it was, both in its dimensions and construction, in accordance with sound engineering practice. It was submitted as against the county council that the county council, at the time of constructing the culvert, should also have constructed a grid and placed it about eight yards upstream of the mouth of the culvert. There was a conflict of evidence amongst the experts as to the necessity for this provision, but the learned judge, who had an opportunity of seeing the witnesses and considering the value of their evidence, appears to have come to the conclusion that such a provision should have been made. I say " appears " because it has been argued that there was not a precise finding in the learned judge's judgment to that effect. I think, however, that it is clear that that was the conclusion to which he came. He said:

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(6) Since replaced by s. 103 of the Highways Act, 1959. (7) See p. 794, letter A, ante.

> " Now it was said on behalf of the plaintiffs that one of the things that ought to have been done was to have a grid. Mr. Patrick, who was the expert called on behalf of the plaintiffs, said that a grid was essential; he thought that it ought to have been about five feet high. He said that that was necessary because of the danger in such country as this of large trunks of trees getting wedged and causing something in the nature of a dam. His view was that a grid was important, and he would put it five feet high and about eight yards back from the pipe. The surveyors called on behalf of the first defendants and the second defendants have disagreed with Mr. Patrick. One of the reasons given was that they do not use grids in the county of Devon; another reason was that they do not think that a grid would have made any difference."

The learned judge then went on:

> " This court cannot help coming to the conclusion that a grid at that spot might well have served at least one useful purpose, and that is, it would have made it easier to clean upstream, and, if any trunks of trees had been lodged against the grid, they could have been pulled out more easily, instead of letting them flow on until they come down to the mouth of the pipe."

A Then the learned judge said:

> "I hold that this was a nuisance. It was a nuisance for the second defendants to have created such a state of affairs; they were interfering with the course of the water—they were pushing it into a pipe. And they made no provision for keeping it clear other than getting one roadman occasionally to go to see that it was not blocked. They never adopted the plan of having B a grid."

I see no reason for disturbing this finding of the learned judge. It was argued that, even if a grid had been constructed by the county council, it would have to be kept clear, presumably by the occupier, and that, if it were not, there would still be as great a danger of blockage as if it were not there. I think that C the real value of the grid, provided of course that the occupier performs his task and keeps it clear, is to catch material coming down-stream during the actual flood which might otherwise block the culvert. An occupier cannot, of course, be certain that the culvert will be kept clear; but, if there is a grid properly sited, it seems to be common sense that the likelihood of the culvert being blocked during a flood will be substantially reduced. In my judgment, on the findings of D the learned judge the county council were at fault in not providing a grid and the absence of the grid was, to some extent at least, responsible for the blockage of the culvert and the consequent flooding of that night.

It has been argued on behalf of the first defendants that they should not be held responsible for their failure as occupiers to keep the goyle clear, as this work was from time to time done by the workmen of the county council, although E there appeared to be no evidence that it was done by them after Mr. Alner left some two or three years before the flood. It was, however, the responsibility of the occupiers, and, although the apportioning of blame in a matter of this kind, as my Lord has said, is difficult because of the various factors that have to be taken into consideration, I would not for my part disturb the apportionment which has been made by the learned judge. I agree that the appeal should be F dismissed subject to the variation in the form of the injunction with which UPJOHN, L.J., will deal.

UPJOHN, L.J.: I agree, and I do not think that I can usefully add anything. Subject to any comments which counsel may care to make, the injunction will be in this form:

> G "An injunction restraining the defendants Henry Bright and Martin John Henry Bright from allowing the entrance to the culvert in the pleadings mentioned from becoming blocked by stones, mud, branches, leaves or other débris so as to cause water in the goyle to flow over the road immediately to the east thereof and thence over the plaintiffs' land and premises in such manner as to cause a nuisance to the plaintiffs."

Appeals dismissed.

Solicitors: *Keene, Marsland & Co.*, agents for *McLusky & Braddell*, Exeter (for the first defendants); *Sharpe, Pritchard & Co.*, agents for *Clerk to Devon County Council* (for the second defendants); *Dunn & Baker*, Exeter (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

HENRY BRIGGS, SON & CO., LTD. *v.* INLAND REVENUE COMMISSIONERS. A

[COURT OF APPEAL (Lord Evershed, M.R., Pearce and Harman, L.JJ.), March 10, 11, 1960.]

Profits Tax—Computation of profits—Franked investment income—Dividends from subsidiary company—"Functions" of company alleged to consist B
wholly of holding property—Colliery company's undertaking nationalised—Subsequent activities devoted to obtaining compensation pending liquidation—Whether company carrying on a trade or business—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 54), *s.* 19 (4).

The taxpayers, a parent company, held all the shares of a subsidiary company, which carried on the trade or business of coal mining until it was C
nationalised in 1946. The subsidiary company then became entitled to compensation and decided not to embark on any new trade, but to ascertain and obtain the compensation and then to go into liquidation. The subsidiary went into liquidation in 1952. Compensation was finally paid in 1955. In the meantime the subsidiary company received interim income payments under the nationalisation legislation and out of those and other D
resources paid dividends to the taxpayers. The dividends were paid between January, 1947, and July 18, 1951. The taxpayers claimed that the dividends were franked investment income* (viz., dividends received from a company carrying on a trade or business to which s. 19 of the Finance Act, 1937, applied) and therefore were exempt from the profits tax. By s. 19 (4)†
of the Act of 1937, if the "functions" of a company consisted wholly or E
mainly in the holding of property, the holding of the property was deemed to be a business carried on by the company.

Held: the word "functions" in s. 19 (4) of the Act of 1937 might be defined as activities appropriate to any business of a company and, although the subsidiary company's right to compensation and interim income payments was property, the subsidiary company had no "functions" in that F
sense at the relevant time because it had given up trading and had no business; accordingly the dividends received by the taxpayers were received from a company that was not carrying on a trade or business to which s. 19 applied and were not franked investment income, and therefore the taxpayers were not entitled to exemption from the profits tax in respect of them.

Dictum of ATKINSON, J., in *Inland Revenue Comrs.* v. *Buxton Palace* G
Hotel ((1948), 29 Tax Cas. at p. 334) applied.

Appeal dismissed.

[As to trades or businesses chargeable to the profits tax, see 20 HALSBURY'S LAWS (3rd Edn.) 613, para. 1198; and as to investment income liable to the profits tax, see ibid., 620-622, paras. 1211, 1213; and for cases on the subject, see 28 DIGEST (Repl.) 374-380, *1635-1660*. H

For s. 19 (4) of the Finance Act, 1937, see 12 HALSBURY'S STATUTES (2nd Edn.) 375.]

Cases referred to:

Carpet Agencies, Ltd. v. *Inland Revenue Comrs.*, (1958), 38 Tax Cas. 223.

Inland Revenue Comrs. v. *Butterley Co., Ltd.*, [1956] 2 All E.R. 197; [1957] A.C. 32; [1956] 2 W.L.R. 1101; 28 Digest (Repl.) 377, *1645*. I

Inland Revenue Comrs. v. *Buxton Palace Hotel*, (1948), 29 Tax Cas. 329; 28 Digest (Repl.) 375, *1638*.

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* "Franked investment income" is defined in the Finance Act, 1937, Sch. 4, para. 7 (1A), as substituted by the Finance Act, 1947, s. 32 (1); see 12 HALSBURY'S STATUTES (2nd Edn.) 384. The exemption for franked investment income is the consequence of para. 7 (1) of Sch. 4 to the Act of 1937.

† The relevant terms of s. 19 (2) (4) of the Finance Act, 1937, are printed at p. 801, letter I, and p. 802, letter A, post.

A *Inland Revenue Comrs.* v. *Desoutter Bros., Ltd.*, [1946] 1 All E.R. 58; 174 L.T. 162; 29 Tax Cas. 155; 28 Digest (Repl.) 431, *1893*.

Inland Revenue Comrs. v. *Parkhouse Collieries*, (1956), 36 Tax Cas. 675; 28 Digest (Repl.) 360, *1591*.

Appeal.

The taxpayers, Henry Briggs, Son & Co., Ltd., appealed to the Special Com-
B missioners of Income Tax against assessments made on them to the profits tax for chargeable accounting periods commencing on Jan. 2, 1947, and ending on July 18, 1951, when they went into voluntary liquidation. The question for decision was whether the taxpayers were liable to include in the computation of their profits for the purposes of the profits tax certain dividends received from a wholly owned subsidiary company, Briggs Collieries, Ltd. The taxpayers
C contended, so far as relevant to the decision of the Court of Appeal, that: (i) the sole trade carried on by the subsidiary company on Jan. 1, 1947, was that of colliery owners and that that trade necessarily ceased by virtue of the Coal Industry Nationalisation Act, 1946; (ii) that from Jan. 1, 1947, the subsidiary company was entitled to compensation under the Coal Industry Nationalisation Acts and that such right was a right of property; (iii) that from Jan. 1, 1947,
D the functions of the subsidiary company consisted wholly or mainly in the holding of that property; (iv) that the dividends received by the taxpayers from Jan. 1, 1947, onwards were therefore franked investment income. The Crown contended that the dividends received from the subsidiary company from Jan. 1, 1947, onwards were to be included in the computation of the taxpayers' profit, because it was throughout a company whose business consisted wholly
E or mainly in the holding of investments or other property within s. 19 (4) of the Finance Act, 1937, and that such dividends related both before and after Jan. 1, 1947, to such trade or business. The dividends, so the Crown contended, were not exempt as franked investment income because after January, 1947, the subsidiary company carried on no trade or business to which s. 19 of the Finance Act, 1937, applied.

F The commissioners held, so far as relevant to the decision of the Court of Appeal, that the functions of the subsidiary company did not consist wholly or mainly in the holding of the property represented by the rights to compensation under the Coal Industry Nationalisation Act, for that company was kept in existence after Dec. 31, 1946, only so that those rights might be realised and liquidated as early as possible. Its functions could not, therefore, be properly
G described as the holding of property. The dividends were not, therefore, franked investment income of the taxpayers. UPJOHN, J., on Apr. 28, 1959, dismissed the appeal of the taxpayers by way of Case Stated against that decision, holding that the functions of the subsidiary company had not changed into the holding of investments or property within s. 19 (4) of the Finance Act, 1937, but were merely carrying out the residual function of a colliery company about to wind up.
H The dividends were therefore not franked investment income of the taxpayers. The taxpayers appealed to the Court of Appeal.

Sir John Senter, Q.C., *D. C. Miller* and *N. P. M. Elles* for the taxpayers.

J. G. Foster, Q.C., and *A. S. Orr* for the Crown.

LORD EVERSHED, M.R.: By s. 19 of the Finance Act, 1937, which
I constituted and defined the scope of what was then called the national defence contribution, and is now known as the profits tax, it was provided by sub-s. (2) that, subject to what was thereafter provided,

> ". . . the trades and businesses to which this section applies are all trades or businesses of any description carried on in the United Kingdom, or carried on . . . by persons ordinarily resident in the United Kingdom."

Subsection (4), which is the subsection particularly involved in this appeal, reads:

> " Where the functions of a company . . . incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this section to be a business carried on by the company . . ."

The appellant taxpayers, Henry Briggs, Son & Co., Ltd., at the material dates held all the shares of a subsidiary company, Briggs Collieries, Ltd., which until the events of 1946 had carried on the trade or business of coal mining. As a result of the nationalisation of the coal mining industry in 1946, its coal mines and the business of conducting them were taken away compulsorily, and by virtue of the terms of the Coal Industry Nationalisation Act, 1946, the subsidiary company became entitled to receive compensation as provided by that Act. The facts of the present case, which are set out in the Case Stated, subject to the corrections made by UPJOHN, J., show that the compensation which the subsidiary company was entitled to receive was finally paid in or about 1955; but in October, 1952, the subsidiary company went into liquidation. What is more important is the finding of fact in the Case Stated that, from the time when the Coal Industry Nationalisation Act, 1946, operated the subsidiary company really ceased any activity whatever. It is stated at p. 8 of the Case, that:

> " No effort was made by [the subsidiary company] to embark upon any other trade, but the whole energies of its directors were devoted towards the ascertainment and obtaining of the compensation to which it was entitled under the Coal Acts."

After stating that the process was long and arduous, the Case points out that the decision was made, when the Act operated, that this company would embark on no other activity—I deliberately use that word—but would await the receipt or at least the final ascertainment of the compensation, and would then go into liquidation. In the meantime, however, in accordance with the Coal Industry Nationalisation Act, 1946, the subsidiary company received from time to time what were called interim income payments and out of those income payments, or out of other resources which it had, it paid from time to time dividends to its parent company, the appellant taxpayers.

The terms of the Act of 1937 were in some sense modified by later provisions, particularly by the Finance Act, 1947. It is sufficient to say that these provide that in certain circumstances income received by the taxpayers might be treated as " franked investment income " as defined in the Acts of 1937 and 1947 and as such would not be taken into account for purposes of profits tax assessment. There is now no doubt, because the contrary is not any longer put forward, that the taxpayers fall within one or other of the subsections of s. 19 of the Finance Act, 1937, which I have read, so that they are themselves liable to profits tax and their liability can only be limited if they can show that the dividends from their subsidiary company were franked investment income (I understand that they formed a most substantial part of the taxpayers' total income); and the dividends would fall within that definition if for the relevant accounting periods the subsidiary company fell within the scope of sub-s. (4).

The point is therefore whether, after the coming into operation of the Coal Industry Nationalisation Act, 1946, and in the light of the decisions of the subsidiary company extracted from the Case, the functions of that company consisted wholly or mainly in the holding of property, so that the holding of that property should be deemed for the purposes of the section to be a business which it carried on. The statutory right of the subsidiary company to obtain the compensation when ascertained, and to receive in the meantime interim income or other payments, is conceded for the purpose of this case (and, I should have thought, rightly conceded) as a species of property; so that it can be said that the subsidiary company at any rate held—i.e., owned, or was possessed of—that right or species of property; but so to say is not to conclude the matter in favour of the taxpayers, because it must first be shown, as regards each accounting

A period, that the "functions" of the subsidiary company consisted wholly (I can leave out "or mainly") in the holding of investments or other property. In the end, therefore, the matter turns on the significance and the use of the word "functions". UPJOHN, J., came to the conclusion that the subsidiary company did not fall within the subsection. He cited the observations of ATKINSON, J., in *Inland Revenue Comrs.* v. *Buxton Palace Hotel* (1):

B

> "Functions, as ATKINSON, J., said, may be defined as being an activity appropriate to any business of the company. Is the company holding property as an activity appropriate to its business? A company whose business is temporarily stopped by requisition does not satisfy that test; nor does one which has given up trading."

C He said of these observations:

> "They do not bind me, because in this field every case depends on its own facts once the true meaning of the word 'functions' has been determined; and in this case it is true to say that [the subsidiary company] never could re-enter into its colliery activities. Nevertheless, on ceasing to trade as a colliery company, a company might do one of several things. It might D decide to engage in some other trading activity, in which case, in my judgment, it would remain a trading company: it might decide to become an investment trust company, in which case it seems to me clear that it would engage in a new business of holding property. If it does neither, but resolves to wind up, it does not seem to me to gain any new character in the sense of carrying on an activity of holding property as being appropriate to E its business. It really has no business."

I will say at once that I have myself come to the conclusion that the judgment of UPJOHN, J., is correct and should be affirmed. As it seems to me, the taxpayers could only escape from the conclusion stated in the light of the facts, if the phrase "shall be deemed for the purpose of this section to be a business carried on", etc., imported this, that the subsection contemplated a case in F which there was really no business but there was none the less deemed to be a business if the earlier part of the subsection was satisfied. Even so, that earlier part of the subsection must be satisfied. In other words it must be shown that the subsidiary company had the function or functions of holding property. Unless that is done, it seems to me that sub-s. (4) must inevitably cover every activity one can think of, whether active or passive, or whatever the G company is doing or not doing. So I think that the learned judge concluded rightly that the matter must turn on the significance of this word "functions", and in its context I agree with him that a company does not have the "function" of holding property if, as in this case, it has deliberately determined to have no function, no activity in any business sense whatever—if the company decided to make no further plan; to do nothing, and simply to wait until the money due H to it was paid and then to go into liquidation.

The view taken by the judge gets some support from certain language used by LORD GREENE, M.R., in *Inland Revenue Comrs.* v. *Desoutter Bros., Ltd.* (2). That case related, not to the language of the Act with which we are concerned, but to the Finance (No. 2) Act, 1939. But s. 12 (4) of that Act is in terms identical with s. 19 (4) of the Act of 1937 with which we are concerned. LORD GREENE I said (3):

> "I should have thought that the objects of that subsection were manifest. In my view, it was intended, and quite clearly intended, to bring into the net a type of corporation which otherwise would or might have escaped it. The commonest type of corporation with which the subsection is dealing is what may be called a trust investment company, whose business is the holding of

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(1) 29 Tax Cas. 329 at p. 334. (2) [1946] 1 All E.R. 58; 29 Tax Cas. 155.
(3) [1946] 1 All E.R. at p. 59; 29 Tax Cas. at p. 160.

> A investments and deriving income from them. Such a corporation would not be said to be carrying on a 'trade or business' within the meaning of sub-s. (1)."

I pause to say that to be within the meaning of sub-s. (1) would involve also being within the meaning of sub-s. (2) of the section there under review, which in turn corresponds with sub-s. (2) of the Act of 1937. LORD GREENE continued B (4):

> " Anyhow, if it were not absolutely clear, sub-s. (4) makes it quite certain that that type of corporation is to be included, and its operations are to be regarded as the carrying on of a trade or business. That seems to me to be the real and sole object of sub-s. (4)." C

I need not consider whether that statement puts the matter rather more strongly than I might put it myself, if the question were entirely free. I was troubled, because it seemed to suggest that one could not say of a trust investment company properly so-called that it was carrying on a business, although in one of his sentences LORD GREENE said that such would be the case. If for " trust investment company" is substituted " property company " (of the kind D commonly met with), I think that LORD GREENE's statement would be free from difficulty. However that may be, LORD GREENE may well have meant no more than that, if there should be any argument whether such a company were or were not within sub-s. (2), the purpose of sub-s. (4) was to make it clear. In any case, on the particular facts of this case, whatever might be said as regards other cases, I have concluded for the reasons indicated by UPJOHN, J., that the E subsidiary company had not got " functions " at the relevant date or dates, and had certainly not got functions of the kind indicated in the first two lines of the subsection.

Counsel for the taxpayers referred to certain other cases. He relied particularly on certain language in *Inland Revenue Comrs.* v. *Butterley Co., Ltd.* (5), and in F *Inland Revenue Comrs.* v. *Parkhouse Collieries* (6). I do not think that those passages really assist on the final point on which this case turns. No doubt the rights conferred by the Coal Industry Nationalisation Act, 1946, were of a somewhat special kind, but as I have already said, they were proprietary. That they constitute a form of property is not in dispute and the precise question with which we are concerned was not before the court in either *Inland Revenue* G *Comrs.* v. *Butterley Co., Ltd.* (5) or *Inland Revenue Comrs.* v. *Parkhouse Collieries* (6). I hope that I shall not be thought disrespectful to counsel's argument if I make no further reference to those cases, but confine myself to saying that I agree with the conclusion of the judge and with his reasons for it, and I would accordingly dismiss the appeal.

PEARCE, L.J.: I agree with what my Lord has said. In my opinion the H view taken by the trial judge was correct, and I would dismiss the appeal.

HARMAN, L.J.: I also agree. Counsel for the Crown cited a decision of mine on this subject, *Carpet Agencies, Ltd.* v. *Inland Revenue Comrs.* (7). I am there reported to have said that, in order to get within s. 19 (4), one must prove, not merely that the company hold some income-bearing investments, but that one I of its functions—i.e., one of its purposes—has always been or has been for a considerable time, the making of money by the holding of investments. I think that puts it too high. I do not think that one need say " has always been or has been for a considerable time ", but I do adhere to the part which says that one

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(4) [1946] 1 All E.R. at p. 59; 29 Tax Cas. p. 160.

(5) [1956] 2 All E.R. 197; [1957] A.C. 32.

(6) 36 Tax Cas. 675.

(7) 38 Tax Cas. 223.

A of its purposes is the holding of investments. Unless one can get so far, one cannot get within the subsection. Subject to that, I agree that the appeal should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Thicknesse & Hull* (for the taxpayers); *Solicitor of Inland Revenue*
B (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

WELHAM *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

C [HOUSE OF LORDS (Lord Radcliffe, Lord Tucker, Lord Keith of Avonholm, Lord Denning and Lord Morris of Borth-y-Gest), February 22, 23, 24, 25, March 24, 1960.]

Criminal Law—Forgery—Uttering a forged document—" Intent to defraud "—
Hire-purchase and credit-sale agreements forged and used to obtain loans
from hire-purchase finance companies—No intention to defraud finance
D *companies—Intention to evade current credit restrictions by deceit—Forgery*
Act, 1913 (3 *&* 4 *Geo.* 5 *c.* 27), *s.* 4, *s.* 6 (2).

An intent to defraud may exist when there is no intention to cause economic loss (see p. 808, letter D, and p. 814, letter F, post).

R. v. *Toshack* ((1849), 4 Cox, C.C. 38) approved.

E The appellant was convicted of uttering forged documents knowing them
to be forged with intent to defraud, contrary to the Forgery Act, 1913, s. 6.
He had witnessed a hire-purchase form and agreement and credit-sale
agreements on which certain finance companies had advanced money.
The form and agreement were forgeries. It was not proved that the
appellant had intended to cause any loss of money to the finance companies.
His admitted intention had been by deceit to induce any person who was
F charged with the duty of seeing that the credit restrictions then current
were observed to act in a way in which he would not act if he had known the
true facts, namely, not to prevent the advancing of large sums of money
exceeding the limit allowed by law at that time. The appellant appealed
against his conviction on the ground that his intention was not an intent to
defraud.

G **Held**: the appellant had been rightly convicted, because an intent to
deceive a person responsible for a public duty into doing something that he
would not have done but for the deceit or into not doing something that, but
for the deceit, he would have done amounted to intent to defraud within
the Forgery Act, 1913; and to put forward a document with knowledge of
its falsity and with similar intent was to commit the crime of uttering it
H (see p. 809, letter C, post).

Dictum of LORD TUCKER in *Board of Trade* v. *Owen* ([1957] 1 All E.R. at p. 414) approved.

Distinction between intent to deceive and intent to defraud drawn by
BUCKLEY, J., in *Re London & Globe Finance Corpn., Ltd.* ([1903] 1 Ch. at
p. 732) explained and, as explained, approved (see p. 809, letter I, to p. 810,
I letter G, and p. 814, letter E, post); and see, particularly, as regards the
distinguishing of the two intents, per LORD DENNING at p. 815, letter I, to
p. 816, letter C, post.

Decision of the COURT OF CRIMINAL APPEAL (sub nom. *R.* v. *Welham*, ante p. 260) affirmed.

[As to the intent to defraud in offences relating to forgery, see 10 HALSBURY'S LAWS (3rd Edn.) 839, para. 1614, and 871, para. 1689; and for cases on the subject, see 15 DIGEST (Repl.) 1238, 1239, *12,672-12,685*.

For the Forgery Act, 1913, s. 4 and s. 6, see 5 HALSBURY'S STATUTES (2nd Edn.) 985, 986.] A

Cases referred to:

Bank of England v. *Vagliano Brothers*, [1891] A.C. 107; 60 L.J.Q.B. 145; 64 L.T. 353; 55 J.P. 676; 42 Digest 779, *2094*.

Barras v. *Aberdeen Steam Trawling & Fishing Co., Ltd.*, [1933] All E.R. Rep. 52; [1933] A.C. 402; 102 L.J.P.C. 33; 149 L.T. 169; 18 Asp. M.L.C. 384; Digest Supp. B

Board of Trade v. *Owen*, [1957] 1 All E.R. 411; [1957] A.C. 602; 121 J.P. 177; 41 Cr. App. Rep. 11; [1957] 2 W.L.R. 351; 3rd Digest Supp.

London & Globe Finance Corpn., Ltd., Re, [1903] 1 Ch. 728; 72 L.J.Ch. 368; 88 L.T. 194; 15 Digest (Repl.) 1115, *11,078*. C

R. v. *Bassey*, (1931), 22 Cr. App. Rep. 160; 14 Digest (Repl.) 129, *911*.

R. v. *Fawcett*, (1793), 2 East, P.C. 862; 15 Digest (Repl.) 1253, *12,861*.

R. v. *Harris*, (1833), 1 Mood. C.C. 393; 6 C. & P. 129; 2 Nev. & M.M.C. 151; 15 Digest (Repl.) 1251, *12,834*.

R. v. *Hodgson*, (1856), Dears. & B. 3; 25 L.J.M.C. 78; 27 L.T.O.S. 144; 20 J.P. 309; 15 Digest (Repl.) 1239, *12,681*.

R. v. *Martin*, (1836), 1 Mood. C.C. 483; 7 C. & P. 549; 15 Digest (Repl.) 1240, *12,694*. D

R. v. *Moah*, (1858), Dears. & B. 550; 27 L.J.M.C. 204; 31 L.T.O.S. 121; 22 J.P. 273; 15 Digest (Repl.) 1252, *12,850*.

R. v. *Newton & Bennett*, (1913), 109 L.T. 747; 15 Digest (Repl.) 1192, *12,094*.

R. v. *Parkes & Brown*, (1797), 2 Leach, 775; 2 East, P.C. 963; 15 Digest (Repl.) 1228, *12,530*. E

R. v. *Sharman*, (1854), Dears. C.C. 285; 23 L.J.M.C. 51; 18 J.P. 119; 15 Digest (Repl.) 1252, *12,849*.

R. v. *Taylor*, (1779), 1 Leach, 214; 2 East, P.C. 853, 960; 15 Digest (Repl.) 1228, *12,528*.

R. v. *Toshack*, (1849), 1 Den. 492; T. & M. 207; 13 J.P. 794; 4 Cox, C.C. 38; 15 Digest (Repl.) 1252, *12,848*. F

R. v. *Ward*, (1727), 2 Stra. 747; 2 Ld. Raym. 1461; 1 Barn. K.B. 10; 15 Digest (Repl.) 1240, *12,686*.

R. v. *Wines*, [1953] 2 All E.R. 1497; 118 J.P. 49; 37 Cr. App. Rep. 197; [1954] 1 W.L.R. 64; 15 Digest (Repl.) 1117, *11,088*.

Appeal. G

Appeal by Robert John Welham pursuant to the certificate of the Attorney-General under the Criminal Appeal Act, 1907, s. 1 (6), from an order of the Court of Criminal Appeal (LORD PARKER, C.J., HILBERY, CASSELS, SALMON and EDMUND DAVIES, JJ.), dated Dec. 21, 1959, and reported sub nom. *R.* v. *Welham*, ante, p. 260, dismissing his appeal against convictions at the Central Criminal Court on Dec. 19, 1958, before the Common Serjeant and a jury on two counts of H uttering forged documents. He was sentenced to nine months' imprisonment on each count, the sentences to run concurrently. The facts appear in the opinion of LORD DENNING, p. 811, letter I, et seq., post.

Gerald Gardiner, Q.C., and *C. W. G. Ross-Munro* for the appellant.

The Solicitor-General (*Sir Jocelyn Simon, Q.C.*), *J. H. Buzzard* and *M. D. L. Worsley* for the Crown. I

Their Lordships took time for consideration.

Mar. 24. The following opinions were read.

LORD RADCLIFFE: My Lords, I have had the opportunity of reading in advance the opinion that will be delivered by my noble and learned friend, LORD DENNING. I agree with what he says and I share his view that this appeal must be dismissed. I propose, therefore, to confine what I say to expressing my opinion on the central question of law involved, the question which has been the cause of the case reaching this House.

What is the meaning of the words " intent to defraud " which occur in s. 1 (1) and, more particularly, in s. 4 (1) of the Forgery Act, 1913? In my opinion, an answer cannot be supplied to that question which does not regard both the context of the Act in which they appear and the previous history of legal decisions as to the meaning of the word " defraud " when used as an element of the crime of forgery. There are, accordingly, two preliminary considerations which commend themselves as being material to this approach.

The first is that the Act itself recognises that there may be at least a significant difference between an intent to defraud and an intent to deceive. For whereas most of the offences for which punishment is prescribed are punishable whether done with intent to deceive or intent to defraud, some acts of forgery can be a crime only if done with intent to defraud (see s. 2 (1) and (2) and s. 4 (1)). Up till the date of this Act, forgery statutes, of which there had been innumerable instances over the preceding five hundred years, while often (though not by any means consistently) defining the offence explicitly in terms of " intent to defraud", had hardly ever used the phrase " intent to deceive " in connexion with it. The first and only occasion on which this occurred, so far as the researches of counsel for the Crown have taken us, was in the Act of 1803 (43 Geo. 3 c. 139), which, by s. 1, dealt with the crime of forging bills of exchange, promissory notes, etc. " with intent to deceive or defraud " His Majesty or other persons. The combined phrase does not seem to have been employed again in a forgery Act, since neither of the consolidating statutes of 1830 (11 Geo. 4 & 1 Will. 4 c. 66) and 1861 (24 & 25 Vict. c. 98) reproduced the substance of s. 1 of the Act of 1803 with anything more than the single phrase " intent to defraud ". On the other hand, " intent to deceive or defraud " did occur in other nineteenth century Acts relating to offences akin to forgery, e.g., in s. 84 of the Larceny Act, 1861, and s. 166 of the Companies Act, 1862. No instance, however, has been discovered of a statute defining forgery in terms of " intent to deceive " except as an alternative to the phrase " intent to defraud ". It seems fair to say then that the Act of 1913 established the first occasion on which, in legislation about forgery, the two phrases " intent to defraud " and " intent to deceive " were brought into any regular combination with or dissociation from each other. While this compels us, I think, to treat them as not being synonymous with each other for the purposes of the Act, I do not conclude, on the other hand, that it requires us for the same purpose to give a more limited meaning to " defraud " than it would otherwise have had, unless not doing so would involve us in finding no independent meaning at all for the word " deceive ".

The second consideration which weighs with me is that, by 1913, the word " defraud ", when used in connexion with forgery, had been a frequent subject of judicial decision and institutional comment. On most occasions the exposition had related to forgery as a crime at common law; but forgery was also becoming increasingly a statutory crime by virtue of those various Acts which had either punished forgery without explicitly referring to intent to defraud or had explicitly imported that intent into the offence proscribed. The Act of 1913, unlike its predecessors of 1830 and 1861, was not merely an Act consolidating a number of previous enactments on the subject of forgery. Its title declares it to be an Act to " consolidate, simplify, and amend the law relating to forgery . . .". In my opinion, it superseded forgery as a crime at common law in the cases to which it applied, though there still remained such a crime (see s. 14), just as much as it superseded the statutory offences whose constituent Acts it amended or repealed. While it did essay a definition of the act of forgery:—" the making of a false document in order that it may be used as genuine, and . . . the counterfeiting of a seal or die " (see s. 1 (1)), it did not introduce any definition of " intent to defraud " or, for that matter, of " intent to deceive ". In that state of affairs, I cannot doubt that the words " intent to defraud " in the Act must be understood in the light of any established legal interpretation that prevailed at the date of the passing of the Act.

Now I think that there are one or two things that can be said with confidence about the meaning of this word " defraud ". It requires a person as its object; that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect on the person who is the object of the fraud that ultimately determines its meaning. This is none the less true because, since the middle of the last century, the law has not required an indictment to specify the person intended to be defrauded or to prove intent to defraud a particular person. Secondly, popular speech does not give, and I do not think ever has given, any sure guide as to the limits of what is meant by " to defraud ". It may mean to cheat someone. It may mean to practise a fraud on someone. It may mean to deprive someone by deceit of something which is regarded as belonging to him or, though not belonging to him, as due to him or his right. It passes easily into metaphor, as does so much of the English natural speech. Murray's New English Dictionary instances such usages as defrauding a man of his due praise or his hopes. Rudyard Kipling in the First World War wrote of our " angry and defrauded young ". There is nothing in any of this that suggests that to defraud is, in ordinary speech, confined to the idea of depriving a man by deceit of some economic advantage or inflicting on him some economic loss. Has the law ever so confined it? In my opinion, there is no warrant for saying that it has. What it has looked for in considering the effect of cheating on another person and so in defining the criminal intent is the prejudice of that person; what Blackstone's Commentaries, Vol. 4, p. 245, called " to the prejudice of another's right ". East's Pleas of the Crown (1803), Vol. 2, pp. 852-854, makes the same point in the chapter on forgery:

> " in all cases of forgery, properly so called, it is immaterial whether any person be actually injured or not, provided any may be prejudiced by it."

Of course, as I have said, in ninety-nine cases out of a hundred the intent to deceive one person to his prejudice merely connotes the deceiver's intention of obtaining an advantage for himself by inflicting a corresponding loss on the person deceived. In all such cases, the economic explanation is sufficient. But in that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated.

I think that it is sufficient if I mention three authorities without analysing them. First, *R.* v. *Harris* (1), in which a forged order purporting to be a direction from a magistrate to the keeper of a county gaol to discharge a prisoner was held by all the judges on the case reserved to be capable of sustaining a conviction for forgery at common law. Secondly, in *R.* v. *Sharman* (2), a forged certificate giving false references as to employment, put forward in order to obtain appointment as a school master, was held to support a similar conviction. The indictment in that case charged " intent to obtain the emoluments . . . and to deceive ". Thirdly, there is *R.* v. *Moah* (3), in which the Court of Criminal Appeal upheld a conviction for forgery at common law where a forged letter of recommendation had been delivered to a chief constable by a forger for the purpose of obtaining the situation of a police constable.

R. v. *Toshack* (4) seems to me to be the most explicit authority on the subject prior to 1913. Toshack had forged a testimonial over the purported signature of a master of a sailing ship in order to deceive Trinity House examiners and so obtain his master's certificate. He was tried on an indictment containing a number of counts, including one of unjustly obtaining a piece of paper value one penny (the master's certificate), but the case as reported only dealt with the seventh and ninth counts, charging respectively that he forged the testimonial with intent to injure, deceive, prejudice and defraud the examiners and that he did the same thing for the purpose of deceiving Trinity House. He was convicted of the offence of forgery at common law and the conviction on these two counts being reserved for the opinion of the judges (POLLOCK, C.B., PATTESON, WIGHTMAN, JJ., PLATT, B., TALFOURD, J.), their unanimous opinion delivered by ALDERSON, B., was that the offence had been committed.

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(1) (1833), 1 Mood. C.C. 393.
(2) (1854), Dears. C.C. 285.
(3) (1858), Dears. & B. 550.
(4) (1849), 4 Cox, C.C. 38.

In my opinion, it is clear that, in connexion with this offence, the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit or not doing something that but for it he would have done. Correspondingly to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it. That seems to me to be the essential point of the present appeal. Inevitably the argument in this House concentrated much attention on what was said by BUCKLEY, J., in the course of his judgment in *Re London & Globe Finance Corpn. Ltd.* (5), when he took occasion to point out the distinction as he saw it between an intention to deceive and an intention to defraud. The passage was criticised by the appellant's counsel as being either incomplete or inaccurate as an exhaustive statement of the law on the point; on the other hand, it was put forward on behalf of the Crown as being an authoritative exposition of the meaning of "intent to deceive" and "intent to defraud" in the crime of forgery, which must be taken as adopted and read into those phrases when they occur in the Act of 1913. I think that the criticism is misconceived, and I think, on the other hand, that the argument for the Crown goes too far; but before I say more it is convenient to set out the familiar passage in full. He said:

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

There is no doubt that what was said was obiter. What the learned judge was deciding in the case was whether to sanction a prosecution of Mr. Whittaker Wright under the Larceny Act, 1861, s. 83 and s. 84, and the Companies Act, 1862, s. 166, at the expense of the company's funds. It was not necessary to that decision to offer a definition of either one or both of the "intents" that would be involved or to express himself in the terms of a judge directing a jury. There is no reason to suppose that he intended to do more than give a general indication of the nature of the offences that were in question and of the distinction between them. I cannot accept that a judicial utterance of this kind could ever qualify as an authoritative exposition of words employed in a subsequent statute within the doctrine laid down by this House in *Barras* v. *Aberdeen Steam Trawling & Fishing Co., Ltd.* (6), where the meaning of the single word "wreck" was in question.

On the other hand, I do not think that what he said is any the less valuable because it does not contain an exhaustive account of the legal significance of deceit and fraud. Certainly, so far as civil liability is concerned, deceit can involve a reckless indifference to truth or falsity as well as the deliberate making of false statements; and in all cases it may involve the inducing of a man to believe a thing to be false which is true as well as to believe to be true what is false. But the learned judge was speaking of the nature of criminal intent in the limited field of activities such as wilful destruction or falsification of books and publication of false statements or accounts, and, apart from that, there would be no difficulty in enlarging on his text if it were necessary to do so in the context of any particular case. Again, it is said and, I think, justly, that to defraud must involve something more than the mere inducing of a course of action by deceit. But these words, which are found in the last sentence of the whole passage, must be understood in the light of what had gone before. They do not qualify the description of " defraud " as " by deceit to induce a man to act to his injury "; what they do is to point the contrast between deceiving, the essence of which is to bring about a state of mind, and defrauding, the essence of which is to bring about a course of action, whether doing something or refraining from something.

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(5) [1903] 1 Ch. 728 at p. 732. (6) [1933] All E.R. Rep. 52; 18 Asp. M.L.C. 384.

It is this last point which constitutes the most important element in the whole passage. It is obvious that it was at once appreciated that it expressed briefly and with felicity the significant distinction between the two kinds of intent when they were referred to together or apart in statutes dealing with criminal offences. The 1905 (23rd) edition of Archbold's Criminal Pleading and Practice incorporated Buckley, J.'s words in full, and they have regularly appeared in subsequent editions. By 1913, they had been cited with approval in a criminal appeal as illustrating or defining " intent to defraud " (see *R.* v. *Newton & Bennett* (7)). They were treated as containing an authoritative distinction between " defraud " and " deceive " in *R.* v. *Bassey* (8), and by 1953 they had become so much the established text as to be referred to by the Lord Chief Justice (Lord Goddard) as the " locus classicus on the subject. It has been cited with approval over and over again . . ." (*R.* v. *Wines* (9)). I think that it would be perverse not to recognise that ever since they were reported they have been accepted and used in the criminal courts as providing a satisfactory account of the essentials of " defrauding " on the one hand and " deceiving " on the other. I imagine that a clear phrasing of the distinction was the more welcome because, in the past, judges dealing with forgery as a crime at common law had not always thought it necessary to distinguish between an intent to deceive and an intent to defraud, and had sometimes spoken of the latter under the title of the former. Thus, East's Pleas of the Crown, 1803, Vol. 2, p. 853, quotes Buller, J., and Eyre, B., as each having described forgery as the making of " a false instrument with intent to deceive " in different trials and adds the comment: " In the word deceive must doubtless be intended to be included an intent to defraud."

It was objected that, if defrauding was treated as meaning something so wide as any deceiving of another to his injury, his detriment or his prejudice, it provided a dangerously wide definition of a crime. It was said, for example, that by such a definition the writing of a faked letter to another giving him a fictitious appointment would constitute the crime of forgery. I do not know that I should regard this as so startling a result as to lead me to reconsider what seems to be the long-accepted definition of defrauding; after all, the crime in question only exists if there is the making of a false document in order that it may be used as genuine, which is itself dishonest and a cheat. Words, not being capable of infinite division for purposes of precise measurement, can only convey ideas that are to some extent general, and I think it may be that the imposition suggested does technically constitute the crime of forgery, unless the rule that lex non curat de minimis puts it out of court or a jury concluded that there was no real intent to prejudice or injure. I suppose that, in any event, these theoretical arguments have to be tried by a certain standard of common sense, and I cannot say that, in practice, I should expect to see a crop of criminal prosecutions based on tricks or deceptions of this kind.

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(7) (1913), 109 L.T. 747.
(8) (1931), 22 Cr. App. Rep. 160.
(9) [1953] 2 All E.R. 1497 at p. 1498.

There is, I think, more weight in the criticism that if, in interpreting the Act of 1913, " intent to defraud " is given as wide an ambit as to include all deceptions to another's prejudice, there is virtually no ambit left to be covered by the other statutory intent, " intent to deceive ", since it is difficult to imagine an instance of a man forging a document in order that it should be used as genuine without having at the same time an intention of affecting another's conduct to his prejudice. It is difficult, but it is not impossible. There can be cases, I think, in which there is an intent to deceive and no more. *R.* v. *Hodgson* (10) may illustrate the kind of thing that can occur. There, a diploma of the College of Surgeons had been altered by substituting Hodgson's name for the genuine name; on the other hand, Hodgson had made no use of the document, so altered, except to hang it on the wall of his room and show it to two friends who inquired as to his qualifications. It was held by the court that this did not constitute forging or uttering at common law, because there was no criminal intent in what he did. It is not clear that the court had in mind any precise distinction between defrauding and deceiving and, as I have said, the distinction was not always made with regard to the crime at common law. But if a question arose under the Act of 1913 on a similar alteration of some document falling within, say, s. 3 or s. 4 (2), I think that it would be hard to say that there had not been an " intent to deceive " within the meaning of the Act.

I am, therefore, of opinion that the judgment of the Court of Criminal Appeal, the subject of the present appeal, was clearly right. The view there taken is in accordance with what was said by my noble and learned friend, LORD TUCKER in *Board of Trade* v. *Owen* (11), and the fuller argument in this case has not led me to think that it needs any qualification.

LORD TUCKER: My Lords, I agree that this appeal should be dismissed for the reasons which have been stated by my noble and learned friend on the Woolsack. I have also had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, LORD DENNING, and desire to express my agreement therewith.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD DENNING: My Lords, Robert John Welham, the appellant, and two other men were charged at the Central Criminal Court with conspiracy to defraud and with uttering forged documents. The appellant was acquitted of the conspiracy but convicted of the uttering and sentenced to nine months' imprisonment. He appealed to the Court of Criminal Appeal. That court dismissed his appeal. The Attorney-General gave his fiat for a further appeal. So it now comes before your Lordships.

The counts for uttering charged the appellant with uttering forged documents contrary to s. 6 of the Forgery Act, 1913. It is sufficient for present purposes to take the second count which was put to him on his arraignment in these words:

> " On Jan. 16, 1957, with intent to defraud, uttered a forged hire-purchase proposal form and hire-purchase agreement purporting to be signed by J. Murray of 4 Meynell Crescent, E.9, knowing the same to be forged."

To that charge he pleaded not guilty. Likewise to the third count (relating to forged credit-sale agreements) he pleaded not guilty. According to the evidence for the prosecution, the appellant was the manager of a firm of motor dealers in Brighton called Motors (Brighton), Ltd. These dealers obtained money from finance companies in London called Consortium Finance, Ltd. and Masterton Finance & Trading Services, Ltd. They did this by submitting to the finance companies sets of documents which appeared to relate to the hire-purchase of lorries or the credit-sale of lorries. But the documents were fictitious. Take, for instance, the hire-purchase document which was the subject of count 2. The document named one " J. Murray " as the hirer of lorry No. XMT 756. But there was, in fact, no such lorry; and, although there was such a person as Mr. Murray, he had not in fact signed the hire-purchase document, nor had he authorised it to be signed in his name. His signature " J. Murray " had been forged. It purported to be witnessed by the appellant " R. J. Welham " but the appellant had never witnessed it. The appellant had signed the document in the place for the witness. His own signature was genuine enough, but he had attested a forgery. It was on that document and others like it that the motor dealers obtained money from the finance companies. That was cogent evidence of a conspiracy to defraud the finance companies. The two other men were convicted of it. But the appellant was acquitted. The appellant's defence to the conspiracy charge which no doubt earned him his acquittal was this: He said that he did not intend to defraud the finance companies at all. He had been brought into the matter by one Prater, a director of the motor dealers. Prater told him that they wished to borrow money from Consortium Finance, Ltd. The company were unable to lend money on straight loans owing to the restrictions on borrowing then in force, and also owing to the objects in their memorandum and articles; but they were ready to lend money under cover of hire-purchase documents so long as nobody outside the " immediate circle " knew of it. The documents were bogus and were known by the finance company to be bogus, but they were necessary to cover up the loans. " The purpose was ", he said, " to satisfy any Board of Trade investigation." The jury must be taken to have accepted the appellant's belief on this point; for they acquitted him on the charge of conspiracy to defraud the finance companies.

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(10) (1856), Dears. & B. 3.
(11) [1957] 1 All E.R. 411 at p. 414; [1957] A.C. 602 at p. 622.

There remained, however, the counts for uttering forged documents with intent to defraud knowing them to be forged. To these counts the appellant said in the first place that he did not know the documents were forged. At the time when he signed as a witness, the signature of the hirer was, he said, in blank. Take the hire-purchase document in count 2. " J. Murray " was, he said, not on it when he signed. He sent it to London to be completed; and when he got it back, the signature " J. Murray " was then filled in; and he accepted that signature as being genuine. He then sent the document forward to the finance company. He acknowledged that there was no such lorry as described in the document but he believed that the signature was genuine. The next answer made by the appellant to the charge of uttering was that he had no intent to defraud. There was, however, in this respect a significant difference between the count for conspiracy and the counts for uttering. The conspiracy was charged as being to defraud specified persons, namely, the finance companies; but the uttering was charged as uttering of forged documents " with intent to defraud " generally, without specifying any particular person or persons. On these counts for uttering, the appellant seems to have been prepared to admit that he had an intent to deceive but not that he had an intent to defraud. His position can be summed up in his answers to the last two questions addressed to him by the Common Serjeant:

> " Q.—I think you told Mr. Maxwell Turner . . . that you passed these documents on to Consortium [Finance, Ltd.], knowing that they were fictitious, with the object of deceiving, among other things, the Capital Issues Committee? A.—I did say that. At that time I knew there were credit restrictions, but the Capital Issues Committee did not mean anything to me; that is to say, with the object of defeating the regulations.
>
> " Q.—And inducing that committee to do something which in fact they were bound in law to prevent. A.—Yes, my Lord."

The Common Serjeant appears to have taken the view, on those answers, that the appellant had admitted an intent to defraud, for he told the jury:

> " It is not incumbent on the prosecution in these two counts as it is in the case of the first count to prove an intent to defraud any particular person, and, therefore, if the prosecution have succeeded in proving against the [appellant] that he was a party to putting forward documents which he knew to be forged, and he put them forward with the dishonest intention, as he himself said, of defrauding the Capital Issues Committee, well, then, he would be guilty on these two counts . . . They have got to prove an intent to defraud, and [the appellant's] own case is that the intention here in respect of these bogus documents was to defraud the Capital Issues Committee by deceiving them in not preventing something which it was their duty in law to prevent."

The jury retired and returned with the question:

> " Does ' with intent to defraud ' mean that when [the appellant] signed . . . as a witness before hirer's signature, was he defrauding? "

The Common Serjeant directed them again on the appellant's two defences. He told them that, in order to convict the appellant, they must be satisfied that he knew Murray's signature was not genuine, and then went on to say:

> " I have ventured to direct you that upon his own evidence, if that be so, these documents like all the others were put forward for the purpose of pulling the wool over the eyes of the Capital Issues Committee, as he understood it, and to cover up the fact, if there should be an inquiry, that these big loans had been made by the hire-purchase companies to Motors (Brighton), Ltd. . . . on his own evidence . . . there would not be an intention to defraud because the intention to defraud would not be the intention to defraud the hire-purchase companies, but to defraud the Capital Issues Committee by deceiving them into taking a course of action which would lead them into not preventing something happening which it was their duty in law, if they knew of it, to prevent."

Something appears to have gone wrong in the transcribing of the last passage, but the Common Serjeant was no doubt repeating again to the jury what he had already told them. The jury retired again, and found the appellant guilty on counts 2 and 3 of uttering forged documents.

Such being the direction of the Common Serjeant, these complaints were made of it: (i) That the Common Serjeant failed to give the jury a clear direction as to the distinction between an intent to defraud and an intent to deceive. (ii) That the Common Serjeant incorrectly told the jury that on the appellant's own case he had an intention to defraud. (iii) That there was no evidence that the appellant had an intention to defraud. (iv) That in any case it should have been left to the jury to say whether the appellant had an intention to defraud. My Lords, I think that all these complaints depend on whether, on the appellant's own evidence in the witness-box, he had an intent to defraud; for if he had, then the Common Serjeant was entitled to direct the jury as he did. There was no need for him to embark on a discussion of the difference between an intent to defraud and an intent to deceive if the evidence did not give rise to it. And there was no need for him to leave it to them as an open question when the appellant's own evidence permitted only of one answer. He said to them in effect what many judges have said before: " Why even if you accept his own evidence on this point, you may well think he had an intent to defraud."

The crucial question is, therefore, what is the meaning of the words " intent to defraud " in the Forgery Act, 1913, which were contained in the indictment. To determine this question I must set out the material sections of the Act:

> " 1.—(1) For the purposes of this Act, forgery is the making of a false document in order that it may be used as genuine . . . and forgery with intent

> to defraud or deceive, as the case may be, is punishable as in this Act provided . . .
>
> " 4.—(1) Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour . . .
>
> " (2) Forgery of any public document which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud or deceive, shall be a misdemeanour . . .
>
> " 6.—(1) Every person who utters any forged document . . . shall be guilty of an offence of the like degree . . . and on conviction thereof shall be liable to the same punishment as if he himself had forged the document . . .
>
> " (2) A person utters a forged document . . . who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document . . . uses, offers, publishes, delivers, disposes of . . . or puts off the said forged document . . . "

My Lords, the declared object of the Forgery Act, 1913, is

> " to consolidate, simplify, and amend the law relating to forgery and kindred offences ":

and if its language were clear and unambiguous, it would not be right to embark on a close consideration of previous authorities in order to ascertain its meaning: see *Bank of England* v. *Vagliano Brothers* (12), by LORD HERSCHELL. But the more I consider the phrase " with intent to defraud " in this statute, the more doubtful do I find its import. It appears to be used in contrast to the phrase " with intent to deceive ", but whilst I can see there may on occasion be a distinction between these two intents, I find it extremely difficult to say where the one intent ends and the other begins. Much valuable guidance is to be obtained from the dictum of BUCKLEY, J., in *Re London & Globe Finance Corpn., Ltd.* (13), but this has been criticised by modern scholars. It has even been hinted that it conceals within it the fallacy of the illegitimate antistrophe, which sounds, I must say, extremely serious. These scholars seem to think that they have found the solution. " To defraud ", they say, involves the idea of economic loss. I cannot agree with them on this. If a drug addict forges a doctor's prescription so as to enable him to get drugs from a chemist, he has, I should have thought, an intent to defraud, even though he intends to pay the chemist the full price and no one is a penny the worse off.

Seeing, therefore, that the words of the statute are of doubtful import, it is, I think, legitimate to turn for guidance to the previous state of the law before the Act. And here I would say at once that the phrase " with intent to defraud " has been the standard usage of lawyers in defining forgery for over 160 years. In 1796 all the judges of England laid down the definition of forgery as " the false making a note or other instrument *with intent to defraud* ": see *R.* v. *Parkes & Brown* (14), and ever since that time it has been held that the very essence of forgery is an *intent to defraud* and it must be laid in the indictment: see EAST'S PLEAS OF THE CROWN (1803), Vol. 2, p. 988, CHITTY'S CRIMINAL LAW (1826), Vol. 3, pp. 1039, 1042a. I cannot help thinking that when Parliament, in s. 4 (1) of the Act of 1913, used a phrase so hallowed by usage, it used it in the sense in which it had been used by generations of lawyers. It was never by them confined to the causing of economic loss. Let me prove this by taking some examples: Take the case where a man forges a reference as to character, intending to get employment by means of it. It is clear forgery: see *R.* v. *Sharman* (15), *R.* v. *Moah* (16). But there may well be no economic loss intended. The man may intend, if he gets the job, to render full service in return for his wages. Or the post which he seeks may be unpaid, such as a justice of the peace. But he has the intent to defraud all the same. Take next the case, where a servant steals his master's money and afterwards forges a receipt or other document so as to cover up his defalcations. This, too, is forgery: see *R.* v. *Martin* (17). He does not intend to deprive his master of anything; for he has already done that. He may not even do it so as to keep his job, because he may be under notice. What he really intends to do is to cover up his tracks so that he should not be found out. But he has the intent to defraud none the less. Then there are the cases concerned with the release of prisoners. If a man forges an order or letter to the sheriff or to the governor of a prison, intending thereby to secure the release of a prisoner, he is guilty of forgery at common law: see *R.* v. *Fawcett* (18) and *R.* v. *Harris* (19). There is no idea of economic loss here. He has no intent to deprive the gaoler of any money or valuable thing. But at common law he is held to have an intent to defraud. Counsel for the appellant rather suggested that the reason for those decisions was that the documents were documents of a public nature. But I do not so read them. Even if they were public documents, it was still essential that there should be an intent to defraud. Ever since *R.* v. *Ward* (20) in 1726, public and private documents were at common law on the same footing in this respect (see EAST'S PLEAS OF THE CROWN (1803), Vol. 2, pp. 859-862). The forgery of any of them was a misdemeanour if done with intent to defraud, but not otherwise: see *R.* v. *Hodgson* (21) by JERVIS, C.J.

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(12) [1891] A.C. 107 at pp. 144, 145.
(13) [[1903] 1 Ch. 728 at p. 732.
(14) (1797), 2 Leach, 775 at p. 785.
(15) (1854), Dears. C.C. 285.
(16) (1858), Dears. & B. 550.

There remains *R.* v. *Toshack* (22), which is, to my mind, decisive. Toshack, a seaman, forged a certificate of good conduct so as to be admitted to sit for an examination for his master's certificate. He had no intention to deprive the examiners or Trinity House of any money or valuable thing. The piece of paper, value one penny, was not mentioned in the counts on which he was convicted. But he was held guilty of forgery. ALDERSON, B., said (23):

> " it does amount to a very serious offence, if persons do forge certificates of this sort, and are found to utter them for the purpose of deceiving the Trinity House."

What is the common element in all these cases? It is, I think, best expressed in the definition given by EAST'S PLEAS OF THE CROWN (1803), Vol. 2, p. 852. He treats the subject, I think, better than any writer before or since:

> " To *forge* (a metaphorical expression borrowed from the occupation of the smith), means, properly speaking, no more than to *make* or *form*: but in our law it is always taken in an evil sense; and therefore forgery at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making malo animo, of any written instrument *for the purpose of fraud and deceit.* This definition results from all the authorities ancient and modern taken together."

That was written in 1803, but it has been always accepted as authoritative. It seems to me to provide the key to the cases decided since it was written as well as those before. The important thing about this definition is that it is not limited to the idea of economic loss, nor to the idea of depriving someone of something of value. It extends generally to the purpose of fraud and deceit. Put shortly, " with intent to defraud " means " with intent to practise a fraud " on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.

At this point, it becomes possible to point the contrast in the statute between an " intent to deceive " and an " intent to defraud ". " To deceive " here conveys the element of deceit, which induces a state of mind, without the element of fraud, which induces a course of action or inaction. Take the case of a private document, for instance, where a man fabricates a letter so as to puff himself up in the opinion of others. Bramwell, B., put the instance:

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(17) (1836), 1 Mood. C.C. 483.
(18) (1793), 2 East, P.C. 862.
(19) (1833), 1 Mood. C.C. 393.
(20) (1727), 2 Stra. 747.
(21) (1856), Dears. & B. 3 at p. 10.
(22) (1849), 4 Cox, C.C. 38.
(23) (1849), 4 Cox, C.C. at p. 41.

> " if I were to produce a letter purporting to be from the Duke of Wellington inviting me to dine, and say, See what a respectable person I am ",

R. v. *Moah* (24). There would then be an intent to deceive, but it would not be punishable at common law or under the statute because then it would not be done with intent to defraud. Take next the case of a public document. For instance, a parish register. If a man should falsify it so as to make himself appear to be descended of noble family, for the sake of his own glorification, he would not be guilty of an intent to defraud and would, therefore, not be punishable at common law: see *R.* v. *Hodgson* (25); but he would have an intent to deceive, and he would be punishable under the present statute as, indeed, he was under its predecessors, such as the Forgery Act, 1861, s. 36.

So much for the principal point under discussion. Counsel for the appellant did make a further point. He said that the intent must be to defraud the particular person to whom the document is first presented or his agent; and that it was insufficient if he intended to defraud somebody else. This is not correct. It has long been ruled that it is no answer to a charge of forgery to say that there was no intent to defraud any particular person, because a general intent to defraud is sufficient to constitute the crime. So, also, it is no answer to say that there was no intent to defraud the recipient, if there was intent to defraud somebody else: see *R.* v. *Taylor* (26).

In my judgment, s. 4 (1) of the Forgery Act, 1913, only restates the requirements of the common law of forgery. The " intent to defraud " there mentioned is the same intent as was required by the common law. It is satisfactory to find that, in the cases subsequent to the Act, the courts have been giving it the same meaning as they did before; *R.* v. *Bassey* (27) is particularly in point; and I am glad to find this confirmed by what my noble and learned friend, Lord Tucker, said in *Board of Trade* v. *Owen* (28). Applying this meaning to the present case, it appears that the appellant on his own evidence had an intent to defraud; because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practise a fraud on whomsoever might be called on to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud. I think the Common Serjeant was entitled to direct the jury as he did.

I find myself in entire agreement with the Court of Criminal Appeal and I would dismiss this appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, I agree that this appeal should be dismissed for the reasons which have been given by my noble and learned friends.

Appeal dismissed.

Solicitors: *Bellamy, Bestford & Co.* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* G. A. Kidner, Esq., *Barrister-at-Law.*]

[END OF VOLUME ONE.]

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(24) (1858), Dears. & B. at pp. 552, 553.
(25) (1856), Dears. & B. 3.
(26) (1779), 1 Leach, 214.
(27) (1931), 22 Cr. App. Rep. 160.
(28) [1957] 1 All E.R. at p. 414; [1957] A.C. at p. 622.

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